



आयुक्त(अपील) का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065 - टेलीफैक्स 07926305136



DIN : 20230564SW0000163631

स्पीड पोस्ट

- क फाइल संख्या : File No : GAPPL/COM/CEXD/15/2023 / 1789 - 89
- ख अपील आदेश संख्या Order-In-Appeal No. AHM-EXCUS-001-APP-40/2023-24
दिनांक Date : 19-05-2023 जारी करने की तारीख Date of Issue 29.05.2023
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of OIO No. 01/DC/BK/Ref/2022 दिनांक: 25.04.2022 passed by Deputy
Commissioner, CGST, Division II, Ahmedabad South
- घ अपीलकर्ता का नाम एवं पता Name & Address

Appellant

- The Assistant Commissioner
CGST Division II, Ahmedabad South
3rd Floor, CGST Bhavan,
Ambawadi, Ahmedabad - 380015

Respondent

- M/s Sarvottam Steel Industries
Plot No. 54/2/P, Phase-I, GIDC,
Vatva, Ahmedabad - 382445

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 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 को प्रक्रिया के दौरान हुई हो।

(iii) Case of any loss of goods where the loss occur in transit from a factory to a warehouse or to 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 मामलों 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 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।

(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 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.

(2) 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 :-

(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. 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रु.6.50 पैसे कान्यायालय 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.

- 20 सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट), के प्रतिअपीलो 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)-

- a. (Section) खंड 11D के तहत निर्धारित राशि;
इण लिया गलत सेनवैट क्रेडिट की राशि;
बण 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:

- (ccliii) amount determined under Section 11 D;
(ccliv) amount of erroneous Cenvat Credit taken;
(cclv) 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 one is in dispute."



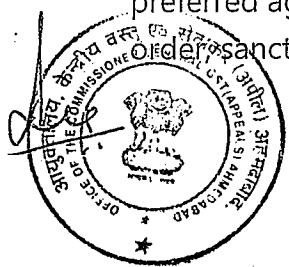
ORDER IN APPEAL

The present appeal has been filed by the Assistant Commissioner, CGST, Division-II, Ahmedabad South Commissionerate, (hereinafter referred to as '*the appellant*') in pursuance of Review Order No. 42/2022-23 dated 06.09.2022 issued under Section 35 E (2) of the Central Excise Act, 1944 by the Commissioner, Central GST, Ahmedabad South, against the Order-in-Original No. 01/DC/BK/REF/2022 dated 25.04.2022 (in short '*impugned order*') passed by the Deputy Commissioner, Central GST, Division-II, Ahmedabad South (hereinafter referred to as '*the refund sanctioning authority*') in the case of M/s. Sarvottam Steel Industries, 54/2/P, Phase-I, GIDC, Vatva, Ahmedabad-382445 (hereinafter referred to as '*the respondent*').

2. The facts of the case, in brief, are that the respondent, having Central Excise Registration No. ABHFS3862LXM001, were engaged in manufacture of S.S. Cold Rolled Patta Patti falling under Chapter 72 of the CETA, 1985. Based on intelligence, a search was conducted at the premises of the respondent. A case of clandestine removal of goods was booked against the respondent. During the investigation and adjudication proceedings of the case, the respondent deposited amount of Rs. 18,60,298/-.

2.1 On conclusion of investigation, Show Cause Notice (SCN) No.MP/PI-II/INQ-16/2010-11 dated 03.08.2011 was issued to the respondent proposing demand of Central Excise duty amounting to Rs. 13,53,968/- alongwith interest and penalties. The said SCN was adjudicated vide OIO No. 06/Additional Commissioner/2012 dated 23.02.2012 passed by the Additional Commissioner, erstwhile Central Excise, Ahmedabad-I, wherein the duty demand of Rs. 13,53,968/- was confirmed alongwith interest and penalties. The amount of Rs. 12,92,227/- paid by the respondent was also appropriated against the confirmed demand. The respondent preferred appeal against the said O-I-O. The Commissioner (Appeal) vide O-I-A No. 92 to 95/2012 (Ahd-I) CE/AK/Commr(A)/Ahd dated 18.10.2012, remanded the matter to the adjudicating authority. The SCN was re-adjudicated vide O-I-O dated 30.11.2017, issued under F. No. V. 72 /15-156/Sarvottam/JC/2016 by the Joint Commissioner, CGST, Ahmedabad South, wherein duty was confirmed alongwith interest and penalties. Being aggrieved, the respondent preferred appeal and the Commissioner (Appeal) CGST, Ahmedabad, vide O-I-A No. AHM-EXCUS-001-APP-472 to 476/2017-18 dated 27.03.2018, upheld the O-I-O dated 30.11.2017. Aggrieved by the O-I-A dated 27.03.2018, the respondent filed an appeal before Hon'ble CESTAT Ahmedabad. Hon'ble Tribunal, vide Final Order No. A/10276-10280/2022 dated 17.03.2022, set-aside the O-I-A and allowed the appeal of the respondent.

2.2 Consequent to Tribunal's Final Order No. A/10276-10280/2022, the respondent filed a refund application on 05.04.2022, claiming refund of Rs. 18,60,298/- paid during investigation and proceedings of the case against them. The jurisdictional Deputy Commissioner observed that in terms of Explanation (B) (ec) of Section 11B of the CEA, 1944, the claim does not suffer from limitation. Further, in terms of Section 11B (2) (e) of the Central Excise Act, 1944 unjust enrichment is also not applicable as the claimant has produced the Trial Balance of their Income Tax Returns, wherein an amount of Rs. 18,60,298/- has been shown as Central Excise duty paid under protest. As no appeal was preferred against said CESTAT Order, the refund sanctioning authority has, vide impugned Order sanctioned the refund amount of Rs. 18,60,298/- to the respondent.



3. Being aggrieved with the impugned order passed by the refund sanctioning authority, the appellant has preferred the present appeal on the grounds elaborated below:-

- The finding of the refund sanctioning authority that the claimant has produced the Trial Balance of their Income Tax Returns, wherein an amount of Rs.18,60,198/- has been shown as Central Excise duty paid under protest, is against the settled legal position. Hon'ble Supreme Court in the case of Sahakari Khand Udyog Mandal Ltd.- 2005(181) ELT 328 (SC) held that in respect of all the refunds even not covered under Section 11B, unjust enrichment is applicable. Thus, provisions of unjust enrichment are applicable in the instant case also.
- The Apex Court's above decision was binding on the refund sanctioning authority. The impugned order is a non-speaking order as was passed without giving any findings on the provisions of unjust enrichment.
- The appellant have placed reliance on following case-laws and prayed to set-aside the impugned order:-
 - Lorenzo Bestonso- 2017(347) ELT 104
 - Dynamic Metal Coverters – 2017 (357) ELT 511
 - Aspire Exports Pvt. Ltd- 2018 (363) ELT 1029

4. Personal hearing in the matter was held on 19.04.2023. Shri Harshad Patel, Advocate, appeared on behalf of the respondent. He submitted cross-objection to the appeal and also submitted additional written submission and relevant pages of audited Balance Sheet as on 31.03.2022, during the hearing.

5. The respondent, in the cross-objection, has contested the grounds of appeal on following grounds:-

- The Apex Court's decision passed in the case of Sahakari Khand Udyog Mandal Ltd is not applicable to the instant case as there the claimant had already charged and collected the duty amount from their customers and as such it was not entitled to claim the said amount.
- The appellant have purposely relied on para-48 of the said judgment and knowingly ignored the findings recorded at Pars-49 of the same judgment wherein it is recorded that "*All the authorities below have expressly recorded a finding that the appellant-Mandal has recovered the amount from consumers and as such excise duty is passed on to consumers/customers.*" As there is no finding that the respondent have collected the disputed amount from anybody, the above decision cannot be made applicable to the instant case.
- The decision of Mafatlal Industries -1997 (89) ELT 247 is also not applicable as it was only concerned with the constitutional validity of the twin amendments to Section 11B of the CEA, 1944 and Section 27 of the Customs Act, 1962 in 1991. The decision of Lorenzo Bestonso, Dynamic Metal Coverters and Aspire Exports Pvt. Ltd are distinguishable on facts hence not applicable.

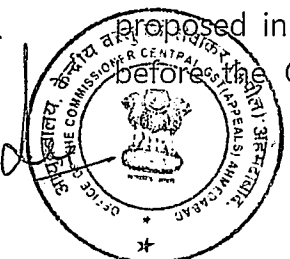


- As the disputed amount was paid during investigation and before and after issuance of SCN is in the nature of pre-deposit hence unjust enrichment shall not apply. Reliance is placed on catena of decisions some of them are listed below;
 - Suvidhe Ltd- 1997 (94) ELT 159 (SC)
 - Silvester Textiles P. Ltd- 2003 (156) ELT 216 (Tri-Mum)
 - Parle International Ltd- 2001 (127) ELT 329 (Guj)
 - N.K.Overseas- 2015 (317) ELT 356 (Tri-Ahmd)
 - EBIZ Com Pvt. Ltd- 2017 (49) STR 389 (All)
 - National Organic Chemical Industries- 2021 (378) ELT 314 (Tri-Mumbai)
 - Birla Corporation Ltd- 2017 (358) ELT 443 (Tri-All)
 - Jindal Stainless Ltd- 2016 (343) ELT 613
- Irrespective of the fact whether the order is challenged or not, the refund of amount deposited during investigation is not a refund of duty hence not subjected to provisions of Section 11B of the CEA, 1944.
- The amount deposited during investigation is always involuntary in nature and thus deemed as made under protest. Though no clandestine clearance was made the appellant was forced to pay duty under GAR-7 challans. Courts have held that any amount deposited during investigation whether with or without protest are always to be deemed under protest and accordingly to be considered as deposits and not duty. When the demand itself has been set-aside, it becomes null and void therefore the amount paid remains as deposit. Thus, doctrine of unjust enrichment to such refund claim is not applicable.

6. I have carefully gone through the facts of the case, the impugned order passed by the refund sanctioning authority, submissions made by the appellant in the appeal memorandum, the submission made by the respondent in the cross-objection as well as those made during personal hearing. The issue to be decided in the present case is as to whether the doctrine of unjust enrichment as provided under Section 11B 2 (e) of the Central Excise Act, 1944 is applicable to the amount of Rs. 18,60,298/- refunded to the respondent.

6.1 On perusal of the facts of the case, it is observed that a case of clandestine removal of goods was booked against the respondent. In Para-10 of the impugned order, it is recorded that the respondent had paid total amount of Rs. 13,53,968/- towards Central Excise duty, out of which Rs. 12,92,227/- was paid during investigation and Rs. 61,741/- was paid after issuance of SCN. The interest liability amounting to Rs. 1,67,838/- and penalty amounting to Rs. 3,38,492/- was paid after confirmation of demand vide O-I-O dated 23.02.2012. So, it is apparent that part of the payment was made before issuance of SCN and part payment was made after issuance of SCN.

6.2 Any amount paid after issuance of SCN is obviously against the demand proposed against the appellant and hence cannot be considered as a pre-deposit, as claimed by the appellant. The appellant had paid amount of Rs. 5,68,071/- after issuance of SCN, which invariably has to be considered as payment made against the demand of Rs. 13,53,968/- proposed in the SCN. This demand was thereafter confirmed during adjudication and before the Commissioner (Appeals). However, it was subsequently set-aside by the



Hon'ble Tribunal by way of allowing respondent's appeal. The respondent, therefore, filed a claim seeking refund of such duty paid, which, I find, shall undoubtedly be governed by the provisions of Section 11B of the CEA, 1944. Any person claiming refund of any excise duty and interest has to make an application for refund of such duty and interest to the authority enumerated in Section 11B, before the expiry of one year from the relevant date, in such form and manner as may be prescribed. Also, in terms of sub-section (2) of Section 11B, the claimant has to establish that the amount of duty of excise in relation to which such refund is claimed was paid by him and that the incidence of such duty has not been passed on by him to any other person. In case, it is found that a part of duty of excise paid is refundable, the amount shall be credited to the Consumer Welfare Fund. The relevant text of Section 11B is reproduced below:-

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 that where an application for refund has been made before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991, such application shall be deemed to have been made under this sub-section as amended by the said Act and the same shall be dealt with in accordance with the provisions of sub-section (2) substituted by that Act :]

[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 of Central Excise 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 that the amount of [duty of excise and interest, if any, paid on such duty] as determined by the [Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise] under the foregoing provisions of this sub-section shall, instead of being credited to the Fund, be paid to the applicant, if such amount is relatable to -

- a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- b) unspent advance deposits lying in balance in the applicant's account current maintained with the [Principal Commissioner of Central Excise or Commissioner of Central Excise];
- c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;



- d) *the [duty of excise and interest, if any, paid on such duty] paid by the manufacturer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;*
- e) *the [duty of excise and interest, if any, paid on such duty] borne by the buyer, if he had not passed on the incidence of such [duty and interest, if any, paid on such duty] to any other person;*
- f) *the [duty of excise and interest, if any, paid on such duty] borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :*

Provided further that no notification under clause (f) of the first proviso shall be issued unless in the opinion of the Central Government the incidence of [duty and interest, if any, paid on such duty] has not been passed on by the persons concerned to any other person...."

6.3 The law relating to refund has been fully analyzed by the Apex Court in the case of **Mafatlal Industries Vs U.O.I - 1997(89) ELT 247 (SC)** which makes it very clear that all types of refund claim, be thereof excess duty paid or otherwise, are to be filed under Section 11B and have to pass the proof of not passing on the incidence of duty to others. The decisions of Hon'ble Supreme Court in the case of **Sahakari Khand Udyog and Others -2005 (181) ELT 328 (SC)** clearly laid down that all refunds have to pass through doctrine of unjust enrichment, even if it is not so expressly provided for the statute. Therefore, applying the above ratio judgment the amount paid by the appellant and claiming the same as refund has to pass the doctrine of unjust enrichment.

6.4 Now, the question arises, whether the amount of Rs. 12,92,227/- paid during investigation and before issuance of SCN should be considered as duty or pre-deposit? It is observed that Hon'ble CESTAT, WZU, Ahmedabad in the case of **Ratnamani Metals & Tubes Ltd- 2019 (366) E.L.T. 139 (Tri. - Ahmd.)** at Para 5, held that;

"As regard, the deposit made during the investigation it is obvious that there is no provision in Central Excise or to make a deposit. Whatever payment made it is towards the probable Excise duty liability for which the investigation is undergoing, therefore, it cannot be said that any deposit made during the investigation so made by the assessee is not a duty but only a deposit. Once the adjudication authority confirms the demand the said amount stands confirmed as duty only, the same being the duty stands appropriate against the demand confirmed in the adjudication order. For this reason also the amount even though that paid during the investigation, shall be considered as payment of duty. When this be so the refund of such duty amount is clearly governed by the Section 11B of Central Excise Act, 1944."

6.5 As the Act provides for assessee to pay admitted duty liability even prior to issuance of show cause notice, the respondent have made certain deposits during investigation. The deposit made during investigation was subsequently confirmed against the appellant. Hence, it takes the character or colour of duty. Therefore, any subsequent refund of such duty shall attract the provisions of Section 11B of the CEA, 1944.

6.6 Further, I also disagree with the contention of the respondent that the amount deposited during investigation is always involuntary in nature and thus deemed as made under protest. From the facts of the case as well as from the OIA No. AHM-EXCUS-001-



APP-472 to 476/2017-18 dated 27.03.2018, it is observed that the payment made by the respondent was voluntary. Hence, the same cannot be deemed as payment made under protest. Also from the OIO dated 30.11.2017, it is obvious that the amount of Rs. 12,92,227/- paid during investigation was appropriated against the duty confirmed. When the deposit stood adjusted against the duty confirmed, then the deposit converts into duty and no longer remains a deposit.

6.7 The judgment of Hon'ble High Court of Gujarat passed in the case of **Ajni Interiors (Special Civil Application No. 10435 of 2018)** is applicable to the instant case, wherein it was held that

" 14. Considering the arguments advanced by learned advocates of the parties and scanning the material on record, it is clear that the case of the petitioner that payment towards Excise Duty is in the form of pre-deposit is misconceived. Considering the Annexures annexed with the petition i.e. Challans for deposit of Central Excise. Duty in Form No.TR-6, that too, without protest is the payment towards the Excise Duty and can never be considered as pre-deposit. If any payment is made as a pre-condition for exercising the statutory right it can be termed as pre-deposit. However, it cannot be equated with voluntary deposit of Excise Duty paid even during the course of investigation and prior to show cause notice or adjudication to assert that it is pre-deposit. The payment of duty was intended to prevent the incidence of interest and liability accruing from the non-payment of duty, and hence, it cannot be termed as deposit. Therefore, the payments made by the petitioner towards Excise Duty in Challans Form No.TR-6, can never partake characteristic of pre-deposit as mentioned in Section 35F of the Act, as argued by learned advocate for the petitioner.

Under the circumstances, the contention that the amounts were paid involuntarily and, therefore, are deemed to be under protest and should be considered as deposits deserves to be rejected. Firstly as discussed hereinabove the payments made by the petitioner are in the nature of Central Excise Duty and hence, cannot be considered to be akin to or in the nature of pre-deposit as contemplated under Section 35-F of the Act; and secondly there is nothing on record to establish that the petitioner had paid the amount in question under protest, and hence the second proviso to sub-section (1) of Section 11B of the Act which provides that the limitation of one year shall not apply where duty and interest, if any, paid on such duty has been paid under protest would not be applicable. Once it is held that the payments made by the petitioner were in the nature of excise duty and were not deposits, the provisions of Section 11B of the Act would be attracted; and having regard to the fact that the amounts in question had not been deposited under protest, the petitioner would be liable to file the claim within the prescribed period of limitation and in the manner prescribed by the statute, viz. in the prescribed format. It is an admitted position that the petitioner has not filed the refund claim within the prescribed period of limitation and hence, the Tribunal was wholly justified in rejecting the claim as being time barred."

6.8 The above judgment was upheld by Hon'ble Apex Court vide Order dated **20.02.2020**. Thus, following the above judicial pronouncements, I find that the amount of Rs. 18,60,298/- paid by the respondent during investigation and after issuance of SCN cannot be considered as deposit. As such deposit became duty after adjudication. Therefore, any subsequent refund arising on account of a decision passed in favour of the respondent shall attract the provision of Section 11B. Once the amount was paid as duty irrespective whether it was payable or otherwise, refund the same has to compulsorily undergo the test of unjust enrichment as provided under Section 11B of the Central Excise Act, 1944.



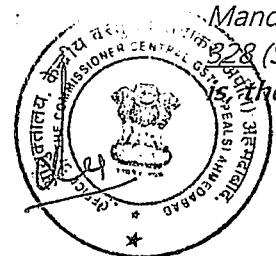
7. The respondent have heavily relied on the judgment of Hon'ble Supreme Court passed in the case of **Suvidhe Ltd- 1997 (94) ELT A159 (SC)** wherein the Apex Court has held that in respect of the deposit made under Section 35F of the Central Excise Act, 1944, provisions of Section 11B can never be applicable since it is not a payment of duty but only a pre-deposit for availing the right of appeal and the amount is bound to be refunded when the appeal is allowed with consequential relief. Doctrine of unjust enrichment has no application to such deposit and the show cause notice issued by the department to the appellant for forfeiture of pre-deposit is thoroughly dishonest and baseless.

7.1 In the above case, the assessee had made the deposit under Section 35F, whereas in the case on hand, the deposit made by the respondent was not under Section 35F but was made during the investigation as well as after issuance of SCN. The payment made during investigation is towards the probable duty liability. Whereas the payment made after issuance of SCN is obviously against the demand proposed and to conclude the proceedings. I, therefore, find that the Apex Court's above judgment is not applicable here, as the deposit made was not under Section 35F of the Central Excise Act, 1944.

7.2 Other citations relied by the respondent are also distinguishable on facts and are not relevant to the instant case. In the case of **Silvester Textiles P. Ltd- 2003 (156) ELT 216 (Tri-Mum)**, the duty was paid for one extra day along with interest hence it was held that unjust enrichment is not applicable as the appellants could not have passed on the duty benefit to their customers at the time of the clearance of the goods. Similarly, in the case of **Indoswe Engineers Pvt. Ltd- 2008 (225) ELT 502 (Tri-Mum)**, **Jindal Stainless Ltd- 2016 (343) ELT 613 (Tri-Bang)**, the payments were made under protest; in the case of **National Organic Chemical Industries- 2021 (378) ELT 314 (Tri-Mum)**, the amount was deposited during pendency of appeal. In the case of **Birla Corporation Ltd- 2017 (358) ELT 443**, the clearances were made on the basis of MRP which was preprinted on each cement bag and therefore reduction in price may not fluctuate the price which is constant and fixes on the basis of the contracts made between the customers. All these above decision do not have precedence value as they have not distinguished the judgment of Apex Court's decision passed in the case of Ajni Interiors.

7.3 It is also observed that respondent has relied on the judgment passed in the case of **Parle International Ltd- 2001 (127) ELT 329 (Guj)**, wherein it was held that the amount of duty shown in bill was paid to Revenue and subsequent demand is on the ground of undervaluation, but the Department miserably failed to establish it. The appeal filed by petitioner having been allowed by Tribunal, amount deposited by petitioner during adjudication proceedings is to be regarded as 'deposit' and not duty. Doctrine of unjust enrichment is not applicable to such deposit. This judgment was challenged before Apex Court and Hon'ble Apex Court held that;

"We are of the view that the issue in this case stands concluded by the decisions of this Court in Commissioner of Central Excise, Mumbai-II v. Allied Photographics India Ltd., reported in 2004 (166) E.L.T. 3 (S.C.) = 2004 (4) SCC 34, and Sahakari Khand Udyog Mandal Ltd. v. Commissioner of Central Excise & Customs reported in 2005 (181) E.L.T. 278 (S.C.) = 2005 (3) SCC 738. The High Court's decision to the contrary is wrong and is, therefore, set aside.



The High Court had interfered in the matter and set aside the show cause notice issued by the appellant calling upon the respondent to show cause why it should not be denied refund under Section 11B of the Central Excise Act, 1985. Since we have set aside the decision of the High Court, the show cause notice revives. Having regard to the facts of the case, we record the submission of the learned Counsel appearing on behalf of the appellant that the issue of limitation will not be raised by it in the event the respondent gives an answer to the show cause notice. In any event, we extend the time consequent upon this appeal being allowed. We extend the time for the respondent to show cause to the notice within a period of six weeks. It will be open to the respondent to file the answer in the form and manner required by the appellant without prejudice to the respondent's submission before the authority concerned that such a compliance was not necessary having regard to the application already made for refund by it on 28-9-1999.

It is made clear that this Court has decided the appeal purely on a question of law. All the issues of fact as well as the issue relating to the form of answer to the show cause notice will be decided by the authorities concerned. The authorities will take such decision uninhibited by any observations of the High Court on the merits of the respondent's case."

8. Thus, in light of the above judicial pronouncements, I find that the voluntary deposit of Excise Duty paid even during the course of investigation and prior to show cause notice or during adjudication cannot be considered as pre-deposit and has to be treated as duty. Further, the payment made after issuance of SCN shall as to be treated as duty as the same stands confirmed at the stage of adjudication. Thus, I, find that the refund claim filed by the respondent shall also undergo the test of unjust enrichment.

9. The refund sanctioning authority sanctioned the refund by giving a finding that the unjust enrichment is not applicable to present case as the respondent has produced a Trial Balance of their Income Tax Return wherein the said amount of Rs.18,60,298/- was shown as Central Excise duty paid 'under protest'. I find that the order suffer from legal infirmity in as much as such findings were in contradiction to the above legal pronouncements. I, therefore, find that it would be proper to remand the matter back to the refund sanctioning authority to examine whether the claim for refund was hit by the doctrine of unjust enrichment and pass a speaking order.

10. Accordingly, I set-aside the impugned order and allow the appeal filed by the appellant by way of remand.

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

(अखिलेश कुमार) 19th

आयुक्त(अपील्स) may

2023..

Date: 19.05.2023

Attested

Rekha A. Nair
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad



By RPAD/SPEED POST

To,
The Assistant Commissioner,
CGST, Division-II,
Ahmedabad South

- **Appellant**

M/s. Sarvottam Steel Industries,
54/2/P, Phase-I, GIDC, Vatva,
Ahmedabad-382445

- **Respondent**

Copy to:

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad South.
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