



::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE.



द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/62/BVR/2017	मूल आदेश सं / O.L.O. No. 461/R/2016-17	दिनांक / Date 10.01.2017
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3643 to 3645

ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-195-2017-18

आदेश का दिनांक / Date of Order:	05.03.2018	जारी करने की तारीख / Date of issue:	15.03.2018
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Passed by **Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham)**

अधिसूचना संख्या २६.१७/दिनांक (टी.एन) शु.उ.के-२०१७/१०-२०१७ के साथ पढ़े बोर्डे ऑफिस आदेश सं . दिना .टी.एस-२०१७/०५क १६, के अनुसरण में २०१७.११.११ पी. ए. वसावे ,आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, कच्छ (गांधीधाम), को वित्त अधिनियम १९९४ की धारा ८५केन्द्रीय उत्पाद शुल्क , के ३५की धारा १९४४अधिनियम अंतर्गत दजे की गई अपीलो के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri P. A. Vasave, Commissioner, CGST & Central Excise, Kutch(Gandhidham), has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम/ भावनगर। द्वारा उपरलिखित जारी मूल आदेश से सृजित /

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham/ Bhavnagar :

घ **अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-**
M/s Mepro Pharmaceuticals Pvt. Ltd. (Unit-II),, Q Road, Phase-IV, GIDC,, Wadhwan City, Surendranagar.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

- (A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-
- (i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर.के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.
- (ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलो के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

- (iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

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.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

- (B) नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी।

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एक के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है।

- (i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त वह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.

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

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :

Revision application to Government of India:

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पैरालेग के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, ससद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /
In case of any loss of goods, where the loss occurs 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
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केंद्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा संसाधनविधि पर या बाद में पारित किए गए हैं। /
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 such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केंद्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केंद्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी 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-5 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेट्री कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers 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 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER-IN-APPEAL ::

M/s. Mepro Pharmaceuticals Pvt. Ltd. Unit-II, Q. Road, Phase-IV, GODC, Wadhwan City – Surendranagar 363035 (hereinafter referred to as Appellant) has filed present appeal against the refund order no. 461/R/2016-17 dated 10.01.2017 (herein after referred to as "impugned order") passed by the Assistant Commissioner, Central Excise Division, Surendranagar (herein after referred as "adjudicating authority").

2. Briefly stated facts of the case are that appellant is engaged in manufacturing of medicament covered under MRP base assessment and accordingly they are clearing their goods after availing admissible abatement of 35% as provided under relevant notification No. 49-2008CE(NT) dated 24.02.2008 as amended. The Noticee by mistake have cleared their goods covered under Central Excise Invoice No. 0240/2016.17 dated 11.08.2016 & 0250/16.17 dated 18.08.2016 after deduction of 30% abatement on the MRP value instead of 35% abatement admissible under the said notification. As such they have paid the excess amount of central excise duty total amounting to Rs. 85,266/- (Rs. 51,066/- covered under central excise invoice No. 0240/16.17 dated 11.08.2016 & Rs. 34,200/- covered under central excise invoice No. 0250/16.17 dated 18.08.2016) for the goods cleared there under. Accordingly they have filed the refund claim of duty paid in excess total amounting to Rs. 85,266/- along with the copy of relevant documents.

3. The refund claim of Rs. 85,266/- was rejected by the adjudicating authority on the ground of unjust enrichment in terms of Section 11B readwith Section 12B of CEA 1944. Being aggrieved with the impugned order, the appellant filed the present appeal on the ground that the question of unjust enrichment will not arise in this case as they have already issued credit note no. CN/II/16-17/004 dated 28.08.2016 for Rs. 51,066/- and CN/II/16-17/005 dated 28.09.2016 for Rs. 34,200/- to their customer M/s ABBOTT INDIA LTD., AHMEDABAD/INDORE. Further the Declaration from Abbot India Limited certifying that they have not passed on the any incidence of such excess payment of excise duty to its customer.

4. The personal hearing in the matter was held on 31.01.2018. Shri Mehul jivani (Chartered Accountant) and Shri Nilesh Chauhan, Central Excise in-charge, authorized representatives appeared on behalf of the appellant and reiterated the grounds of appeal and submitted that they have not collected differential duty from the M/s Abbott India Ltd. They also stated that M/s Abbott India Ltd have given the declaration that they had not passed on the burden of differential excise duty to their consumers. In support of the same, they also produced copies of Payee's advice of Standard Chartered bank of M/s Abbott India Ltd and their (appellant's) Bank statement issued by the Bank of India, copy of ledger, where in the amount has shown under the Head Excise receivable account for that they have given Journal Entry voucher and copy of certificate dated 03.01.2017 issued by the Chartered Accountant certifying that M/s Mepro

Pharmaceuticals Pvt. Ltd. have paid the duty from their own pockets. In their support they also cited various judgments.

5. I have gone through the facts of the case, the appeal memorandum, impugned order and submission made during the personal hearing.

6. I find that in case of instant appeal, the impugned order was received by the appellant on 23.01.2017 and date of filing of appeal is 15.03.2017. Hence, the appeal have been filed within the stipulated time period and there is no delay in filing the appeal. The condition of pre-deposit also stand fulfilled.

7. I find that limited issue to be decided is whether the impugned order rejecting the refund on the ground of unjust enrichment in terms of Section 11B read with Section 12B of CEA 1944 was proper or otherwise?

8. The adjudicating authority at para 26 of the impugned order has held that the invoices were issued on 11.08.2016 and 18.08.2016 whereas the credit note was issued on 29.09.2016 and there is delay of 1 ½ month in issuance of the credit note from the date of invoice. Therefore there is no alternative to presume that for such a long period the duty incidence has been passed on even to the first buyer or to the subsequent buyers. I find that such observation made by the adjudicating authority is without any legal backing and not supported by any documentary evidence and is purely based on presumption. There is no provision in the Central Excise Act, 1944 which provides that if there is a delay then it can be presumed that the duty incidence has been passed on to the buyer.

9. Further, the adjudicating authority has held that credit notes are not sufficient to prove that the duty burden has not been passed on to the buyers. Also the appellant has not brought on any record and material to show and prove that the buyer to whom the incidence of duty was passed on by the appellant have not further passed it on to his buyers and any other person. The adjudicating authority placed reliance of circular no. **317/33/97-CX dated 18.06.1997** which relevant Para's are reproduced below:

The CEGAT (Eastern Zonal Bench) in the case of Indo Flogates Ltd. v. CCE, Bhubaneswar 1997 (20) RLT 443 (CEGAT-EZB) has decided the issue of unjust enrichment under Section 11B holding that if credit notes have been issued, refund is admissible. This decision is given by Single Member Bench.

2.0 However, the CEGAT (South Zonal Bench) consisting of two Members in the case of CCE, Madras v. Addison & Co., Madras 1997 (20) RLT 479 has held that refund is not admissible if credit notes have been issued as passing on duty at time of clearance and not post clearancetransactions by issue of credit notes is relevant under Section 11B of the Central Excise Act.

3.0 As the decision of South Zonal Bench is of two Members Bench, it would prevail over the decision of Eastern Zonal Bench is which of Single Member Bench. The jurisdictional Commissioner has been requested to consider filling Reference Application against the order in case of CCE v. Indo Flogates Ltd.

The said circular was issued by placing Reliance on the judgement of **CCE Madras Vs M/s Addison and company report in 1997 (20) RLT 479**. The said judgement of the tribunal was overruled by the Madras High Court reported in 2001


(129) E.L.T. 44 (Mad.) against which appeal was filed by the department in Supreme Court which has been decided vide judgement report in 2016 (339) E.L.T 177(SC). The Hon'ble Supreme Court in the above mentioned case has held in para 35 that where there is no dispute than the duty claimed as refund has not passed on to any other person by the buyer than the refund of such excise duty paid which is recovered from buyer by way of credit note shall be allowed. The relevant para is reproduced below:

35. The respondent-Assessee is a 100 per cent Export Oriented Unit (EOU) manufacturing cotton yarn. The respondent filed an application for refund of an amount of Rs. 2,00,827/- on 14-8-2002 on the ground that it had paid excess excise duty at the rate of 18.11 per cent instead of 9.20 per cent. The Assessee initially passed on the duty incidence to its customers. Later the Assessee returned the excess duty amount to its buyers which was evidenced by a certificate issued by the Chartered Accountant on 2-8-2002. The refund claim was rejected by the Deputy Commissioner of Central Excise, Kolhapur Division vide an order dated 24-9-2002 on the ground that the Assessee did not submit either the credit notes or the Chartered Accountant's certificate at the time of filing the refund application. Not satisfied with the genuineness of the documents the Deputy Commissioner rejected the refund claim. The Commissioner (Appeals), Central Excise, Pune allowed the appeal filed by the Assessee by taking note of the certificate issued by the Chartered Accountant and the credit notes dated 29-7-2002. The Appellate Authority accepted the Assessee's contentions and held that there was no reason to doubt the genuineness of the documents produced. The Appellate Authority allowed the appeal of the Assessee and the said order was confirmed by the Customs, Excise and Service Tax Appellate Tribunal vide judgment and order dated 6-10-2005. The said order of Central Excise and Service Tax Appellate Tribunal was further confirmed by the High Court of Judicature at Bombay in Customs Excise Appeal No. 100 of 2008 filed by the Revenue. The Revenue has filed the above Civil Appeal challenging the validity of the judgment of the High Court in Central Excise Appeal No. 100 of 2008.

36. Except for a factual dispute about the genuineness of the certificate issued by the Chartered Accountant and the credit notes raised by the Assessee regarding the return of the excess duty paid by the Assessee, there is no dispute in this case of the duty being passed on to any other person by the buyer. As it is clear that the Assessee has borne the burden of duty, it cannot be said that it is not entitled for the refund of the excess duty paid. In view of the facts of this case being different from Civil Appeal No. 7906 of 2002, the appeal preferred by the Revenue is dismissed.

10. In light of above, I hold that as per the ratio of the said judgement the appellant is eligible for the refund claim on the basis of certificate issued by the Chartered Accountant and Credit Notes. Since original Chartered Accountant certificate and other relevant documentary evidences have been produced by the appellant along with the original refund application filed with adjudicating authority. Therefore, I remand back the case to the adjudicating authority to decide the refund after verification of genuineness of certificate issued by the Chartered Accountant along with financial documents maintained by the appellant. Accordingly, I allow the appeal filed by the appellant by way of remand.

11. The above appeal filed by the appellant is disposed off in above terms.


(P. A. Vasave)
Commissioner (Appeals)/
Commissioner
CGST & Central Excise,
Kutch (Gandhidham)