



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

द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan.

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या Appeal / File No. V2/20/EA2/RAJ/2016	मूल आदेश सं / OIO No. 04/REF/2016-17	दिनांक / Date 31.05.2016
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ख अपील आदेश संख्या (Order-In-Appeal No.):

**RAJ-EXCUS-000-APP-140 -2017-18**

आदेश का दिनांक /  
Date of Order: 11.12.2017 जारी करने की तारीख /  
Date of issue: 14.12.2017

कुमार सतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गन्धिधाम/ द्वारा उपरोक्तित आदेश मूल आदेश से सृजित /

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

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

M/s. Blue Lake Ceramic., Survey No. 119/1., 8A, National Highway, Sartanpar Road,,Senso Chowkadi,At: Sartanpar,Wakaner.,Rajkot - 363621

इस आदेश(अपील) से व्यक्तित कोई व्यक्ति निम्नलिखित तरीके से 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 अपील/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) विशेषण मूल्यांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील/न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को भी 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 बतलाया गया अपील के अलावा सेवा कर अपील/न्यायाधिकरण (विस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, भवानी भवन अलावा अहमदाबाद- 380016 को भी जानी चाहिए। /

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

(iii) अपील/न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) विधिसूचनी, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये धर पर EA-3 को ताल पत्रियों में दर्ज किया जाना चाहिए। इसमें से कम से कम एक पत्रि के साथ, जहां उत्पाद शुल्क की सीमा अज्ञात की सीमा और अज्ञात सेवा शुल्क, धर 5 लाख या उससे कम, 5 लाख धर या 50 लाख धर तक अथवा 50 लाख धर 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 अपील/न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार 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 अपील/न्यायाधिकरण की शाखा स्थित है। स्थान आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- धर 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) अपील/न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर विधिसूचनी, 1994, के नियम 9(1) के तहत निर्धारित धर पर 5 T-5 में धर पत्रियों में की जा सकती है। इसमें से कम से कम एक पत्रि के साथ, जहां उत्पाद शुल्क की सीमा अज्ञात की सीमा और अज्ञात सेवा शुल्क, धर 5 लाख या उससे कम, 5 लाख धर या 50 लाख धर तक अथवा 50 लाख धर 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 अपील/न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार 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 अपील/न्यायाधिकरण की शाखा स्थित है। स्थान आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- धर 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 5.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 fees 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 दंड की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकती है एवं उसके साथ अप्रयुक्त, केन्द्रीय उत्पाद शुल्क अध्याय अप्रयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रामाणिक होनी चाहिए) और अप्रयुक्त द्वारा सहायक अप्रयुक्त अध्याय अप्रयुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपील न्यायाधिकरण को आवेदन दंड 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 Form 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.
- (ii) शीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सेनटेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर की भी लागू की गई है, इस आदेश के प्रति अपील न्यायाधिकरण में अपील करने 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, बशर्ते कि इस धारा के अंतर्गत जमा कि जमा वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "आय किए गए शुल्क" में निम्न शामिल है।  
(i) धारा 11 डी के अंतर्गत रकम  
(ii) सेनटेट जमा की गयी गई राशि  
(iii) सेनटेट जमा नियमवली के नियम 6 के अंतर्गत देय रकम  
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (स. 2) अधिनियम, 2014 के अंतर्गत से पूर्व किसी अपील न्यायाधिकरण के समक्ष विचारणीय स्थान नहीं एवं अपील को लागू नहीं होगी।  
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 स्थानों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के अंतर्गत अथवा अधिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी अड़िया, जेवन दीप भवन, संसद 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 मांग के किसी नुकसान के मामले में, जहां नुकसान किसी मांग को किसी नगरघरों से भंडार गृह के परिवहन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह परिवहन के दौरान, या किसी भंडार गृह में या भंडारण में मांग के प्रसंस्कार के दौरान, किसी कारखाने या किसी भंडार गृह में मांग 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 मांग के विनिर्माण में प्रयुक्त कच्चे मांग पर भरी गई केन्द्रीय 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 on 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 मांग निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty  
(iv) मुनिश्चित 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 अप्रयुक्त (अपील) के द्वारा वित्त अधिनियम (स. 2), 1998 की धारा 109 के द्वारा निर्यात की गई लसीख अध्याय समावाहिकी पर या बाद में पारित किए गये 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 जबर सहाय EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदनों के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के संश्लेषण के लिए 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-6 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 (जो 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, उपरोक्त धारा में किया जाना चाहिए। इस संश्लेषण के होते हुए भी की निम्न परी कराये से बचने के लिए पध्दतिनिर्देश अपील न्यायाधिकरण के एक अपील या केन्द्रीय 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, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.  
(E) सहायक न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं संश्लेषण आदेश की प्रति पर निर्धारित 6.50 रुपये 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 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) शीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (कार्य विधि) नियमवली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और 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 अपील न्यायाधिकरण को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और अद्यतन प्रावधानों के लिए, अपीलकर्ता विभागीय वेबसाइट [www.cbec.gov.in](http://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](http://www.cbec.gov.in)

**:: ORDER IN APPEAL ::**

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The Principal Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "appellant") has filed the present appeal against Refund Order No. 4/REF/2016-17 dated 31.05.2016 (hereinafter referred to as "impugned order") passed by the Assistant Commissioner, Central Excise Division-II, Rajkot (hereinafter referred to as "sanctioning authority") in the case of M/s. Blue Lake Ceramics, 8-A National Highway, Wankaner (hereinafter referred to as "respondent").

2. Briefly stated, facts of the case are that respondent is registered Central Excise assessee, engaged in manufacture of Ceramic Wall Tiles falling under CETH 69 of the First schedule to the Central Excise Tariff Act, 1985, which are assessed to Central Excise duty under Section 4A of Central Excise Act, 1944 (hereinafter referred to as "the Act"). The factory premises of the respondent were searched by Officers of the department on 23.02.2012 and incriminating documents/records were resumed under Panchnama. The respondent tendered post dated cheques totally amounting to Rs. 14,00,000/-, which were realized by the department on 29.02.2012, 13.03.2012 and 27.03.2012.

2.1. Show Cause Notice No. V.69/AR-WNR/Div.II/ADC/2013 dated 01.10.2013 was issued proposing recovery of Central Excise duty of Rs. 15,46,061/- under Section 11A(4) of the Act along with interest under Section 11AA (earlier 11AB) of the Act; to impose penalty under Section 11AC of the Act and also to impose penalty under Rule 26 of the Rules upon Shri Mahesh D. Panara, Partner of the respondent and their buyers, which was adjudicated by the Additional Commissioner, Central Excise, Rajkot vide Order-in-Original No. 16/JC/BKS/2014-15 dated 20.02.2015 wherein he confirmed demand of Central Excise duty of Rs. 15,46,061/- under Section 11A (4) of the Act along with interest under Section 11AA of the Act and appropriated Rs. 14,00,000/- against the confirmed demand of duty; imposed penalty of Rs. 15,46,061/- under Section 11AC of the Act on the respondent also and imposed penalty of Rs. 2,50,000/- upon Shri Mahesh D. Panara, Partner of the Respondent.

2.2 Being aggrieved with the said Order-in-Original, the respondent and others had filed appeals before the then Commissioner (Appeals), Central Excise, Rajkot, who vide Order-in-Appeal No. RAJ-EXCUS-000-APP-061 to 067-15-16 dated 23.02.2016 allowed all the appeals and set aside the Order-in-Original. Consequently, the respondent filed refund claim of Rs. 14,00,000/- on 04.05.2016 which was sanctioned by the sanctioning authority vide impugned order.

3 Being aggrieved with the impugned order, department preferred the present appeal, *inter alia*, on the following grounds: -

(i) The sanctioning authority has erred in sanctioning the refund by not considering the aspect whether subsequent to investigation, the respondent has collected any



amount towards Central Excise duty liability from their buyers towards sale of illicit clearance or otherwise since during the course of investigation, the buyers had also confessed the illicit purchases from the respondent or as to whether the said assessee had sold the goods clandestinely to various customers inclusive of duty elements or otherwise. The sanctioning authority has failed to consider the doctrine of unjust enrichment while sanctioning the refund claim. If the respondent has recovered Central Excise duty on the goods sold to their buyers, it is sufficient to presume that incidence of duty has been passed on and the amounts recovered towards Central Excise duty from their buyers will be transferred to Consumer Welfare Fund. The respondent has not provided any supporting documents establishing that incidence of duty was actually not passed on to any other person.

(ii) The sanctioning authority has made contradictory findings treating the payment of Central Excise duty as 'deposit', whereas, the facts of the case are that the respondent had voluntarily credited Rs. 14,00,000/- into Government exchequer and appropriated against confirmed duty. The department relied on Hon'ble CESTAT, New Delhi's Final Order No. C/91/2010 (PB) dated 28.06.2010 in the case of Seaking Marine Services reported as 2010 (258) ELT 113 (Tri. - Del.).

4. Personal hearing in the matter was attended to by Shri Chetan Dethariya, Chartered Accountant, who submitted detailed written P.H. submissions with supporting case laws and submitted that Rs. 14,00,000/- were deposited by the respondent in 2011-12 and this was shown in Balance Sheet of 2011-12 and onwards as deposit/advances with Assistant Commissioner, Central Excise, till refund was granted in 2016-17; that question of unjust enrichment does not arise as the amount has never been recovered from any one/customers; that Certificate of Chartered Accountant was provided to this effect, the basis on which impugned order has been passed by the Assistant Commissioner; that all relevant documents were filed to Assistant Commissioner, Central Excise Division-II, Rajkot and hence appeal of department is not correct and may be rejected on merits. The appeal filed by the department was not attended to by any officer though P.H. notices were issued to them.

4.1 The respondent in their written P.H. submission has submitted as under: -

(i) The respondent had filed refund claim along with Audited Balance Sheet for FY 2011-12 to FY 2014-15, which clearly establish that Rs. 14,00,000/- paid by the respondent during investigation was shown under the "Current Asset and Advances". Further, the respondent had also submitted Certificate from Chartered Accountant certifying that respondent has not passed on Central Excise duty of Rs. 14,00,000/- to their customers. The above are again submitted during P.H. of the Appeal.

(ii) The allegations of the department are factually incorrect because no finished excisable goods had been cleared clandestinely without payment of Central Excise duty by them and whatever finished excisable goods had been manufactured by them, they had been removed from the factory in proper and accounted manner. The Hon'ble Commissioner (Appeals) vide Order-in-Appeal dated 23.06.2016 had, therefore, set aside order confirming demand of Central Excise duty and penalty imposed on them.

(iii) The demand of duty in this case was Rs. 15,46,061/-, but they had deposited Rs. 14,00,000/- only during investigation. These deposits were made only as a law-abiding respondent and to show their bonafide and therefore the fact of the disputed amount though deposited by them cannot be considered as an evidence of accepting these liabilities as they have countered the order of Additional Commissioner and got that order set aside by the then Commissioner (Appeals), Rajkot. The appellant relied on decisions of Hon'ble High Court of Gujarat in the case of Parle International Ltd. reported as 2001 (127) ELT 329 and of the Hon'ble CESTAT in the case of Shakti Chemical Industries reported as 1995 (76) ELT 410 in this regard. Besides this, the respondent relied on the following case-laws also:-

- Ebiz Com Pvt. Ltd. – 2017 (49) STR 389 (All.)
- Pricol Ltd. – 2015 (320) ELT 703 (Mad.)
- Jayant Glass Inds. (P) Ltd. – 2003 (155) ELT 188 (Tri. – LB)
- Aadishwar Motors (P) Ltd. – 2014 (3) STR 329 (Tri.- Ahmd.)
- ITC Ltd. – 2005 (179) ELT 15 (SC).

#### FINDINGS: -

5. I have carefully gone through the facts of the case, impugned order, appeal memorandum and submissions made by the appellant. The issue to be decided is whether in the facts and circumstances of the present case, the impugned order passed by the lower adjudicating authority sanctioning refund claim of 14,00,000/- is correct or not.

6. The records reveal that the respondent had paid Rs. 14,00,000/- vide GAR 7 challans dated 29.02.2012, 13.03.2012 and 27.03.2012 and SCN dated 01.10.2013 had demanded Central Excise duty of Rs. 15,46,061/- which was confirmed by the then Joint Commissioner, Central Excise, Rajkot vide Order-in-Original No. 16/JC/BKS/2014-15 dated 26.02.2015 and he appropriated Rs. 14,00,000/- against demand so confirmed. The respondent & others had preferred appeal before the then Commissioner (Appeals), Central Excise, Rajkot who vide Order-in-Appeal dated 25.02.2016 allowed the appeals filed by the respondent and their Partner and accordingly respondent claimed for refund of Rs. 14,00,000/-, which was sanctioned, hence present appeal by the department.

7. The department has contended that the sanctioning authority has sanctioned refund without taking into consideration the aspect whether subsequent to investigation, the respondent has collected this amount as Central Excise duty from their buyers as the buyers had confessed illicit purchases from the respondent or whether the said assessee had sold the goods clandestinely to various customers inclusive of duty elements or otherwise. The respondent argued that these allegations are factually incorrect because no finished excisable goods had been cleared by them clandestinely without payment of duty and that the Hon'ble Commissioner (Appeals) vide Order-in-Appeal dated 23.02.2016 had set aside demand of Central Excise duty as well as penalty imposed on them. I would like to produce relevant Paragraphs of the Order-in-Appeal passed by the then Commissioner (Appeals), Central Excise, Rajkot as under:-

7.1 ..... In the instant case, the show cause notice is absolutely silent on the aspect of procurement and excess utilization of raw materials used for the production of alleged clandestinely removed goods. The investigation has also failed to look into the aspect of consumption of electricity. Neither has the investigation been extended to the transporters of such allegedly illicitly cleared goods. Further, the investigation has failed to bring on record vital evidence in the form of flow back of funds.

7.2 The present case has been booked on the basis of one excel document found in the computer of the appellant. On the basis of such excel sheet, confessional statements of various persons have been recorded. However, there is no documentary evidence to corroborate the statements of the concerned persons.....

.....  
 .....  
 7.5 The above amply demonstrates that for the purpose of establishing the charges of clandestine production and clearance, the investigation has to bring on record material evidence regarding procurement and utilization of excess raw materials, excess consumption of electricity, transporters documents and most importantly the financial flow-back. In the instant case, I find that none of the above parameters have been dealt with by the revenue and the show cause notice is absolutely silent on these aspects. Thus, I find that there is complete lack of evidence to substantiate the charges in the show cause notice.

8. Further, I find that reliance has been placed on the sorting register of the appellant and an Annexure marked C has been prepared which shows the comparison of the manufactured quantity shown in the sorting register vis-à-vis the DSA. A statement in this regard has been extracted from Shri Maheshbhai D. Panara to the effect that the appellants enter less production in

Daily Stock Register as compared to actual production and they clear the differential quantity without issuing invoice and without payment of duty. On going through the Annexure - C, it is apparent that each entry which has been done date-wise indicates that the production of wall tiles shown in the Daily Stock Register under the grade ECO-IV is higher than that shown in the sorting report. The confessional statement would mean that the appellants have actually manufactured a lesser quantity of ECO-IV tiles and shown a production on the higher side in the Daily Stock Register. The effect that such a practice would have on the appellants is that they would be required to show clearance and resultantly pay duty on a quantity of tiles that they had never manufactured. It is beyond human logic that any prudent person would show excess quantity in the Daily Stock Account than that actually manufactured. Placing reliance on the sorting register and the statement extracted in this regard gives rise to such an absurd situation. Thus, I find that the sorting register and the statement cannot be relied upon as evidence in view of the contradictory inference that can be drawn from such evidence. The above discussion clearly indicates that proper evidence is required to substantiate the charges of clandestine removal. The revenue's reliance on such distorted evidence is not sustainable especially in light of the above discussions.

.....  
 10. Further, I find that the appellant have contended that the opportunity of cross examination was not extended to them. In such circumstances, the charges cannot be sustained by merely relying on the oral statements.

11. In view of the above discussion, I find that the revenue has failed to bring on record any independent evidence in the form of documents or financial flow-back to establish the charges of clandestine production and removal. In view of the lack of cogent evidence, I find that the charges leveled in the show cause notice are not sustainable and the impugned order is not sustainable. Accordingly, I set aside the impugned order and allow the appeals filed by the appellants.

(Emphasis supplied)

8. The findings of the above order clearly establish that the department could not make out a case of clandestine clearance of finished excisable goods without payment of Central Excise duty by the respondent. The contention of the department that the sanctioning authority has not verified the aspect that the respondent has collected any amount from their customers subsequent to investigation does not seem to be convincing in view of facts discussed in Paragraphs 9 to 9.2 as discussed below and therefore cannot sustain. The department has just made argument in appeal without adducing any evidences in this regard in appeal memorandum and therefore the same is required to be



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rejected.

8.1. The department has also contended that sanctioning authority has erroneously treated the payment of Central Excise duty as 'deposit'. There is no dispute that the respondent had deposited Rs. 14,00,000/- through account payee cheques in favour of department which was encashed on 29.02.2012, 13.03.2012 and 27.03.2012, during investigation itself, however the department had alleged evasion of Central Excise duty only of Rs. 15,46,061/- on 01.10.2013 and was confirmed by the adjudicating authority, which was set aside by the Commissioner (Appeals), Central Excise, Rajkot. The department has challenged this Order-in-Appeal before Hon'ble CESTAT, Ahmedabad, however the appeal of the department is pending. Therefore, the amount of Rs. 14,00,000/- paid by the respondent is required to be treated as deposit. I find that the Hon'ble CESTAT, Ahmedabad in case of Nissan Copper Limited involving identical facts reported as 2015 (329) ELT 843 (Tri. - Ahmd.) has held as under: -

3. *Ld. Counsel brings to my notice the factual position. It is his submission that the investigating officers during the investigation has made the appellant debit the amount of Rs. 8,35,000/- in the cenvat account. He would submit that the investigation which was carried out, ended in an order which is in the favour of appellant by the Tribunal vide Order No. M/1470-1471/WZB/AHD/2010, dated 24-8-2010. Having won in the Tribunal, the appellant preferred the refund claim of the amount debited by them. He would submit that this issue is no more res integra in as much as, various decisions of the Tribunal and also as judicial fora have settled the law that the amounts paid during the investigation stage and if an appeal is filed the said amount is to be refunded to the assessee. He said that this ratio has been laid down by the constitution Bench of Supreme Court in the case of Mafatlal Industries Ltd - 1997 (89) E.L.T. 247. He would submit that this view has been followed by the Tribunal in the following decisions:*

1. *CCE, Raipur v. Indian Ispat Works Pvt. Ltd. - 2006 (3) S.T.R. 161*
2. *Laxmi Board & Paper Mills Ltd. v. CCE, Mumbai - 2007 (208) E.L.T. 384*
3. *CCE, Vadodara v. Swiss Glass Equipments Ltd. - 2013 (291) E.L.T. 417*
4. *Jupiter Cement Industries Ltd. v. CCE, Rajkot - 1998 (102) E.L.T. 308*

*Prasad*

3.1 *It is his submission that the question of unjust enrichment which has been raised by the lower authorities is also unsustainable as Hon'ble High Court of Punjab & Haryana in the case of CCE., Chandigarh v. Modi Oil & General Mills - 2007 (210) E.L.T. 342 specifically settled the law that the amounts have been debited or paid after the date of clearance, the question of unjust enrichment does not arise. It is also his submission that these settled law as to if an amount is paid and the matter is litigated before the judicial fora, it would amount to payment of said amount under protest.*

.....  
 .....  
 .....

9. *In the factual matrix as stated above, I find that the Ld. Counsel was correct in stating that the issue is now squarely covered by the various decision cited him and as indicated in the Paragraph 3. In my considered view, the ratio of the judgments of the Tribunal clearly hold that if any amount is paid to the Revenue during the investigation and successfully challenged before the higher judicial*



fora, such an amount needs to be considered as deposit and refund needs to be sanctioned. In the case in hand, it is the issue and having succeeded before the Tribunal, the Revenue could not hold back an amount which is due to the assessee. Yet another point which has been raised by the lower authorities with regard to the amount not being paid (under protest) which in my view is incorrect proposition of the law in as much, that when an assessee prefers an appeal, it itself tantamount not to accepting the orders of the Revenue and the amount paid is in dispute. In my view, the question of unjust enrichment also will not arise as correctly stated by the Id. Counsel that the amounts were debited by the appellant on an allegation that they have removed the goods without payment of duty; allegation set aside by the higher court. The judgment of the Hon'ble High Court of Punjab & Haryana is directly on the point and covers the issues in favour of the appellant.

(Emphasis supplied)

9. The Hon'ble High Court of Madras in the case of Pricol Limited reported as 2015 (320) ELT 703 (Mad.) has held that any deposit made during investigation but order is challenged, has to be treated as deposit under protest and therefore, the principles of unjust enrichment does not apply in such cases, as under:-

7. The first question of law, which is raised, relates to the plea of unjust enrichment and much emphasis is laid on the decision of the Supreme Court in Mafatlal Industries case [1997 (89) E.L.T. 247 (S.C.)]. Relevant portion of the order passed by the Supreme Court in Mafatlal Industries case (supra) has been extracted in the grounds (b) and (c). There is no dispute with regard to the proposition of law as laid down by the Supreme Court. In the present case, as is evident from the records, it is not a case of refund of duty. It is a pre-deposit made under protest at the time of investigation, as has been recorded in the original proceedings itself. In this regard, it has to be noticed that it has been the consistent view taken by the Courts that any amount, that is deposited during the pendency of adjudication proceedings or investigation is in the nature of deposit made under protest and, therefore, the principles of unjust enrichment does not apply. The above said view has been reiterated by the High Court of Bombay in *Suvidhe Ltd. v. Union of India* - 1996 (82) E.L.T. 177 (Bom.), and by the Gujarat High Court in *Commissioner of Customs v. Mahalaxmi Exports* - 2010 (258) E.L.T. 217 (Guj.), which has been followed in various cases in *Summerking Electricals (P) Ltd. v. CEGAT* - 1998 (102) E.L.T. 522 (All.), *Parle International Ltd. v. Union of India* - 2001 (127) E.L.T. 329 (Guj.) and *Commissioner of Central Excise, Chennai v. Calcutta Chemical Company Ltd.* - 2001 (133) E.L.T. 278 (Mad.) and the said view has also been maintained by the Supreme Court in *Union of India v. Suvidhe Ltd.* - 1997 (94) E.L.T. A159 (S.C.). There are also very many judgments of various Courts, which have also reiterated the same principles that in case any amount is deposited during the pendency of adjudication proceedings or investigation, the said amount would be in the nature of deposit under protest and, therefore, the principles of unjust enrichment would not apply. In view of the catena of decisions, available on this issue, this Court answers the first substantial question of law against the Revenue and in favour of the assessee.

(Emphasis supplied)


9.1 The department has contended that the respondent has not provided any supportive documents establishing the fact that incidence of duty was actually not passed on to any other person. The respondent has countered this argument by stating that they had filed refund claim along with Audited Balance Sheets of the respondent for the FY 2011-12 to FY 2015-16 wherein Rs. 14,00,000/- paid by the respondent is shown under the head of "Current Assets - Loans & Advances" and they had also submitted Certificate dated 03.05.2016 of an independent Chartered Accountant certifying that

respondent had not passed on Rs. 14,00,000/- to their customers. The respondent has submitted copy of refund claim along with copy of Audited Balance Sheets from F.Y. 2011-12 to F.Y. 2015-16 and Certificate of Chartered Accountant submitted to the sanctioning authority. On perusal of the said documents, I find that appellant has accounted for Rs. 14,00,000/- paid by them during investigation under the head "Current Assets- Loans and advances" throughout the period from deposit to sanction of refund. Therefore, I find that the respondent has proved that the incidence of Central Excise duty has not been passed on by them to their customers or any other person. Hence, I find that the refund claim filed by the respondent is not hit by bar of unjust enrichment and the sanctioning authority has correctly sanctioned refund claim in favour of the respondent.

10. In view of above factual and legal position, I find no reason to interfere with the findings of the sanctioning authority and hence, I uphold the impugned order and reject the appeal filed by the department.

१०.१. डिपार्टमेंट द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

10.1. The appeal filed by the department stands disposed off in above terms.

  
(कुमार संतोष)  
आयुक्त (अपील्स)

**By Regd. Post AD**

To.

M/s. Blue Lake Ceramics,  
8-A National Highway,  
Wankaner

मे. ब्लू सिरैमिक्स,  
८-अ नेशनल हाइवे,  
वांकानेर

**Copy for information and necessary action to:**

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise Commissionerate, Rajkot
- 3) The Assistant Commissioner, GST & Central Excise Division-II, Rajkot.
- 4) Guard File.