:: प्रधानआयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क::
O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST &CENTRAL EXCISE

द्वितीय तल,जी एस टी भवन / 2nd Floor, GST Bhavan
रेस कोर्स रिंग रोड / Race Course Ring Road
राजकोट / Rajkot -- 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date:
	V2/24/BVR/2018-19	**R-289/REFUND/17-18**	**15/2/2018**

ख अपीलआदेशसंख्या(Order-In-Appeal No.):

BHV-EXCUS-000-APP-095-2019

आदेश का दिनांक / Date of Order:	**31.03.2019**	जारी करने की तारीख / Date of issue:	**01.04.2019**

श्री कुमार संतोष, प्रधान आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Principal Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot/Jamnagar/Gandhidham :

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

M/s Madhav Steel, GIDC, Phase-I, Bhavngar- Rajkot Road, Sihor, Bhavnagar-364240.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीक 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 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) वर्गीकरणमूल्यांकनसेसम्बन्धितसभीमामलेसीमाशुल्क,केन्द्रीयउत्पादनशुल्कएवंसेवाकरअपीलीयन्यायाधिकरणकीविशेषपीठ,वेस्टब्लॉकनं2,आर॰के॰पुरम,नईदिल्ली,कोकीजानीचाहिए।/
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 अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६का की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 dutydemand/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) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 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 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 प्रतियाँ 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 Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ 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, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस 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

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी 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 कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन 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 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 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 माल 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 ड्यूटी क्रेडीट 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 समायाविधि पर या बाद में पारित किए गए है।/
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 केन्द्रीय 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 केन्द्रीय 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-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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो 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 पढी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers variousnumbers 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 filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I 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-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय 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. Madhav Steels, GIDC, Phase- I, Bhavnagar- Rajkot Road, Sihor 364240 (hereinafter referred to as "the Appellant) filed present Appeal against order no. R-289/Refund/ 17-18 dated 15.2.2019 (hereinafter referred as "impugned order") passed by the Assistant Commissioner, Central GST Divisions, Bhavnagar-I, Bhavnagar (hereinafter referred to as "the lower adjudicating authority") .

2. The Brief facts of the case are that the appellant had filed refund claim of deemed Modvat credit consequent to Gujarat High Court's order dated 27.08.2014 in Tax Appeals No. 56 to 74 of 2005 filed by the respondent against CESTAT's order No.CI/233-332/ WZB/2003 dated 03.02.2003 in the matter of Commissioner(Appeal)'s Order No. No. 548 to 587 (199 to 238-Raj)/ CE/ Collr(A)/ Ahd dated 12.10.1995. The said refund claims had been sanctioned by the Jurisdictional sanctioning authority vide Order No. 214/Refund/15-16 dated 17.8.2015, *inter-alia* treating Rs.15,14,204/- as lapsed as on 01.08.1997 in light of CBEC Circular No. 326/42/97-Cx dated 25.07.1997 and no cash disbursement for that portion was ordered.

2.1 Appellant preferred appeal again against the said Refund order dated 17.8.2015, which was rejected by the then Commissioner (Appeals), Rajkot vide OIA No. BHV-EXCUS-00- APP-141-149-166-17 dated 29.9.2016. However, in Appeal against the said OIA dated 29.9.2016, the Hon'ble CESTAT, Ahmdeabad vide order No. A/13414-13422/2017 dated 13.11.2017 decided that Appellant is entitled for Cenvat Credit held as lapsed in the impugned OIA. Appellant filed refund application before the lower adjudicating authority who vide the impugned order sanctioned refund claim of Rs. 15,14,204/- however, appropriated same against the alleged outstanding government dues under Section 11 of the Central Excise Act, 1944 (hereinafter referred to as "the Act").

3. Being aggrieved with the impugned order, the appellant preferred the present appeal stating that appropriation of refund of Rs. 15,14,204/- is violating the Hon'ble CESTAT's order dated 13.11.2017;that the said recovery was made by the lower adjudicating authority on the ground that interest was payable by them against demand confirmed vide OIO No. 65-88 / BVR/ JC/ 2005 dated 30.12.2005/17.1.2006 ;that the said OIO was challenged by them and was pending vide Tax Appeal no. 1044/2008 filed before the Hon'ble High Court of Gujarat

against CESTAT order No. A/2325 to 2333/ WZB/ Ahd/ 2007 arising out of OIA No. 84 to 95/ 2006/ BVR/ CE/AV/ Commr(A)-IV)/Ahd dated 24.8.2006/ 30.8.2006 in the matter of OIO No. 65 to 88/BVR/JC/2005 dated 30.12.2005/17.2006; that the appellant had paid duty under protest, which was acknowledged by the JRS as arrears of Rs. 34,90,994/- is reported as 'interest'; that the matter is still pending with the Hon'ble High Court of Gujarat.

3.1 There is no order for confirmation of demand of interest in the OIO NO. 65 to 88/BVR/JC/ 2005 dated 30.12.2005/17.1.2006; that while disallowing Deemed Modvat Credit disputed in that proceedings is not ordered for recovery of interest; that no order has been passed for payment of interest in the said OIO; that recovery and adjustment of arrears of interest is coercive action and such action can only be taken in absence of any other source to recover the dues; that it is not arrears of interest as the matter is pending with the Hon'ble High Court of Gujarat; that they rely upon the following case laws in their support :

- 2006(201) ELT 615 (Tri-Bang)- M/s. Volta Ltd
- 2004 (165) ELT 518 (LB)- M/s. Rama Vision
-2005 (190) ELT 390 ELT 399 (CESTAT)

4. Personal hearing in the matter fixed on was 18.12.2018, on 8.1.2019 and on 29.1.2019. However, Appellant did not turn up for hearing but vide their written submission dated 2.1.2019, they stated that appeal may be decided on the basis of grounds of appeal mentioned in the appeal memorandum; that they submitted copy of order dated 27.8.2014 of the Hon'ble High Court of Gujarat and re-iterated that OIO dated 30.12.2005 did not confirm the interest on Deemed Modvat Credit in dispute.

FINDINGS

5. I have carefully gone through the facts of the case, impugned orders, appeal memorandum and submissions made by the appellant. The issue to be decided in the present Appeal is as to whether the impugned order appropriating refund of Rs.15,14,204/- against recovery of interest is correct or not.

6. I find that as per Hon'ble CESTAT's order dated 13.11.2017 the appellants were eligible to avail deemed Modvat credit. Since, the refund of entire amount has been sanctioned by the sanctioning authority, I find that the

decision of Hon'ble CESTAT is followed. The present dispute remains regarding appropriation of the said refund amount.

7. Appellant has contested appropriation of the sanctioned refund on the ground that Order-in-Original No.65 to 88/BVR/JC/2005 dated 30.12.2005 did not confirm interest payable by the Appellant and the matter is still pending before the Hon'ble Gujarat High Court in subsequent litigation preferred by them. The lower adjudicating authority has recorded his findings as under:-

> *"13. The aforesaid refund claim was sent to the Range Superintendent vide this office letter of even No. dated 12.12.2017 and 8.1.2018 for verification. In reply, the Range Superintendent vide his letter No. SH-2/CESTAT-REFUND/17-18 dated 18.12.2017, 11.01.2018 has verified the claim and found admissible in light of Order passed by the Hon'ble CESTAST. Further, the JRS reported that there are some Govt. dues pending against the claimant amounting to Rs.34,90,994/- (interest amount as on 18.12.2017) is outstanding against the claim and in the case of Tax Appeal No.1044/2008 pending at Hon'ble High Court. Therefore I find that the aforesaid due amount is required to be appropriated against the outstanding amount.*

7.1 I find that Order-in-Original No.65 to 88/ BVR/ JC/ 2005 dated 30.12.2005 in respect of SCN No.AR/SH/RR/6-12/94 dated 19.5.1995 for the period Dec,1994 to Jan, 1995, do not seek recovery of interest from the Appellant on account of disallowed deemed Modvat Credit. The Order portion of the said Order reads as under:

> *"ORDER*
>
> *I) I disallow the deemed modvat credit taken by the assesses and confirm the demands of Central Excise duty mentioned at Col. No.(4) of the table of this Order mentioned above against Show Cause Notices mentioned at Col. No.(3) of the said table in respect of the assesses mentioned against each at Col. No.(2) of the table under Rule 57 I of CER-1944 read with Section 11A of erstwhile Central Excise & Salt Act, 1944 (now Central Excise Act,1944).*
>
> *II) I refrain from imposing any penalty under Rule 173 Q of CER-1944 on the assesses mentioned at Col. No.(2) of the table."*

7.2 I find that the lower adjudicating authority wrongly accepted recovery of interest of Rs.34,90,994/- on account of the adjudication order dated 30.12.2005 on the basis of JRS letter without going through order dated 30.12.2005. It is a fact that the impugned order does not speak recovery of interest anywhere. The lower adjudicating authority has also not recorded in the impugned order whether any recovery proceedings were initiated for recovery of interest as per the said OIO dated 30.12.2005 reproduced above in Para 7.1. It is forthcoming from the impugned order that the appellant was not given opportunity to represent their case before appropriation of Rs.15,14,204/- against interest liability reported by

the JRS, which is incorrect on part of the lower adjudicating authority.

8. I find that the Appellant has also contested that the OIO dated 30.12.2005 and Tax Appeal no. 1044/2008 filed by them before the Hon'ble High Court of Gujarat against CESTAT's order No. A/2325 to 2333/ WZB/ Ahd/ 2007 (arising out of OIA No. 84 to 95/ 2006/ BVR/ CE/AV/ Commr(A)-IV/ Ahd dated 24.8.2006) is still pending with the Hon'ble High Court and has not yet attained finality. Further, interest on deemed Modvat credit was not demanded in SCN dated 19.5.1995 as per details of SCN given in Para 2 of OIO dated 30.12.2005, nor ordered in Order-in-Original dated 30.12.2005, interest can not be recovered from the Appellant as the case against an assessee can be started only with issuance of SCN for recovery of interest and not otherwise. Also Section 11AA and Section 11AB providing for recovery of interest has been brought under Central Excise Act for the first time w.e.f. 26.5.1995 and 28.9.1996 which can't be invoked by the SCN issued prior to 26.5.1995.

9. I find that the Hon'ble High Court of Karnatka in the case of M/s. Stella Rubber Works reported as 2011(267) ELT 495 (Kar.) has held as under:-

> *"3. The facts are not in dispute. The assessee is entitled to a refund of ` 2,29,433/- and the order passed to that effect has attained finality. In so far as the delayed payment of duty for the period 1982-83 to 1984-85 is concerned, on receipt of such payment, no steps were taken by the Department to claim interest for the delayed payment. For the first time their claim for delayed payment by way of interest is made after the order for refund of rebate claim is allowed, that too for refund of the amount, an attempt is made to adjust the interest claim. As the interest claim is not yet adjudicated, the question of adjusting the said claim towards the admitted claim of refund is impermissible in law.*
>
> *4. In fact, it is relevant to point out that Section 11AA was inserted by Act 22 of 1995 which came into effect from 26-5-1995. In the instant case, the claim for interest is in respect of the belated payment of duty pertaining to the period 1982-83 to 1984-85. Therefore, on the face of it, the said claim has no basis and it is unfortunate that the revenue invokes such excuses for not paying back the assessee amounts, which are legitimately due to them. In these circumstances, we deem it proper that the assessee is entitled to the cost of the proceedings"*
>
> (Emphasis Supplied)

9.1 The Hon'ble CESTAT in the case of M/s. Voltas Ltd reported as 2006(201) ELT 615 (Tri-Bang) has also held that demands not reached finality are not arrears and can not be adjusted against refund to be sanctioned and paid. The relevant portion of the order is reproduced below:-

"8. We have gone through the records of the case carefully. The learned Advocate for the appellants has cited a number of decisions wherein it is held that the refund amount due to the party cannot be adjusted against demands which are under challenge in the appellate fora. In the present case, even though the refund order for an amount of Rs. 15,73,149/- was passed on 16-11-1998. The same was not actually paid to the appellants and adjusted against some pending demands under Section 11 of the Central Excise Act 1944. Section 11 is reproduced below.

> *"SECTION 11. Recovery of sums due to Government. - In respect of duty and any other sums of any kind payable to the Central Government under any of the provisions of this Act or of the rules made there under (including the amount required to be paid to the credit of the Central Government under Section 11D), the officer empowered by the [Central Board of Excise and Customs constituted under the Central Boards of Revenue Act, 1963 (54 of 1963)] to levy such duty or require the payment of such sums may deduct the amount so payable from any money owing to the person from whom such sums may be recoverable or due which may be in his hands or under his disposal or control, or may recover the amount by attachment and sale of excisable goods belonging to such person; and if the amount payable is not so recovered, he may prepare a certificate signed by him specifying the amount due from the person liable to pay the same and send it to the Collector of the District in which such person resides or conducts his business and the said Collector, on receipt of such certificate, shall proceed to recover from the said person the amount specified therein as if it were an arrear of land revenue."*

9. Section 11 is actually a provision for recovery of sums due to Government. There are some assessee's who do not pay promptly the Government dues. In order to deal with such recalcitrant assessee's, the above provision is made and it enables the proper officer to deduct the amount payable from any money owing to the assessee. In this case, the refund is actually due to the appellant. But the appellants by virtue of certain Orders-in-Original owed money to the Government. The important thing to be noted is that these amounts decided by the Orders-in-originals were not final. Every Order-in-Original can be appealed. Therefore, at the first stage of confirmation of a demand, no finality has been reached. To put in other words, those demands cannot be called as arrears. There is a possibility that these demands could be set aside by the Commissioner (A) or the Tribunal or any other judicial forum. That is why large number of decisions hold that refund cannot be adjusted against the demands which are sub-judice. In the present case, the action of the authorities in adjusting the refund is against the legal provisions. Section 11 should be involved only when the demands have reached finality and should not be invoked even at the initial stage. Section 11BB provides interest for delayed refunds. This is squarely applicable to the present case. The Commissioner (A) has not at all given any reason as to why the said section is not applicable. In view of the above findings, we allow the appeal with consequential relief."

9.2 I further find that the Hon'ble CESTAT in the case of M/.s Kisan Irrigations & Infrastructure Ltd reported as 2016 (339) ELT 583 (Tri-Del) has held as under:-

> *"5. The Tribunal in 2009 (247) E.L.T. 512 (Tri.-Del.) and Jay Kay Synthetics - 2002 (145) E.L.T. 718 (Tri.-Del.) held that before appropriation of refund towards any arrears due, show cause notice/personal hearing is required. In the present case, I find the appellants were not even issued a simple intimation regarding proposed appropriation. Further, the Tribunal in Voltas Ltd. - 2008 (9) S.T.R. 591 = 2006 (201) E.L.T. 615 (Tribunal) examined the scope of applicability of Section 11 to recover the sums due to Government. It was held that only after finality of the appeal proceedings, the dues become arrears. In the present case, the appeal is pending before the Tribunal as per the amended provisions of Section 35F on payment of mandatory pre-deposit. The amount in excess of such pre-deposit cannot be collected coercively.*
>
> *6. Considering the above discussions and analysis, I find the impugned order is not justifiable and accordingly set aside the same. The appellant is eligible for refund of full amount as originally decided by the jurisdictional Asstt. Commissioner with applicable interest, if any. The appeal is allowed accordingly."*
>
> (Emphasis supplied)

9.2.1 The present case also has same facts, interest appropriated from the amount of refund to be sanctioned/paid without SCN and without giving personal hearing notice to the Appellant.

9.3 In the case of M/s. KEC international Ltd reported as 2014 (310) ELT 615 (Tri-Del), it was held that adjustment of refund against unconfirmed demand of interest can not be made and principles of natural justice are to be followed including issuance of Show Cause Notice, which is not done in the present case also. Para 4 of the Final Order reads as under:-

> *"4. The facts of the present case are identical to the facts involved in the above referred decision. Learned Advocate has drawn my attention to letter dated 29-3-2012 addressed by the Superintendent to the appellant giving details of interest against which the balance amount of rebate of Rs. 8,01,573/- was adjusted. The said letter also mentions that "higher officers at the relevant time were of the opinion that no show cause notice be issued for recovery of interest, hence no show cause notice was issued for the above amount. Learned Advocate has also made a statement at bar that even subsequent to the said letter, they have not been issued a show cause notice for confirmation of any demand of interest. It is well settled law that any demands from an assessee are required to follow the principle of natural justice, which includes issuance of show cause notice, affording a reasonable opportunity to the assessee to put forward its case and adjudicating the matter thereof. Such type of interest confirmation without following due principles of natural justice cannot be appreciated inasmuch as they represent only one sided view of the Revenue. As such, the adjustment of sanctioned rebate claims against the interest amount, which never stand adjudicated by the department, cannot be upheld in terms of law declared by the Hon'ble Karnataka High Court. Accordingly, all the appeals are allowed to the extent of rebate claim of Rs. 8,01,573/- with consequential relief to the appellants."*

10. By respectfully following the above decisions, I hold that the impugned order appropriating Rs.15,14,204/- against the sanctioned refund towards interest without SCN and without following principles of natural justice is not correct, legal and proper.

11. Accordingly, I have no option but to set aside the impugned order and hence, I set aside the impugned order and allow the appeal filed by the Appellant with consequential relief, if any.

१२. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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

सत्यापित,

स्मितेष रूपारेलिया
अधीक्षक (अपील्स)

(कुमार संतोष)
प्रधान आयुक्त(अपील्स)

पंजीकृत डाक द्वारा

M/s. Madhav Steels, GIDC, Phase- I, Bhavnagar- Rajkot Road, Sihor 364240	मेसर्स महादेव स्टील्स, जी आई डी सी फेज -I भावनगर -राजकोट रोड, सीहोर -३६४२४०

प्रति:

१ प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।

२ आयुक्त, केन्द्रीय वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु ।

३ सहायक आयुक्त, केन्द्रीय वस्तु एवं सेवा कर मण्डल, भावनगर-१, भावनगर को आगे आवशयक कार्यवाही हेतु।

४ गार्ड फाइल।