



::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 / 2nd Floor, GST Bhavan

रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

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रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal / File No. V2/1/EA2/BVR/2019	मूल आदेश सं / O.I.O. No. R-53/Refund/2018-19	दिनांक/ Date: 28-11-2018
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ख अपीलआदेशसंख्या(Order-In-Appeal No.):

BHV-EXCUS-000-APP-235-2019

आदेश का दिनांक/ Date of Order:	21.10.2019	जारी करने की तारीख / Date of issue:	22.10.2019
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श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Gopi Nath, 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 theAppellants&Respondent :-
M/s.Vijay Steel, 207-209, GIDC-II, Sihor, Bhavnagar-364240.

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 अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016को 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 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) 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 fees of Rs. 1000/- 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/-.



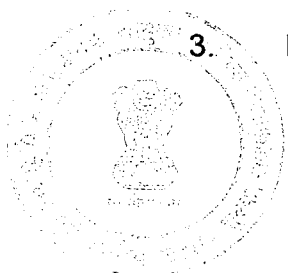
- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं इसमें साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ 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 section 86 of Finance Act 1994, shall be filed in Form S.T.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) 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 दस करोड़ रुपये 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 राशि
- बशर्ते यह कि इस धारा के प्रावधान वितीय (सं. 2) अधिनियम 2014 के आरंभ 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 पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 छूट (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) 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 (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि 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 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 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 पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को 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 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 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-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 ::

The present appeal No. V2/1/EA2/BVR/2019 has been filed by Assistant Commissioner, CGST Division, Bhavnagar-1, Bhavnagar on behalf of the Commissioner, Central GST & Central Excise, Bhavnagar (hereinafter referred to as "department") in pursuance of the direction and authorization issued under sub-Section (2) of Section 35E of the Central Excise Act, 1944 against Order-in-Original No. R-53/Refund/2018-19 dated 28.11.2018 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, CGST Division Bhavnagar – I, Bhavnagar (hereinafter referred to as 'the adjudicating authority') in the case of M/s. Vijay Steel, 207-209, GIDC-II, Sihor, Pin – 364 240 (hereinafter referred to as "the respondent").

2. Brief facts of the case are that the respondent was engaged in manufacture of Angle/Channels/Bars etc. and availing deemed modvat credit on ingots and re-rolling materials originated from breaking up of ships in terms of the Government of India's Order No. TS/36/94-TRU dated 01.03.1994 issued under erstwhile provisions of Rule 57G(2) of the erstwhile Central Excise Rules, 1944 (hereinafter referred to as 'the Rules'). Show Cause Notices were issued to the respondent proposing to disallow deemed modvat credit of Rs. 4,35,698/- and also proposed penal action. The said SCNs were adjudicated by the Deputy Commissioner of Central Excise, Bhavnagar vide OIO No. 133-160/2004 dated 28.06.2004, wherein he disallowed the deemed modvat credit wrongly taken and utilized by the appellant under Rule 57I of the Rules read with Section 11A and Section 38A of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') and imposed penalty of Rs. 43,000/- under Rule 173Q(1) of the Rules read with Section 38A of the Act. Being aggrieved, the respondent preferred appeal before the Commissioner (Appeals), Rajkot who vide OIA No. 305 to 320/2004/84 to 99(BVR)/Commr(A)/Raj dated 30.11.2004 upheld the said OIO dated 28.06.2004. The respondent vide letter dated 22.02.2005 and 30.03.2005 informed to the department that they had made payment/reversal of duty and penalty under protest. The respondent preferred Appeal No. E/610/2005 before the Hon'ble CESTAT, Ahmedabad against the said OIA dated 30.11.2004, the Hon'ble CESTAT, Ahmedabad vide Order No. A/2290 to 2321/WZB/AHD/07 dated 29.08.2007 had set-aside the OIA dated 31.11.2004 of the Commissioner (Appeals), Rajkot and allowed the appeal of the respondent with consequential relief. Accordingly, the respondent filed refund claim of Rs. 4,78,698/- (Rs. 4,35,698/- towards credit and Rs. 43,000/- towards penalty) which was sanctioned vide impugned order by the adjudicating authority.

3. Being aggrieved with the impugned order, the appellant - department

preferred present appeal, *inter alia*, on the following grounds:

(i) that the adjudicating authority has erred in sanctioning the refund of Rs. 4,78,698/-; the refund claim was governed under Section 11B of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'); that the respondent had made payment of duty and penalty only after decision in appeal filed before the Commissioner (Appeals) and not at the time of assessment, therefore, the payment, by no stretch of imagination, can be considered as 'under protest' as claimed by the respondent; that the observation of the adjudicating authority that the refund claim is not time barred in light of the proviso to Section 11B is not correct, proper and legal.

(ii) that the refund is arising out of Order dated 29.08.2007 of the Hon'ble CESTAT and therefore, the refund claim is required to be filed within one year from the date of Order of the Hon'ble CESTAT latest by 28.08.2008 i.e. "relevant date" as prescribed under Section 11B of the Act, whereas the instant refund claim was filed by the respondent on 28.08.2018 i.e. after elapsing almost eleven years from the date of decision of the Hon'ble CESTAT, which is beyond the permissible time limit as prescribed under Section 11B(ec) of the Act. Therefore, the refund claim is hit by the bar of limitation and the adjudicating authority has sanctioned the refund claim erroneously vide impugned order.

(iii) Reliance placed on following case laws:

- ITEL Industries – 2013 (296) ELT 103 (Tri. – Bang.)
- Evershine Marbles & Exporters P. Ltd. – 2009 (245) ELT 398 (Tri. – Del.)

(iv) Thus, the adjudicating authority has wrongly concluded that this is the case of refund of duty and penalty paid 'under protest', which does not attract time limit to file the refund claim. Even otherwise, it is considered that the payment was made under protest, the said protest can be said to have been vacated as soon as the order passed by the Hon'ble CESTAT. Thus, by this way also the refund is hit by bar of limitation as provided under Section 11B of the Act.

4. The respondent submitted Memorandum of Cross Objections, *inter alia*, contending as under:

(i) that the period of demand was involving from 16.03.1995 to 17.05.1995, whereas the respondent had paid the same demand under protest and informed to the department on 30.03.2005; that the question of unjust enrichment not arise.

(ii) that the grounds taken by the appellant – department cannot be said as healthy ground but made only on grounds of imagination; that the Hon'ble Tribunal held that the respondent was entitled to avail restricted Modvat credit at

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the material time; that such payment made under protest was remained into force since the decision given by the higher authority; that the appellate authority had not decided the issue on merit but simply rejected the appeal filed by the respondent and to avoid complication, the respondent had paid the confirmed duty along with interest; that the views taken by the department are not true and correct; that the Order dated 29.08.2007 of the Hon'ble Tribunal not served upon to the respondent at the material time but they received certified copy of the same order dated 29.08.2007 after request made to the Hon'ble Tribunal.

(iii) that the adjudicating authority has correctly and legally held that the refund claim was not time barred in terms of Section 11B of the Act; that the ground mentioned with regard to the time limit of filing refund claim does not arise.

(iv) that as per settled laws, the limitation period, if any, starts only from the date of receipt of such order; that the relevant date for filing such refund claim define as per Section 11B read with Explanation (B)(ec); that they received certified copy of Order dated 29.08.2007 of the Hon'ble CESTAT on 09.08.2018 on their request; that therefore, the refund claim was not time barred.

(v) that there are various case laws that whatever the payment of taxes paid during the pendency of such issue before the various appellate authority, should be considered as paid under protest.

5. Personal hearing in the matter was attended by S/Shri N. K. Maru and U. H. Qureshi, Consultants on behalf of the respondent and reiterated the submissions of cross objections already submitted and requested that the appeal filed by revenue may be rejected.

6. I have carefully gone through the facts of the case, the impugned order, grounds of appeal and Memorandum of Cross Objections submitted by the respondent. The issue to be decided in the instant appeal is whether in the facts and circumstances of the present case, the impugned order passed by the adjudicating authority sanctioning refund of Rs. 4,78,698/-, is correct or not.

7. I find that the respondent claimed refund of Rs. 4,78,698/- on 29.08.2018 by virtue of the Hon'ble CETAT, Ahmedabad Order No. A/2290 to 2321/WZB/AHD/07 dated 29.08.2007. Since, the refund is sanctioned in respect of entire amount by the adjudicating authority, I find that the decision of the Hon'ble CESTAT is followed. The dispute remains with regard to duty payment to be considered under protest and refund hit by bar.

7.1 I find that the appellant department submitted that the respondent had not paid the duty at the time of assessment but paid after OIA issued, therefore, the payment cannot be considered as under protest in term of second proviso to

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Section 11B of the Act; that the refund claim was filed by the respondent on 28.08.2018 which is beyond the permissible time limit as prescribed under Section 11B(ec) of the Act, therefore, hit by the bar of limitation and the appellant department relied on case law of the Hon'ble CESTAT, SEZ, Bangalore in case of M/s. ITEL Industries reported as 2013 (296) ELT 103 (Tri.-Bang.).

7.2 I find that the undisputed facts are that the refund claim in question was filed under Section 11B of the Act by the respondent claiming refund of duty paid under protest; that the said refund claim was filed on the basis of the Hon'ble CESTAT's Order dated 29.08.2007. For better understanding, I would like to reproduce Section 11B of the Act, which is as under:

"SECTION 11B. Claim for refund of duty and interest, if any, paid on such duty.
— (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

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

Provided further that] the limitation of one year shall not apply where any duty and interest, if any, paid on such duty has been paid under protest.

(2) If, on receipt of any such application, the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise is satisfied that the whole or any part of the duty of excise and interest, if any, paid on such duty paid by the applicant is refundable, he may make an order accordingly and the amount so determined shall be credited to the Fund :

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

- (a) rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;
- (b) unspent advance deposits lying in balance in the applicant's account current maintained with the Principal Commissioner of Central Excise or Commissioner of Central Excise;
- (c) refund of credit of duty paid on excisable goods used as inputs in accordance with the rules made, or any notification issued, under this Act;
- (d) the duty of excise and interest, if any, paid on such duty paid by the manufacturer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (e) the duty of excise and interest, if any, paid on such duty borne by the buyer, if he had not passed on the incidence of such duty and interest, if any, paid on such duty to any other person;
- (f) the duty of excise and interest, if any, paid on such duty borne by any other such class of applicants as the Central Government may, by notification in the Official Gazette, specify :

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

(3) Notwithstanding anything to the contrary contained in any judgment, decree, order or direction of the Appellate Tribunal or any Court or in any other provision of this



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Act or the rules made thereunder or any other law for the time being in force, no refund shall be made except as provided in sub-section (2).

(4) Every notification under clause (f) of the first proviso to sub-section (2) shall be laid before each House of Parliament, if it is sitting, as soon as may be after the issue of the notification, and, if it is not sitting, within seven days of its re-assembly, and the Central Government shall seek the approval of Parliament to the notification by a resolution moved within a period of fifteen days beginning with the day on which the notification is so laid before the House of the People and if Parliament makes any modification in the notification or directs that the notification should cease to have effect, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be, but without prejudice to the validity of anything previously done thereunder.

(5) For the removal of doubts, it is hereby declared that any notification issued under clause (f) of the first proviso to sub-section (2), including any such notification approved or modified under sub-section (4), may be rescinded by the Central Government at any time by notification in the Official Gazette.]

Explanation. — For the purposes of this section, -

(A) "refund" includes rebate of duty of excise on excisable goods exported out of India or on excisable materials used in the manufacture of goods which are exported out of India;

(B) "relevant date" means, -

(a) in the case of goods exported out of India where a refund of excise duty paid is available in respect of the goods themselves or, as the case may be, the excisable materials used in the manufacture of such goods, -

(i) if the goods are exported by sea or air, the date on which the ship or the aircraft in which such goods are loaded, leaves India, or

(ii) if the goods are exported by land, the date on which such goods pass the frontier, or

(iii) if the goods are exported by post, the date of despatch of goods by the Post Office concerned to a place outside India;

(b) in the case of goods returned for being remade, refined, reconditioned, or subjected to any other similar process, in any factory, the date of entry into the factory for the purposes aforesaid;

(c) in the case of goods to which banderols are required to be affixed if removed for home consumption but not so required when exported outside India, if returned to a factory after having been removed from such factory for export out of India, the date of entry into the factory;

(d) in a case where a manufacturer is required to pay a sum, for a certain period, on the basis of the rate fixed by the Central Government by notification in the Official Gazette in full discharge of his liability for the duty leviable on his production of certain goods, if after the manufacturer has made the payment on the basis of such rate for any period but before the expiry of that period such rate is reduced, the date of such reduction;

(e) in the case of a person, other than the manufacturer, the date of purchase of the goods by such person;

(ea) in the case of goods which are exempt from payment of duty by a special order issued under sub-section (2) of section 5A, the date of issue of such order;

(eb) in case where duty of excise is paid provisionally under this Act or the rules made thereunder, the date of adjustment of duty after the final assessment thereof;

(ec) in case where the duty becomes refundable as a consequence of judgment, decree, order or direction of appellate authority, Appellate Tribunal or any court, the date of such judgment, decree, order or direction;

(f) in any other case, the date of payment of duty."

7.3 In view of the above, it can be seen that the second proviso to Section 11B expressly provides that the limitation of one year shall not apply where any duty has been paid under protest. Now, where a person proposes to contest his liability by way of appeal, revision or in the higher courts, he would naturally pay the duty, whenever he does, under protest. I thus find that the duty paid under protest, period of limitation i.e. one year is not applicable in the present case. I

find that the respondent is entitled to the benefit of second proviso to Section 11B of the Act. These views are supported by the decision of the Hon'ble High Court of Punjab & Haryana in case of Ind Swift Lands Ltd. reported as 2017 (6) GSTL 21 (P & H) and decision of the Hon'ble High Court of Judicature at Allahabad in case of Kisan Cooperative Sugar Factory Ltd. reported as 2018 (8) GSTL 365 (All.). I find that the adjudicating authority has correctly held that the refund claim in question is not time barred in terms of Section 11B of the Act, after considering the submission dated 26.11.2018 of the respondent in reply to deficiency cum show cause notice dated 16.11.2018 issued for rejection of the said refund claim treating as time barred.

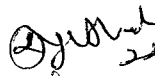
7.4 I further find that the case law of the Hon'ble CESTAT, SEZ, Bangalore in case of M/s. ITEL Industries reported as 2013 (296) ELT 103 (Tri.-Bang.) cited by the appellant department is not relevant in the present case as the same has been reversed by the Hon'ble High Court of Kerala reported as 2014 (301) ELT 288 (Ker.), wherein held as under:

"9. In the present case computation of period of one year with reference to the relevant date is not an issue for adjudication as the very case of the appellant is such period of limitation, i.e. one year, is not applicable to his case as the duty was paid under protest. Since the duty paid by the applicant was subsequent to 20-9-1991, he is entitled to the benefit of second proviso to Section 11B, therefore the Tribunal was erroneous in setting aside the order of the first appellate authority which granted the benefit to the applicant. Accordingly, the appeals deserves to be allowed and allowed sustaining the order of the first appellate authority."

8. In view of the above discussion, I do not find any infirmity in the impugned order and the appeal filed by the appellant department is rejected.


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

सत्यापित,

 22/10/19

आर. पी. शाह

अधीक्षक (अपील)

 21/10/19

(GOPI NATH)

Commissioner (Appeals)

By RPAD

To,

(i) The Commissioner, Central GST & Central Excise, Bhavnagar.	(i) आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर.
(ii) M/s. Vijay Steel, 207-209, GIDC-II, Sihor, Pin - 364 240	(ii) मे. विजय स्टील, २०७-२०९, जीआईडीसी-II, सिहोर, पिन - ३६४ २४०.

प्रति:

- (1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु।
(2) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर, मण्डल: भावनगर-I, भावनगर को आवश्यक कार्यवाही हेतु।
(3) गार्ड फ़ाइल



आह्वान (अपील) का निर्णय केन्द्रीय कर एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE.

द्वितीय मंजरी एन सी जम / 2nd Floor, Gir Sonmath,
रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tel: Fax No. 0281 - 2477952/2441142 Email: ccgapp@cis.gov.in

S. No. V2/23/BTR/2019

16.09.2019

CORRIGENDUM

Corrigendum to Order-in-Appeal No. BHV-EXCUS-000-APP-022-2019 dated 16.09.2019/ 17.09.2019 passed by the Commissioner (Appeals), Central GST, Rajkot in the case of M/s Aditya Birla Nuvo Ltd, Junagadh-Veraval Road, Veraval. In the aforesaid Order-in-Appeal, the name of the Appellant read as "M/s aditya Birla Nuvo Ltd", which has to be corrected and read as "M/s Aditya Birla Nuvo Ltd (since amalgamated with Grasim Industries Ltd)".

सत्यापित,



विपुल शाह

अधीक्षक (अपील्स)



(Goyt Sonmath)

Commissioner (Appeals),
GST & Central Excise, Rajkot.

To,

M/s Aditya Birla Nuvo Ltd

(since amalgamated with Grasim Industries Ltd)

Junagadh-Veraval Road,

Veraval,

District Gir Sonmath.

प्रति,

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र अहमदाबाद को आवश्यक कार्रवाई हेतु।

2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद, अहमदाबाद को आवश्यक कार्रवाई हेतु।

3) अन्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद को आवश्यक कार्रवाई हेतु।

गई भण्डारी

