::प्रधान आयुक्त (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 – 2477952/2441142Email: cexappealsrajkot@gmail.com

F.No. V2/94/RAJ/2020

Miscellaneous Application for Rectification of Mistake

In

Order-in-Appeal No.

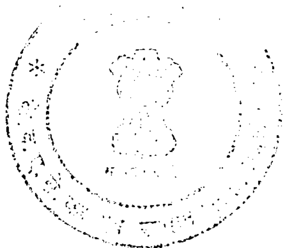
RAJ-EXCUS-000-APP-102-2020 dated 25.9.2020 / 28.9.2020

ROM Order No. 1/2020 dated 28.10.2020

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Gopi Nath**, Principal Commissioner (Appeals), Rajkot

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

M/s. Falcon Pumps Pvt. Ltd.,
Survey No. 39/4,
Vavdi Industrial Area,
Behind Hotel Krishna Park,
Gondal Road, NH27, Post Vavdi,
Rajkot - 360004



:: Order ::

M/s. Falcon Pumps Pvt. Ltd., Rajkot (hereinafter referred to as "Appellant") has filed Miscellaneous Application for rectification of mistake under Section 74 of the Finance Act, 1994 in the matter of Order-in-Appeal No. RAJ-EXCUS-000-APP-102-2020 dated 25.9.2020 passed by the Commissioner (Appeals), Rajkot.

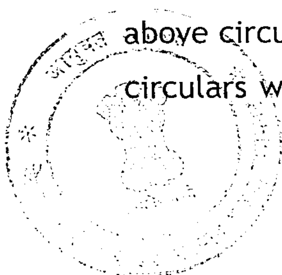
2. The brief facts of the case are that Show Cause Notice was issued to the Appellant for non payment of service tax on remuneration paid to the Director, which was adjudicated by the Additional Commissioner, CGST, Rajkot vide Order-in-Original No. 13/ADC/RKC/18-19 dated 26.12.2018 who confirmed service tax demand of Rs. 52,53,868/-. Being aggrieved, the Appellant preferred appeal before the Commissioner (Appeals), Rajkot and deposited Rs. 3,94,041/- @7.5% as pre-deposit under Section 35F of the Central Excise Act, 1944 as made applicable to the Service Tax vide Section 83 of the Finance Act,1994. The said amount was paid by way of debit from electronic credit ledger maintained under the CGST Act,2017.

2.1 The Commissioner (Appeals), Rajkot allowed their appeal vide Order-in-Appeal No. RAJ-EXCUS-000-APP-175-2019 dated 22.10.2019. Consequent upon the said OIA, the appellant vide letter dated 4.1.2020 filed refund claim of Rs. 3,94,041/- before the Dy. Commissioner, CGST Division-II, Rajkot who rejected the refund claim on the ground that the Appellant is not eligible for refund of pre-deposit made by debiting from electronic credit ledger under the provisions of CGST Act, 2017. Aggrieved, the appellant preferred appeal before the Commissioner(Appeals), Rajkot who rejected the appeal vide Order-in-Appeal No. RAJ-EXCUS-000-APP-102-2020 dated 28.9.2020.

3. Aggrieved, the Appellant has filed Miscellaneous Application for rectification of mistake under Section 74 of the Finance Act, 1994, inter alia, contending that,

(i) There is apparent mistake on record in the impugned order passed by the Commissioner (Appeals), Rajkot to the extent of rejecting their appeal.

(ii) That they had made an application for refund of pre-deposit in view of the various instructions / circulars issued vide F.No. 275/37/2K-CX dated 02.01.2002, 802/35/2004-CX dated 08.12.2004, 984/08/2014 & 1053/2/2017-CX dated 10.03.2017 and not refund of duty under Section 11B ibid. In view of the above circulars refund of pre-deposit of the amount was governed under the said circulars which clearly states refund should be paid; that the refund cannot be



construed as by way of credit but it has to be construed in cash only. The said circulars nowhere states or clarify about refund by way of credit in any account not to speak of Cenvat Credit Account.

(iii) That the provisions of Section 142(3) of the CGST Act, 2017 specifically provides that every claim of refund filed by any person before, on or after the appointment day, for refund of any amount of Cenvat Credit, duty, tax, interest or any other amount paid under the existing law, shall be disposed of in accordance with the provisions of existing law and any amount eventually, accruing to him shall be paid in cash, notwithstanding anything to the contrary contained under the provisions of existing law other than the provisions of sub-section (2) of Section 11B of the Central Excise Act, 1944. Thus, on combine regarding of Section 35F of the Central Excise Act, 1944 as made applicable to Service Tax vide Section 83 of the Finance Act, 1994 read with above referred circulars and Section 142(3) and Section 142(5) of the CGST Act, 2017, it has rightly claimed refund of pre-deposit which was required to be sanctioned and paid to it in cash only.

(iv) That it is held at last line of para 7 of the impugned order that "The Appellant is, therefore, eligible to avail credit of Rs. 3,94,041/- in their Electronic Credit Ledger" and in at para 8 "In view of above, I uphold the impugned order and reject the appeal". It may be at para 8 should have been like that " I allow the appeal by way of allowing Credit in Electronic Ledger".

(v) That at para 1 of the impugned order, "OIO No. 20/REF/2019-20" is written in place of "OIO No. 21/REF/2019-20", which is required to be rectified.

(vi) That the impugned order may be rectified and refund of pre-deposit may be sanctioned in cash only.

4. Hearing in the matter was granted to the Appellant following the principles of natural justice, which was attended by Shri P.D.Rachchh, Advocate on behalf of the Appellant who reiterated the grounds of Miscellaneous Application and requested to rectify the mistake by allowing the refund of pre-deposit in cash instead of credit in electronic credit ledger.

5. I have carefully gone through the facts of the case, the impugned order, grounds of Miscellaneous Application and oral submission. The issue to be decided in the present case is whether there is any error apparent from record in the impugned order as envisaged under Section 74 of the Finance Act, 1994 or otherwise.

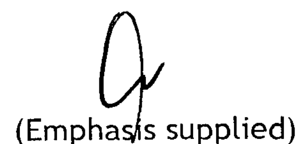
6. I find that the Appellant has filed Miscellaneous Application for rectification of mistake under Section 74 of the Finance Act, 1994 on the ground that there is apparent mistake on record in the impugned order passed by this appellate authority raising contentions as reproduced in para 3 above. Before proceeding further, it is pertinent to examine the provisions of Section 74 of the Finance Act, 1994 to decide the scope of rectification of mistake sought by the Appellant. I reproduce the provisions of Section 74 ibid as under:

> "SECTION 74. Rectification of mistake. —
>
> (1) With a view to rectifying any mistake apparent from the record, the [Central Excise Officer] who passed any order under the provisions of this Chapter may, within two years of the date on which such order was passed, amend the order.
>
> (2) Where any matter has been considered and decided in any proceeding by way of appeal or revision relating to an order referred to in sub-section (1), the [Central Excise Officer] passing such order may, notwithstanding anything contained in any law for the time being in force, amend the order under that sub-section in relation to any matter other than the matter which has been so considered and decided.
>
> ... "

(Emphasis supplied)

7. I find that Section 74 *supra* empowers the Central Excise officer to rectify any mistake apparent from records in the order passed by him. Thus, there has to be 'mistake' and such mistake has to be 'apparent from records'. I find that the Hon'ble Supreme Court has examined the scope of the phrase 'error apparent from records' in the case of Saurashtra Kutch Stock Exchange Ltd reported as 2008 (230) E.L.T. 385 (S.C.) as under:

> "37. In our judgment, therefore, a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish it, can be said to be an error apparent on the face of the record and can be corrected while exercising *certiorari* jurisdiction. An error cannot be said to be apparent on the face of the record if one has to travel beyond the record to see whether the judgment is correct or not. An error apparent on the face of the record means an error which strikes on mere looking and does not need long-drawn-out process of reasoning on points where there may conceivably be two opinions. Such error should not require any extraneous matter to show its incorrectness. To put it differently, it should be so manifest and clear that no Court would permit it to remain on record. If the view accepted by the Court in the original judgment is one of the possible views, the case cannot be said to be covered by an error apparent on the face of the record."



(Emphasis supplied)

7.1 I find that the Hon'ble Supreme Court in the case of RDC Concrete (India) Pvt. Ltd. reported as 2011 (270) E.L.T. 625 (S.C.) has held that,

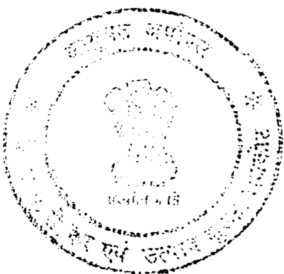
"21. This Court has decided in several cases that a mistake apparent on record must be an obvious and patent mistake and the mistake should not be such which can be established by a long drawn process of reasoning. In the case of *T.S. Balram* v. *M/s. Volkart Brothers* (supra), this Court has already decided that power to rectify a mistake should be exercised when the mistake is a patent one and should be quite obvious. As stated hereinabove, the mistake cannot be such which can be ascertained by a long drawn process of reasoning. Similarly, this Court has decided in *ITO* v. *Ashok Textiles*, 41 ITR 732 that while rectifying a mistake, an erroneous view of law or a debatable point cannot be decided. Moreover, incorrect application of law can also not be corrected."

(Emphasis supplied)

7.2 In backdrop of the above judgements, I find that the Appellant has not demonstrated any error/mistake which is apparent from records which requires rectification of the impugned order under Section 74 ibid.

8. I further find that sub-clause 2 of Section 74 *supra* provides that the Central Excise officer may amend the order in relation to any matter other than the matter which has been so considered and decided. I find that the Appellant has mainly relied upon provisions of Section 142(3) of the CGST Act, 2017 in the Miscellaneous Application in support of their contention that refund of pre-deposit should be made only in cash. I find that the impugned order has already gave categorical findings as to how the Appellant is not eligible for refund of pre-deposit in cash under Section 142(3) of the CGST, Act, 2017. Now, it is not open for this appellate authority to re-examine the issue which has already been decided in the impugned order, in view of sub-clause 2 of Section 74 *supra*. This would result in review of the impugned order passed by this appellate authority, for which this appellate authority is not competent in law. I find that the Hon'ble CESTAT, Mumbai in the case of Hindustan Petroleum Corporation Ltd reported as 2017 (52) S.T.R. 237 has observed that, *"A rectifiable mistake must be obvious and must not be such that its rectification leads to re-writing the Order on merits. Rectification should not result in review of the Order."*

8.1 I rely on the Order passed by the Hon'ble CESTAT, Ahmedabad in the case of Gujarat Security Services reported as 2008 (223) E.L.T. 209 (Tri. - Ahmd), wherein it has been held that,



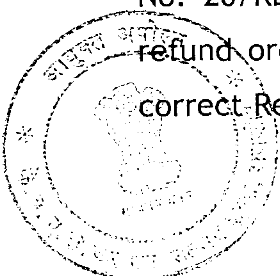
"6. ... No doubt the provisions of Section 74 gives jurisdiction to the Central Excise officer who passed any order under the provisions of this chapter, to rectify any mistake *apparent from the record*, within a period of 2 years of the date on which such order was passed. Sub-clause 2 of the said section is to the effect that any matter has been considered and decided in any proceeding by way of appeal, the Central Excise officer may amend the order in relation to any matter other than the matter which has been so considered and decided. A cumulative reading of the above two sub-rules clearly indicate that the officer who has passed the order can rectify the mistake, which is apparent from the records. As such, it can be safely concluded that the mistake which has been referred to relates to the clear mistake from records, which may be a typographical mistake or a calculative mistake or any arithmetic mistake. The same by no stretch of imagination, can be extended to an interpretation of the legal provisions of law. Inasmuch as in the present case, the mistake pointed out by the appellant was a mistake relating to the method to be adopted for the purpose of calculating the number of days delay it cannot be said that the mistake was a mistake apparent from records. The same definitely involved interpretation of the provisions of law. This becomes clear from the fact that Commissioner (Appeals) has herself also not accepted the appellant's stand and has adopted a different methodology for calculating the number of days delay. This shows that the issue is not simple issue of calculation but involves legal interpretation. As such, first of all, it cannot be said to be a mistake apparent from the records."

(Emphasis supplied)

9. In view of above discussion, I hold that there was no error apparent from records in the impugned order as envisaged under Section 74 of the Finance Act, 1994.

10. The Appellant has sought rectification in respect of sentence appearing at para 8 *"In view of above, I uphold the impugned order and reject the appeal"* to read as *"I allow the appeal by way of allowing Credit in Electronic Ledger"*. On going through the Appeal Memorandum filed in respect of appeal No. V2/33/Raj/2020, I find that the Appellant had sought refund of pre-deposit in cash, which was rejected as per the findings given in the impugned order. However, in the interest of justice, option was extended to the Appellant in the impugned order to avail credit of Rs. 3,94,041/- in their electronic credit ledger, since payment of pre-deposit from electronic credit ledger was not under dispute. However, this cannot be construed that their appeal was allowed since, the Appellant had not taken alternate plea in their Appeal Memorandum to grant them refund by way of credit in electronic credit ledger, in the event of their plea for refund in cash was not considered. I, therefore, hold that there is no rectifiable error on this count.

11. The Appellant has sought rectification in respect phrase "Refund Order No. 20/REF/2019-20" appearing at para 1 of the impugned order. I find that refund order no. is not correct and there is error apparent from record. The correct Refund Order No. is 21/REF/2019-20. The impugned order is rectified to



read as “Refund Order No. 21/REF/2019-20” in place of “Refund Order No. 20/REF/2019-20” in para 1 of the impugned order.

12. In view of above, I dismiss the Miscellaneous Application for rectification of mistake but for the amendment made in impugned order as discussed in para 11 above.

13. अपीलकर्ता द्वारा दर्ज की गई एप्लिकेशन का निपटारा उपरोक्त तरीके से किया जाता है ।

13. The Miscellaneous Application filed by the Appellant is disposed off as above.

28/12/2020

(GOPI NATH)
Principal Commissioner(Appeals)

By Regd Post AD

M/s. Falcon Pumps Pvt. Ltd., Survey No. 39/4, Vavdi Industrial Area, Behind Hotel Krishna Park, Gondal Road, NH27, Post Vavdi, Rajkot - 360004	मे. फाल्कन पम्प्स प्रा ली सर्वे नंबर 39/4, वावड़ी इंडस्ट्रियल एरिया, होटेल क्रिष्णा पार्क के पीछे, गोंडल रोड, एनएच 27, पोस्ट वावड़ी, राजकोट

<u>प्रतिलिपि :-</u>

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र,अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) उप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट-2 मण्डल, राजकोट, को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।