



::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 / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/44/GDM/2019	V.10/04/Refund- BKT/Recredit/2018-19	05.02.2019

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

KCH-EXCUS-000-APP-002-2020

आदेश का दिनांक /

Date of Order: 02.01.2020

जारी करने की तारीख /

Date of issue:

03.01.2020

श्रीगोपी 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 एवं सेवाकर, 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 Appellant & Respondent :-**

Balkrishna Industries Limited Bhuj-Bachau State Highway No. 42, Paddhar, Bhuj, Kutch

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- 380016 को की जानी चाहिए। /

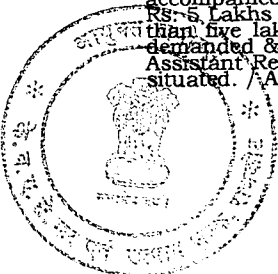
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

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

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/-, Rs.5000/-, Rs.10,000/- where amount of duty demanded/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, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994 and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs or less, Rs.5000/- 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 नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकती 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 of 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) 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 अपीलित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किया 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 अर्जों 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 Convat Credit taken;
(iii) amount payable under Rule 6 of the Convat 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 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 विभिन्न देशों में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिवेट) 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 (नं. 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.

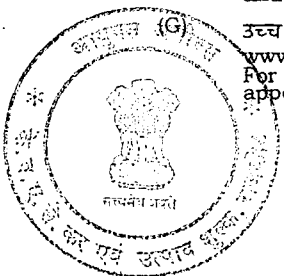
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 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 नयाधिकरण 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 टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.

- (F) सीमा शुल्क, 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.

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.

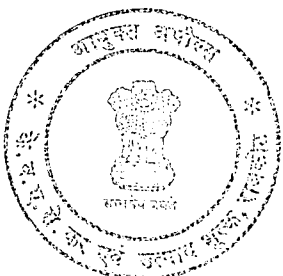


:: ORDER IN APPEAL ::

M/s. Balkrishna Industries Limited, Bhuj-Bhachau Road, State Highway No. 42, Village Paddhar, Taluka – Bhuj, Dist - Kutch(hereinafter referred to as 'Appellant') has filed the present appeal against Order-In-Original NoV.10/04/Refund-BKT/Recredit/2018-19 dated 05.02.2019 (hereinafter referred to as 'the impugned order'), passed by the Assistant Commissioner, Central Goods and Service Tax Division, Bhuj (hereinafter referred to as "the adjudicating authority").

2. The appellant engaged in manufacture and export of tyres falling under Chapter Sub-heading No.4011. Appellant had received order for export of tyres from their Indonesian buyer and as per their requirement they had prepared five advance invoices on 07.01.2017; however, due to some technical reasons, the customer cancelled the order for which appellant had prepared invoices and same was not dispatched by them for export. However, at the end of month they had debited duty from their cenvat account and filed ER-1 return under which they declared above five invoices as export under rebate claim. As the said order was cancelled by the buyer; the appellant had informed jurisdictional Range Superintendent of Central Excise vide their letter dated 10th February-2017 seeking permission to take back the credit of Rs. 11,30,900/- ; the appellant filed their TRAN-1 application to transfer the balance amount of Cenvat Credit into the electronic credit ledger under GST without taking re-credit of above five invoices.

2.1 The Appellant vide their letter dated 28.09.2018 addressed to the Assistant Commissioner, Central Excise & GST Division, Bhuj sought permission to take credit in electronic credit ledger or sanction the said excess paid duty as refund. The adjudicating authority vide order F.No. V.10/04/Refund-BKT/Re-credit/2018-19 dated 24.10.2018 informed that since the time limit of filing Tran-1 credit expired on 27.12.2017, no amount of credit could be carried forward and also informed that refund cannot be sanction as sought by the appellant as same is not falling under 'technical difficulty in availing Tran-1 credit' and due to legal binding, the refund could not be carried forward in Tran-1. The appellant made another representation vide their letter dated 26.10.2018 by stating that the case is not of any negligence on their part to transfer remaining balance credit in Cenvat Account but the same falls under refund of Central Excise duty to be sanctioned either by way of credit in electronic ledger under GST or by way of refund and same was rejected by the adjudicating authority vide letter dated



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12.11.2018; appellant further submitted required documents during the personal hearing on 07.01.2019 and again requested to refund of Central Excise duty to be sanctioned either by way of credit in electronic ledger under GST or by way of refund. The adjudicating authority rejected refund claim vide the impugned order.

3. Aggrieved, the appellant have preferred this appeal on the various grounds as under:

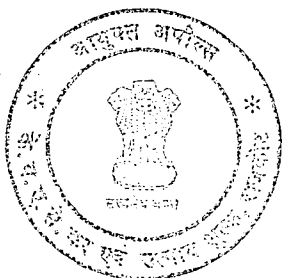
(i) The impugned order is not proper and legal as same has been passed by gross violation of provisions of the Central Excise Act, 1944 and the Rules made there under. The adjudicating authority has not considered that the case is not related to transitional credit but it is related to restoring the duty paid under the subject invoices as a re-credit due to cancellation of the export shipment. They have also not considered that goods meant for export were never cleared outside the factory as the export order were cancelled and that the invoices could not be cancelled as the duty was already paid by them and also reported in ER-1 returns.

(ii) The adjudicating authority further relied upon the provisions of CBSE's Excise Manual of Supplementary instructions issued on 17.05.2005; under which it is stated that refund is required to be filed in the prescribed proforma R-1 and that the appellant's letter dated 10.02.2017 cannot be considered as refund application as the same is not in prescribed format; that the range superintendent is not a proper officer for claiming the refund under section 11B. The adjudicating authority has not considered that Range Superintendent has not responded to their representation to restore / re-credit the Cenvat Credit.

(iii) Appellant further relied on sub-section (3) of Section 142 of CGST Act,2017.

The appellant submitted that as the due date of filing TRAN-1 form for transfer of cenvat credit to GST was over, they requested adjudicating authority to allow them cash refund on the basis of their letter dated 10.02.2017.

(iv) The adjudicating authority has never disputed about the excess payment of duty and the goods were never cleared outside the factory as the export order were cancelled. The appellant submits that the legitimate refund due to them cannot be rejected merely on the procedural infractions when fact



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of excess payment of duty has been admitted by the adjudicating authority.
Appellant relied on the following decisions:

1. Dew-Pond Engineers Pvt. Ltd. 2017-TIOL-295-CESTAT-Mum.
2. Repro India 2016-TIOL-824-CESTAT-Mum.
3. Seimens Limited 2017-TIOL-2479-CESTAT-Mum
4. BDH Industries 2008(229)ELT 364 (Tri LB) and 2008 (231) ELT 61 (Tri.Mum)

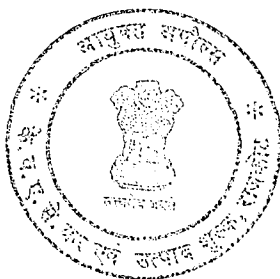
4 Personal hearing in the matter was attended by Shri Satish Talnikar, Deputy General Manager (Excise & Customs), who reiterated Grounds of Appeal memo and also submitted the additional submission for consideration.

4.1 The appellant vide letter dated 06.11.2019 has submitted further written submissions, *interalia*, as under:

(I) *Appellant initially never intended to file a refund claim under the provisions of Section 11B of Central Excise Act,1944, as their case was related to only an adjustment of an account to be made with due permission from the department. The Central Excise duty was paid by them by way of debiting their Cenvat Credit account on export invoices prepared by them in advance and they have not cleared any goods as their order was cancelled by the buyer. Further, they have submitted that they sought permission from jurisdictional range superintendent for re-credit the same but the jurisdictional range superintendent failed to take any action on their representation, therefore, the appellant failed to file proper refund application before the proper officer.*

(II) *Appellant rely on decision of Hon'ble Tribunal in the case of Security Engineering Products V/s. Commissioner of Central Excise, Chandigarh-I 2018-TIOL-1512-CESTAT-CHD [2018 (15) GSTL 77 (Tri.Chen)] wherein it has been held that the Sector officer is part and parcel of establishment of Jurisdictional Assistant Commissioner, therefore, as held in judgement that a communication submitted to any authority under establishment was to be treated as submitted to the head office.*

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5. I have carefully gone through the facts of the case, impugned order, grounds of appeal and submissions made by the appellant. The issue to be decided in the present appeal is whether the adjudicating authority has correctly rejected the refund / re-credit claim of Cenvat credit and whether the appellant's letter dated 10.02.2017 can be considered as refund application or otherwise.

6. The undisputed facts of the case are that appellant were required to prepare an invoice in advance for their export order as per their buyer's request; that at the end of month appellant had debited duty from their cenvat account and filed ER-1 return under which they declared five invoices as export under rebate claim without removal of goods from factory premises. As the said order was cancelled by the buyer; the appellant had informed jurisdictional Range Superintendent of Central Excise vide their letter dated 10th February-2017 sought permission to take back the credit of Rs. 11,30,900/-; after implementation of Goods and Service Tax the appellant filed their TRAN-1 application to transfer the balance amount of Cenvat Credit into the electronic credit ledger under GST without taking re-credit of above five invoices. The Appellant vide their letter dated 28.09.2018 sought the permission to take credit in electronic credit ledger or sanction the said excess paid duty as refund from the Adjudicating Authority and same was rejected by the adjudication authority vide impugned order.

7. I find that it is pertinent to examine whether the letter dated 10.02.2017 filed by the appellant seeking permission from the Range Superintendent to take back / restore cenvat credit can be treated as an application for refund or otherwise?

7.1 it is pertinent to examine the Section 11B of the Central Excise Act, 1944 in respect of Claim for refund of duty and interest, if any, paid on such duty, which is reproduced hereunder:

(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

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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.

7.2 Further, I would like to examine Paragraph 2 of the Chapter 9 of the CBEC Manual of the CBEC manual on the Refund, under which the manner of presentation of refund claim is prescribed; which is reproduced hereunder:

2. Presentation of refund claim

2.1 Any person, who deems himself entitled to a refund of any duties of excise or other dues, or has been informed by the department that a refund is due to him shall present a claim in proper Form, along with all the relevant documents supporting his claim and also the copies of documents/records supporting his declaration that he has not passed on the duty incidence.

2.2 The claim will be filed with the Deputy/Assistant Commissioner of Central Excise with a copy to the Range Officer.

2.3 The claim shall be presented in duplicate and shall be duly signed by the claimant or by a duly authorised person on his behalf and shall be pre-receipted (with revenue stamp on original copy, where necessary).



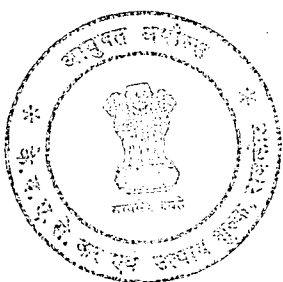
2.4 It may not be possible to scrutinise the claim without the accompanying documents and decide about its admissibility. If the claim is filed without requisite documents, it may lead to delay in sanction of the refund. Moreover, the claimant of refund is entitled for interest in case refund is not given within three months of the filing of claim. Incomplete claim will not be in the interest of the Department. Consequently, submission of refund claim without supporting documents will not be allowed. Even if post or similar mode files the same, the claim should be rejected or returned with Query Memo (depending upon the nature/importance of document not filed). The claim shall be taken as filed only when all relevant documents are available. In case of non-availability of any document due to reasons for which the Central Excise or Customs Department is solely accountable, the claim may be admitted that the claimant is not in disadvantageous position with respect to limitation period.

7.3 Further, I find that in CBEC Manual, at Annexure-67 under erstwhile Rule 173-S of Central Excise Rules, 1944, prescribes "Form R" as application for refund of excise duty.

7.4 Further, I find that in CBEC Circular No. 130/41/95-CX dated 30.05.1995 at para No. 2(a), it is clear that Refund Application must invariably be filed in the office of the Assistant Commissioner and not with the Range Superintendent.

7.5 From the above it is clear that any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application 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 i.e. Form "R". Therefore, letter dated 10.02.2017 filed by the appellant seeking permission from the Range Superintendent to take back / restore cenvat credit cannot be treated as an application for refund.

8. I find that as per Rule 11(2) of Central Excise Rules, 2002 "no excisable goods shall be removed from a factory or a warehouse except under an invoice signed by the owner of the factory or his authorized agent". Appellant have raised invoices without removal of excisable goods from their factory premises, therefore, the invoices issued to their buyer can be treated as proforma invoice /



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commercial invoice / export invoice but cannot be treated as tax invoice to be issued under Rule 11 of Central Excise Rules. However, if the duty is being paid without removal of goods from factory gate, same can be treated as excess payment and same is available for refund as per the provisions of Section 11B of the Central Excise Act, 1944.

8.1 Further, I find that in Chapter-4 of Central Excise manual, procedure of cancellation of invoices is mentioned at Para no. 11, which is reproduced herewith:

Cancellation of invoices

11.1 When an assessee is compelled to cancel invoice, the following actions should be taken: -

- i. Intimation of a cancelled invoice should be sent to the range Superintendent on the same date, whenever possible. However, in case of exceptional circumstances beyond the control of assessee should this not be possible, the intimation should be sent on the next working day;*
- ii. Along with the intimation of the cancelled invoice sent to the range Superintendent the original copy of the cancelled invoice should also be sent.*
- iii. Triplicate copy of the cancelled invoice may be retained by the assessee in the invoice book so that the same can be produced whenever required by audit parties, preventive parties and other visiting officers.*

8.2 On going through the letter dated 10.02.2017 of the appellant addressed to the Range Superintendent, it appears that the Appellant had not enclosed cancelled invoices in original and thus, the appellant had not followed the procedure of the cancellation of invoices.



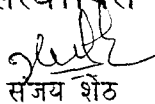
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8.3 I also find that the case laws referred by the appellant are not applicable to present case being not related to admission of present case of refund under Section 11B of the Central Excise Act, 1944.

9. In view of above, I hold that letter dated 19.02.2017 filed by the appellant sought permission from the Range Superintendent to take back / restore cenvat credit cannot be treated as an application for refund under Section 11B of the Central Excise Act, 1944, read with Circular No. 130/41/95-CX dated 30.05.1995 and the instruction contained in the CBEC manual, as the appellant have not followed rules laid down under Section 11B of the Central Excise Act, 1944 and also not followed any procedure laid down under chapter 4 of the Central Excise manual for invoice system. Therefore, considering the facts and circumstances of the case, I uphold the impugned order and reject the appeal.

10. अपीलकर्ताओ द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

10. The appeal filed by the Appellant stand disposed off in above terms.

सत्यापित

संजय शेट
अधीक्षक (अपील्स)


(Gopi Nath) 21/12/20
Commissioner (Appeals)

By Speed Post

To

M/s. Baikrishna Industries Limited,
Bhuj-Bhachau Road, State Highway No. 42,
Village Paddhar, Taluka – Bhuj, Dist - Kutch

Copy to:

- 1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for information please.
- 2) The Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham for necessary action.
- 3) The Asst. Commissioner, GST & Central Excise, Bhuj for necessary action.
- 4) Guard File.

