



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

द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan,  
रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/329/RAJ/2017	मूल आदेश सं / O.I.O. No. V44(18)/123/Refund/2016- 17/546	दिनांक / Date 31.05.2017
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ख अपील आदेश संख्या (Order-In-Appeal No.):

**RAJ-EXCUS-000-APP-031-2018-19**

आदेश का दिनांक / Date of Order:	17.04.2018	जारी करने की तारीख / Date of issue:	23.04.2018
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Passed by **Shri Chandrakant Valvi, Commissioner, Central GST & Excise, Bhavnagar**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री चन्द्रकान्त वलवी, आयुक्त, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क, भावनगर को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Chandrakant Valvi, Commissioner, Central GST & Excise, Bhavnagar has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ 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 / Service Tax, Rajkot / Jamnagar / Gandhidham :

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

**M/s. Natha Rama & Co., Arambhada Road, Contractor Area, Surajkaradi - 361 364, Dist : Dev Bhumi Dwarka**

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- ३८००१६ को की जानी चाहिए।।

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



- (iii) 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, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये 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/- रूपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

- (B) नियमवाली, 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, रूपए 5 लाख या उससे कम, 5 लाख रूपए या 50 लाख रूपए तक अथवा 50 लाख रूपए से अधिक है तो क्रमशः 1,000/- रूपये, 5,000/- रूपये अथवा 10,000/- रूपये 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/- रूपए 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 प्रतियों 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 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 रूपए 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 होगा।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**

**Revision application to Government of India:**

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक 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 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) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि 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 पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय 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, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

- (E) 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 और भी ध्यान आकर्षित किया जाता है। /  
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को देख सकते हैं। /  
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website [www.cbec.gov.in](http://www.cbec.gov.in)

**:: ORDER IN APPEAL ::**

M/s. Natha Rama & Co., Armabhada Road, Contractor Area, Surajkaradi, Distt. Jamnagar 361 345 (hereinafter referred to as "the appellant") has filed the present appeal against Order No. V.44(18)/123/Refund/2016-17/546 dated 31-05-2017 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, Central Excise & Service Tax Division, Jamnagar (hereinafter referred to as "the lower adjudicating authority").

2. Briefly stated the facts of the case are that the appellant was served SCN No. ST/AR-JMR/JC/331/2012 dated 20.12.2012 by the Department for non payment / short payment of Service Tax to the tune of Rs. 18,68,475/-, which was decided by the Department vide OIO No. 56/ADC/2013 dated 28-06-2013 / 10-07-2013, wherein the Department has confirmed the demand of Service Tax of Rs. 18,68,475/- alongwith interest and also imposed penalties under Section 77 and 78 of the Finance Act, 1994. The present appellant had filed an appeal before the Commissioner (Appeal) against the said OIO No. 56/ADC/2013 dated 28-06-2013 / 10-07-2013, which was decided vide OIA No. RJT-EXCUS-000-APP-157-14-15 dated 28-08-2014 by the Commissioner (Appeals), Central Excise & Service Tax, Rajkot wherein he upheld the OIO No. 56/ADC/2013 dated 28-06-2013 / 10-07-2013 issued by the Additional Commissioner, Central Excise and Service Tax, Rajkot. The present appellant filed an appeal before Hon'ble CESTAT, Ahmedabad against the OIA No. RJT-EXCUS-000-APP-157-14-15 dated 28-08-2014 alongwith an application for condonation of delay of 148 days. The Hon'ble CESTAT, Ahmedabad vide Order No. A/11240/2015 dated 24-08-2015 rejected the application for condonation of delay and dismissed the appeal filed by the appellant. The Appellant against the Order No. A/11240/2015 dated 24-08-2015 passed by the Tribunal, Ahmedabad filed Tax appeal No. 311 of 2016 before the Hon'ble High Court of Gujarat, Ahmedabad. The Hon'ble High Court of Gujarat, Ahmedabad vide Order dated 04-08-2016 has quashed and set aside the Tribunal's Order No. A/11240/2015 dated 24-08-2015 and condoned the delay in filing the appeal and appeal has been restored back to the CESTAT, Ahmedabad to decide it on merits. Meanwhile, during the intervening period, department persuaded the matter and an amount of Rs. 31,93,999/- vide Challan dated 27-02-2016 and Rs. 18,93,365/- vide Challan dated 03-05-2016 were deposited in the Government exchequer.

3. As such, the matter was restored at CESTAT level again to decide the



issue on its own merit, the appellant filed a refund claim of Rs.50,87,364/- before the lower adjudicating authority claiming the amount as excess pre-deposit than required in terms of provisions of Section 35F of the Central Excise Act, 1944 made applicable to service tax vide section 83 of the Finance Act, 1994, which was rejected by the lower adjudicating authority vide the impugned order.

4. Being aggrieved, appellant has preferred the present appeal and contended that lower adjudicating authority rejected their claim of Refund of Service Tax, being excess pre-deposit under section 35F of the Central Excise Act, 1944 made applicable to service tax vide section 83 of the Finance Act, 1994, of Rs. 50,87,364/- without considering the provisions of the Service Tax Law; that they refer to the provision of section 35F of the Central Excise Act, 1944; that they rely on the Board's Circular No. 984/08/2014-CK dated 16th September, 2014, wherein Board has categorically stated no recovery is to be made during the pendency of appeal; that being aggrieved by the order passed by the Commissioner (Appeals), Central Excise, Rajkot, they preferred an appeal before Hon'ble CESTAT, Ahmedabad along with a Condonation of Delay Application for condoning the delay of 148 days; that they also made pre-deposit of Rs.1,86,848/- [10% of Duty (Service Tax)] as per section 35F of the Central Excise Act, 1944 made applicable to service tax vide section 83 of the Finance Act, 1994; that Hon'ble CESTAT has dismissed their Appeal by rejecting their Application for Condonation of Delay without going into the merits of the case vide Order No. A/11240/2015 dated 24-08-2015; that against the Tribunal's Order, they preferred Tax Appeal with Hon'ble Gujarat High Court on 18-02-2016 as per provisions of section 35G of the Central Excise Act, 1944 and Hon'ble High Court of Gujarat has vide its order dated 04-08-2016 quashed and set aside Hon'ble CESTAT's order dated 24-08-2015 and delay of 148 days also condoned and Appeal was restored back to the Hon'ble CESTAT, Ahmedabad, which is pending for hearing; that meanwhile during the Recovery Proceedings, Total amount of Rs.50,87,364/- has been deposited over and above pre-deposit of Rs.1,86,848/- already made while filing the appeal with Hon'ble CESTAT, Ahmedabad; that considering the provision of section 35F of the Central Excise Act, 1944 read with Board Circular No. 984/08/2014-CK dated 16th September, 2014, no recovery/payment is required to be made, in excess of Pre-Deposit in terms of section 35F of the Central Excise Act, 1944 during pendency of appeal; that there is no doubt about the fact that their appeal is pending for hearing before Hon'ble CESTAT, Ahmedabad; that had they have filed appeal before CESTAT in time, they could not be forced to pay any amount in excess of Rs.1,86,848/-; that delay in filing of appeal has been condoned by the Hon'ble High Court, Ahmedabad and

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hence, their appeal is now pending with CESTAT, Ahmedabad pending decision on merit; that no amount can be recovered in excess of 10% pre-deposit; that Refund Claimed by them ought to have been granted but the same was not granted by the Adjudicating Authority and hence they requested to grant the same; that rejecting the claim of Refund of Service Tax, being excess of pre-deposit under section 35F of the Central Excise Act, 1944 made applicable to service tax vide section 83 of the Finance Act, 1994, of Rs. 50,87,364/- holding that the recovery was not stayed by any appropriate authority; that it is worthwhile to note that now after introduction of provisions of mandatory pre-deposit, there is no requirement to obtain stay on recovery; that when required pre-deposit has been made and appeal is pending, there is automatic stay till the disposal of appeal; that it is undisputed fact that after order of Hon'ble Gujarat High Court, their appeal has been restored back to Hon'ble CESTAT and pending of hearing; that in this situation withholding of amount in excess of mandatory pre-deposit is against the provision of law and hence the same should forthwith be refunded; that rejecting the claim of Refund of Service Tax, being excess pre-deposit under section 35F of the Central Excise Act, 1944 made applicable to service tax vide section 83 of the Finance Act, 1994, of Rs.50,87,364/- holding that amount paid during recovery proceedings cannot be regarded as pre-deposit under section 35F of the Central Excise Act, 1944; that rejecting the claim of Refund of Service Tax, being excess pre-deposit under section 35F of the Central Excise Act, 1944 made applicable to service tax vide section 83 of the Finance Act, 1994, of Rs. 50,87,364/- without giving any Show Cause Notice or Opportunity of being personally heard; that it is on record that No Show Cause Notice or Opportunity of personal hearing was given before returning the Refund Claim; that thus action of the Deputy Commissioner, Central Excise, Jamnagar seems to be against the principles of natural justice and thus, they requested to quash and set aside the decision; that rejecting the claim of Refund of Service Tax, being excess pre-deposit under section 35F of the Central Excise Act, 1944 made applicable to service tax vide section 83 of the Finance Act, 1994, of Rs.50,87,364/- though Hon'ble CESTAT has dismissed the appeal filed by them on technical ground of delay only and without going into the merits.

5. Personal hearing in the matter was held on 06-03-2018, which was attended to by Shri Keyur P. Radia, Chartered Accountant, wherein he reiterated their written submissions. He further requested that the issue not reached the finality before Hon'ble CESTAT and as such the recovery made by the Department needs to be refunded to them which is more than required pre-deposit as per the provisions of preferring an appeal in the issue.



5.1 During the course of personal hearing, the appellant submitted written submission dated 05-03-2018, wherein he stated that Hon'ble Gujarat High Court has condoned the delay of 148 days in filing the appeal before Hon'ble CESTAT and thus restored the appeal to the CESTAT, Ahmedabad, which is still pending; that Hon'ble CESTAT has not decided the appeal on merits of the case till date; that during the pendency of the appeal, they were required to make pre-deposit of Rs.1,86,848/- (i.e. 10% of duty demanded) as per the provisions of the section 35E of the Central Excise Act and no recovery can be made over and above as per Board Circular No.984/08/2014-CK dated 16-09-2014; that against this total payment of Rs. 52,74,212/- was made during the pendency of appeal as contended in their Appeal Memorandum; that thus, Rs.50,87,364/- is required to be refunded to them, since the holding of the same is without authority of law; that the learned Adjudicating Authority has denied to refund the same, and therefore they requested in this appeal to order the same; that Hon'ble CESTAT has dismissed the appeal on 1<sup>st</sup> September 2015 and recovery was initiated on 22<sup>nd</sup> February 2016; that they refer the Board's Circular No.1035/23/2016-CX dated 04-07-2016; that in the present case, the department's demand has not been confirmed by the Hon'ble CESTAT till the date and thus the above circular is not applicable and thus rejecting the refund in the guise of this circular is not legal and requested to pay the refund; that Decision/Order rejecting the refund is passed without issuing any Show Cause Notice and without providing opportunity of being heard though specifically requested, thus, order is passed in violation of Principal of Natural Justice; that it is on record that Adjudicating Authority has rejected the Refund Claim on the same date on which we have submitted reminder request; that Refund Claim is rejected with pre-determined mind only; that amount of Rs.52,74,212/- paid during the pendency of appeal comes to near about 3 times of Service Tax demand of Rs.18,68,475/-; that due to withholding such huge amount they were facing financial crunch and their Working Capital position became quite vicarious; that refund be granted to them alongwith interest; that they rely on decisions of the Hon'ble Supreme Court viz. (i) Prince Khadi Woolen Handloom Producers Co-operative Ind. Society v/s. CCE 1996 (88) E.L.T. 637 (SC) (ii) Kuil Fireworks v/s. CCE 1997 (95) E.L.T. 3 (SC) (iii) CCE, Hyderabad V. ITC Ltd. reported at 2005 (179) E.L.T. 15 (SC).

6. I have carefully gone through the facts of the case, impugned order, appeal memorandum and the submissions made by the appellant.

6.1 The limited issue to be decided in the present appeal is whether the Lower Adjudicating Authority's orders disallowing the refund filed by the appellant is correct, or otherwise in the backdrop of the circumstances as the appellant have contended that they have made excess pre-deposit made as per Section 35-F of the Central Excise Act, 1944.

7. It is noticed that initially, the Department issued SCN No. ST/AR-JMR/JC/331/2012 dated 20.12.2012, which was adjudicated by the Department vide OIO No. 56/ADC/2013 dated 28-06-2013 / 10-07-2013, wherein the Department has confirmed the demand of Service Tax of Rs. 18,68,475/- alongwith interest and also imposed penalties under Section 77 and 78 of the Finance Act, 1994. It is also noticed that against the OIO No. 56/ADC/2013 dated 28-06-2013 / 10-07-2013, the Appellant preferred an Appeal before the Commissioner (Appeal), Rajkot, who decided the issue vide OIA No. RJT-EXCUS-000-APP-157-14-15 dated 28-08-2014 wherein the OIO No. 56/ADC/2013 dated 28-06-2013 / 10-07-2013 issued by the Additional Commissioner, Central Excise and Service Tax, Rajkot was upheld. Against the said OIA No. RJT-EXCUS-000-APP-157-14-15 dated 28-08-2014, the appellant filed an appeal before Hon'ble CESTAT, Ahmedabad alongwith an application for condonation of delay of 148 days. The Hon'ble CESTAT, Ahmedabad vide Order No. A/11240/2015 dated 24-08-2015 rejected the application for condonation of delay and dismissed the appeal filed by the appellant. The Appellant against the Order No. A/11240/2015 dated 24-08-2015 passed by the Tribunal, Ahmedabad filed Tax appeal No. 311 of 2016 before the Hon'ble High Court of Gujarat, Ahmedabad. The Hon'ble High Court of Gujarat, Ahmedabad vide Order dated 04-08-2016 has quashed and set aside the Tribunal's Order No. A/11240/2015 dated 24-08-2015 and condoned the delay in filing the appeal and appeal has been restored back to the CESTAT, Ahmedabad to decide on merits.

7.1 It is also noticed that the appellant alleged that during the period from 2015-16 and 2016-17, an amount of Rs. 31,93,999/- vide Challan dated 27-02-2016 and Rs. 18,93,365/- vide Challan dated 03-05-2016 were recovered by the Department. The appellant has also produced both copies of the Challans alongwith the memorandum of appeal. The appellant filed refund claim on 20-03-2017 and requested to refund their excess pre-deposit amount of Rs. 50,87,364/- (Rs. 31,93,999/- (+) Rs. 18,93,365/-) before the lower adjudicating authority, which has been rejected vide the impugned order.



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7.2 On going through the impugned order and refund claim filed by the appellant, I find that the appellant filed refund claim amounting to Rs. 50,87,364/- (Rs. 31,93,999/- (+) Rs. 18,93,365/-). However, on going through the main appeal involve the service tax demand of Rs. 18,68,475/-, which is presently pending before the CESTAT, Ahmedabad on account of restoration by the Hon'ble High Court of Gujarat, Ahmedabad. Thus, it is clear that the issue presently pending with the Hon'ble Tribunal, Ahmedabad involve the Demand of Service Tax amounting to Rs. 18,68,475/- alongwith interest and penalties as confirmed vide OIO No. 56/ADC/2013 dated 28-06-2013 / 10-07-2013.

7.3 It is also noticed that as per Board Circular No. 984/08/2014-CK dated 16-09-2014, no amount is required to be paid in excess of mandatory pre-deposit during the pendency of appeal. It is not disputed that the amount of Rs. 50,87,364/- paid by the appellant is over and above mandatory pre-deposit, and when the Hon'ble High Court of Gujarat, Ahmedabad has condoned the delay in filing the appeal with the CESTAT, Ahmedabad and hence, restored back the appeal to the CESTAT, Ahmedabad, therefore, the appeal is undoubtedly pending with the CESTAT for decision on merit. In this circumstances, I agree with the contention of the appellant that no amount is required to be paid over and above mandatory pre-deposit of Rs.1,86,848/- and therefore, the amount of Rs. 50,87,364/- recovered by the department is in excess of pre-deposit deposited by the appellant and the same is in against the instructions contained in the Board Circular No. 984/08/2014-CK dated 16-09-2014. Further, it is evident that the appeal is pending before the CESTAT, Ahmedabad for hearing and therefore, I hold that appellant is eligible for refund of Rs. 50,87,364/- as claimed by them.

7.4 I find that the lower adjudicating authority has rejected the refund claim on the basis of CBEC Circular No. 1035/23/2016-CX dated 04-07-2016. However, on going through the said circular, it is noticed that the same is applicable in case of confirmed demand only and in the present case in hand, the demand is not confirmed by the Hon'ble CESTAT, Ahmedabad and thus the above circular can not be made applicable and as such, rejecting the refund in the guise of the above circular is not proper and according to law. Accordingly, I hold that appellant is eligible for refund of Rs. 50,87,364/- as claimed by them.

8. In view of above discussion, I set aside the impugned order passed by the lower adjudicating authority and allow the appeal filed by the appellant with consequential relief.

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

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

सत्यापित,  
रिप्लेस स्टंपरिया  
अधीक्षक (अपील्स)

(चंद्रकान्त घलवी)  
आयुक्त  
17/4/18

By Regd. Post AD

To

M/s. Natha Rama & Co., Armabhada Road, Contractor Area, Surajkaradi, Distt. Jamnagar-361 345	मेसर्स नाथा रामा एंड कंपनी, आरंभड़ा रोड, कोनट्राक्टर एरिया, सूरजकराड़ी, डिस्ट्रिक्ट - जामनगर - ३६१ ३४५.
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Copy to: -

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Additional Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot
4. The Deputy Commissioner, GST & Central Excise Division, Jamnagar
5. Guard File.