



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



सत्यमेव जयते

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142

Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/106/RAJ/2017	मूल आदेश सं / O.I.O. No. ST/43/2017-18	दिनांक / Date 06-04-2017
---	--	--	--------------------------------

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

KCH-EXCUS-000-APP-108-2018-19

आदेश का दिनांक / Date of Order:	16.08.2018	जारी करने की तारीख / Date of issue:	17.08.2018
------------------------------------	-------------------	--	-------------------

Passed by **Shri Sunil Kumar Singh, Commissioner, CGST & CX, Gandhinagar**

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 सुनील कुमार सिंह, आयुक्त, केन्द्रीय वस्तु व सेवाकर, गांधीनगर 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 Sunil Kumar Singh, Commissioner, CGST & CX, Gandhinagar 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. Adani Wilmar Ltd. Village : Dhrub,, Mundra - Kutch 370 421, -,

इस आदेश(अपील) से व्याथित 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 निम्नलिखित जगह की जा सकती है।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CI / 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 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 Blc 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 सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली ३ अहमदाबाद- ३८००१६ को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (C 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals oth 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 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) 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 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 नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी।

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the 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 रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं 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 (नं. 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, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की 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 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

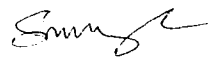
:: ORDER-IN-APPEAL ::

-Being aggrieved with the following Orders-in-Original (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Service Tax Division, Gandhidham (Kutch) (hereinafter referred to as "the Adjudicating Authority"), M/s. Adani Wilmar Limited, Vill. Dhrub, Mundra-Kutch-370421 (hereinafter referred to as "the appellant") have filed following appeal:

Appeal No	Order-in-Original		Rejected Refund of		
	Number	Dated	Swachh Bharat Cess	Krishi Kalyan Cess	Total
106/GDM/2017	ST/43/2017-18	06.04.2017	2,49,070/-	89,753/-	3,38,823/-

2. The facts of the case in brief are that the appellant had filed a refund claim on dated 19.01.2017 for amount of Rs. 26,92,603/-, as Service Tax paid on taxable service used for export of goods during the period of July-September 2016, under Notification No. 41/2012-ST dated 29-06-2012, as amended (hereinafter referred to as "the said Notification") which included claim of Rs.89,753/- for Swachh Bharat Cess and Rs.89,753/- for Krishi Kalyan Cess. The adjudicating authority vide impugned order sanctioned the refund of Rs. 23,53,780/- and rejected the refund to the extent of the amount of Rs. Rs.89,753/- for Swachh Bharat Cess and Rs.89,753/- for Krishi Kalyan Cess holding that there is no any clarification regarding refund of the same under the Notification No. 41/2012-ST. dated 29.06.2012. Further Adjudicating authority has also ordered for recovery of Swachh Bharat Cess of Rs.1,59,317/-, which was already sanctioned and disbursed vide the following OIO's to the appellant:

Sr. No.	OIO No	Date	Swachh Bharat Cess Recoverable
1	ST/145/2016-17	29.04.2016	62092
2	ST/235/2016-17	30.06.2016	45678
3	ST/360/2016-17	23.09.2016	51547
TOTAL			1,59,317/-



2.1 Accordingly, out of the total refund claim of Rs.26,92,603/, filed by the appellant under Notification No. 41/2012-ST dated 29.06.2012, the adjudicating authority has vide impugned order sanctioned the refund claim of Rs. 23,53,780/- & rejected remaining amount of Rs. 3,38,823/-.

3. Being aggrieved with the impugned order which rejecting the refund of Swachh Bharat Cess and Krishi Kalyan Cess, the appellant have filed the present appeal on the following grounds:-

3.1 The impugned order has been issued in gross violation of the principles of natural justice in as much as the adjudicating authority has rejected its refund claim without issuing any show cause notice to it asking it to explain as to why this amount should not be rejected.

3.2 The impugned order has not assigned any legal grounds for rejecting the claim and the only reason assigned in the order is that there is no clarification regarding refund of Swachh Bharat Cess & Krishi Kalyan Cess under Notification No. 41/2012-ST dated 29.06.2012. The impugned order is therefore based on the assumptions and presumptions and is therefore liable to be set aside on this ground alone.

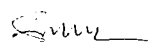
3.3 The impugned order is totally illegal and arbitrary as it seeks to recover an amount of Rs. 1,59,317/- which already had been sanctioned and disposed vide earlier OIOs dated 29.04.2016, 30.04.2016 & 29.09.2016. This amount could not have been recovered unless and until the three OIOs under which the said amount was sanctioned were reviewed and an appeal against the same was filed and decided in favour of department. In the absence of the said three orders not being reviewed and no SCN having been issued in respect of alleged erroneous refund, the recovery of rs.1,59,317/- is totally illegal, arbitrary and unsustainable and the impugned order to this effect is straightway liable to be set aside.

3.4 The Swatchh Bharat Cess has been introduced vide Section 119 of the Finance Act, 2015 and Krishi Kalyan Cess has been introduced vide Section 161 of the Finance Act, 2016. These Sections clearly state that the cess shall be levied and collected as service tax on or any of the taxable services @ 0.5% on the value of such services and that the provisions of Chapter VI of the Finance Act, 1994 and rules made thereunder including those relating to refund and exemption from tax, interest and imposition of penalty shall, as in force, may be apply to them as they apply in relation to the levy & collection of tax on such taxable services under the said chapter and the rules made thereunder. A plain reading of the provisions clearly bring out that both these Cess are to be levied and collected as service tax, and therefore, they have to be treated as service tax, and therefore, the appellant is fully eligible for exemption/rebate under the provisions of Notification No. 41/2012-ST dated 29.06.2012.

3.5 In the past, similar exemptions relating to service tax were provided by Notification No. 41/2007-ST dated 06.10.2007, 52/2011 dated 30.12.2011 in the form of rebate in respect of service tax paid on taxable services used in the export of goods. Similar dispute has at that time also arisen as to whether such refund of service tax would also include refund of Ed. Cess imposed under Finance Act, 2004 and Sec & Higher Ed. Cess imposed under Finance Act, 2007 which was also levied and collected as service tax under. This dispute was resolved by the CBEC vide Circular F. No. 354/42/2011-TRU (Circular No. 134/3/2011-ST dated 08.04.2011) clarified that exemption under Notification 41/2007 from service tax will apply to Education Cess as well.-

3.6 They rely upon following case laws wherein it has been clearly held that refund of Education Cess and Secondary & Higher Education Cess is also admissible under the provisions of Notification 41/2007-ST dated 06.10.2007:

- (i) Cavery Coffee Traders vs CCE CE 2013 (31) STR 126 (Tri-Bang.);
- (ii) CCE, Mangalore vs Kundremukh Iron Ore co Ltd-2013 (31) STR 633(Tri-Bang)
- (iii) Tumkar Minerals Pvt. Ltd. Vs. CCE 2016 (41) STR 434 (Tri-Mum)



3.7 They also rely upon the decision of Hon'ble High Court of Karnataka passed in the case of TVS Motor Co. Ltd.-2015 (323) ELT 57 (Kar) wherein the Court has held that automobile cess which is collected as excise duty under the CEA, 1944 is eligible for rebate of excise duty under the provisions of Rule 18 of CER, 2002. Similarly they rely upon the Tribunal decision in the case of India Yamaha Motors Pvt. Ltd.-2014 (302)ELT 130 (Tri-Del.) wherein refund on NCCD was allowed on similar grounds in respect of goods cleared for export. Accordingly, the appellant has stated that the refund of Swachh Bharat Cess and Krishi Kalyan Cess cannot be disallowed under the provisions of Notification No.41/2007.

4. - A personal hearing in the matter was held on 25.06.2018 which was attended by Shri S.J. Vyas, advocate of the appellant. He appeared and reiterated the Grounds of Appeal. He pleaded that impugned matter is covered under following citation:-

- (i) 2013 (31) STR 126 (Tri-Bang)
- (ii) 2016 (41) STR 434 (Tri-Mumbai)

Discussion and findings:

5. I have carefully gone through the impugned order passed by the adjudicating authority, the submission made by the appellant in the appeal memorandum as well as by the Ld. Advocate during personal hearing. Since the said appeal is against rejection of refund of Swachh Bharat Cess and Krishi Kalyan Cess, therefore there is no need for compliance to requirement of Section 35F(i) of Central Excise Act, 1944. I find that the limited issues required to be decided in this appeal is-

- (i) Whether the refund of Rs. 1,79,506/- of Swachh Bharat Cess and Krishi Kalyan Cess can be granted to the appellants under Notification No. 41/2012-ST dated 29-06-2012, as amended, in the facts and circumstances of the case, and
- (ii) Whether the refund of Swachh Bharat Cess amounting to Rs.1,59,317/-, already been sanctioned and disbursed to the

appellant vide the earlier OIO's, could be recovered from the present claim.

6. It is observed that Notification No. 41/2012-ST dated 29-06-2012, as amended, which governs the refund of Service Tax paid on services, applicable in the present case, reads as under:

"In exercise of the powers conferred by section 93A of the Finance Act, 1994 (32 of 1994) (hereinafter referred to as the said Act) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) number 52/2011-Service Tax, dated the 30th December, 2011, published in the Gazette of India, Extraordinary, Part II, Section 3, Sub-section (i) vide number G.S.R. 945(E), dated the 30th December, 2011, except as respects things done or omitted to be done before such supersession, the Central Government, on being satisfied that it is necessary in the public interest so to do, hereby grants rebate of service tax paid (hereinafter referred to as rebate) on the taxable services which are received by an exporter of goods (hereinafter referred to as the exporter) and used for export of goods, subject to the extent and manner specified herein below, namely :- "

(emphasis supplied)

Thus, I find that the said notification provides for grant of refund of Service Tax paid by the exporter on the services which were used for export.

7. It is further observed that Section 119 of the Finance Act, 2015, governing statutory provisions for Swachh Bharat Cess, reads as under:

**CHAPTER VI
SWACHH BHARAT CESS**

119. Swachh Bharat Cess. —

- (1) *This Chapter shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.*
- (2) *There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Swachh Bharat Cess, as service tax on all or any of the taxable services at the rate of two per cent. on the value of such services for the purposes of financing and promoting Swachh Bharat initiatives or for any other purpose relating thereto.*

Smu

- (3) *The Swachh Bharat Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable on such taxable services under Chapter V of the Finance Act, 1994 (32 of 1994), or under any other law for the time being in force.*
- (4) *The proceeds of the Swachh Bharat Cess.....*
- (5) *The provisions of Chapter V of the Finance Act, 1994 and the rules made thereunder, including those relating to refunds and exemptions from tax, interest and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Swachh Bharat Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994 or the rules made thereunder, as the case may be.*

8. Further, Section 161 of the Finance Act, 2016, governing statutory provisions for Krishi Kalyan Cess, reads as under:

**CHAPTER VI
KRISHI KALYAN CESS**

161. Krishi Kalyan Cess. —

- (1) *This Chapter shall come into force on the 1st day of June, 2016.*
- (2) *There shall be levied and collected in accordance with the provisions of this Chapter, a cess to be called the Krishi Kalyan Cess, as service tax on all or any of the taxable services at the rate of 0.5 per cent. on the value of such services for the purposes of financing and promoting initiatives to improve agriculture or for any other purpose relating thereto.*
- (3) *The Krishi Kalyan Cess leviable under sub-section (2) shall be in addition to any cess or service tax leviable on such taxable services under Chapter V of the Finance Act, 1994 (32 of 1944), or under any other law for the time being in force.*
- (4) *The proceeds of the Krishi Kalyan Cess levied under sub-section (2) shall first be credited to the Consolidated Fund of India and the Central Government may, after due appropriation made by Parliament by law in this behalf, utilise such sums of money of the Krishi Kalyan Cess for such purposes specified in sub-section (2), as it may consider necessary.*

- (5) *The provisions of Chapter V of the Finance Act, 1994 (32 of 1944) and the rules made thereunder, including those relating to refunds and exemptions from tax, interest and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Krishi Kalyan Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under the said Chapter or the rules made thereunder, as the case may be.*

9. On plain reading of Notification No. 41/2012-ST dated 29.06.2012, as amended, I find that it provides for grant of rebate of service tax paid on the taxable services received by the exporter and used for export of goods. Further, Section 119 (2) of Finance Act, 2015 and Section 161(2) of the Finance Act, 2016 clearly state that Swachh Bharat Cess and Krishi Kalyan Cess, respectively, are Service Tax. Further, Section 119 (5) of Finance Act, 2015 and Section 161 (5) of the Finance Act, 2016 clearly stipulate that provisions of Chapter V of the Finance Act, 1994, and the rules made thereunder, including those relating to refund, shall apply *mutatis mutandis* as they apply in relation to levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994. Accordingly, I find that the appellant is eligible for the refund of Krishi Kalyan Cess and Swachh Bharat Cess paid on the taxable services received by the exporter and subsequently used for export of goods.

10. It is observed that in the past also, vide Section 95 of the Finance Act, 2004, **Education Cess** was levied. For sake of quick reference, the said provisions read as under:

- (1) *The Education Cess levied under section 91, in the case of all services which are taxable services, shall be a tax (in this section referred to as the Education Cess on taxable services) at the rate of two per cent., calculated on the tax which is levied and collected under section 66 of the Finance Act, 1994.*
- (2) *The Education Cess on taxable services shall be in addition to the tax chargeable on such taxable services, under Chapter V of the Finance Act, 1994.*
- (3) *The provisions of Chapter V of the Finance Act, 1994 and the rules made thereunder, including those relating to*

Sumit

refunds and exemptions from tax and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Education Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994 or the rules, as the case may be.

11. Similarly, Secondary & Higher Education Cess was levied under Section 140 of the Finance Act, 2007 which reads as under:

- (1) *The Secondary and Higher Education Cess levied under section 126, in the case of all services which are taxable services, shall be a tax (in this section referred to as the Secondary and Higher Education Cess on taxable services) at the rate of one per cent., calculated on the tax which is levied and collected under section 66 of the Finance Act, 1994.*
- (2) *The Secondary and Higher Education Cess on taxable services shall be in addition to the tax chargeable on such taxable services, under Chapter V of the Finance Act, 1994 and the Education Cess chargeable under section 95 of the Finance (No. 2) Act, 2004.*
- (3) *The provisions of Chapter V of the Finance Act, 1994 and the rules made thereunder, including those relating to refunds and exemptions from tax and imposition of penalty shall, as far as may be, apply in relation to the levy and collection of the Secondary and Higher Education Cess on taxable services, as they apply in relation to the levy and collection of tax on such taxable services under Chapter V of the Finance Act, 1994 or the rules made thereunder, as the case may be.*

12. It is observed that provisions of Section 95(3) of the Finance Act, 2004, Section 140 (3) of the Finance Act, 2007, Section 119 (5) of the Finance Act, 2015 and Section 161 (5) of the Finance Act, 2016, are identically worded and they clearly stipulate that provisions of Chapter V of the Finance Act, 1994 shall apply to refund of cess. Thus, when as per provisions of the Finance Act, 1994, it has been notified that refund of service tax is admissible then Swachh Bharat Cess and Krishi Kalyan Cess, are also service tax by virtue of Section 119 (5) of the Finance Act, 2015 and Section 161 (5) of the Finance Act, 2016 respectively and therefore refund thereof is admissible as specified in terms of the said notification.

13. I find my views are well supported by Circular No. 134/3/2011-S.T. dated 08.04.2011, issued from F. No. 354/42/2011-TRU, wherein it has been clarified:

"Education Cess and Secondary and Higher Education Cess - reg

Representations have been received from the field formations, seeking clarification regarding the applicability of service tax exemption to Education Cess (refers to both Education Cess leviable under Finance (No.2) Act, 2004 and Secondary and Higher Education Cess leviable under Finance Act, 2007), under notifications where 'whole of service tax' stands exempted. Apparently the doubt arises in the context of Tribunal's Order in the matter of M/s. Balasore Alloys Ltd. Vs CCE, Customs and Service Tax, BBSR-I (2010-TIOL-1659-CESTAT-KOL).

2. *The issue has been examined. Though Tribunal's Order referred above is in favor of revenue, it is inconsistent with the policy intention of the Government to exempt education cess in addition to service tax, where 'whole of service tax' stands exempted. According to section 95(1) of Finance (No.2) Act, 2004 and section 140(1) of Finance Act, 2007, Education Cess and Secondary and Higher Education Cess are leviable and collected as service tax, and when whole of service tax is exempt, the same applies to education cess as well. Since Education Cess is levied and collected as percentage of service tax, when and wherever service tax is NIL by virtue of exemption, Education Cess would also be NIL.*

3. *This being the principle, field formations are directed not to initiate proceedings to recover the education cess, where 'whole of service tax' stands exempted under the notification. Extending the same principle, where education cess has been refunded to exporters along with service tax, by virtue of exemption notifications where 'whole of service tax' is exempt, the same need not be recovered."*

14. It is observed that while deciding the issue related to refund of Education Cess and Secondary & Higher Secondary Education Cess, similar views have been taken by Tribunal in the case of M/s Kudermukh Iron Ore Company Limited – 2013 (31) S.T.R. 633 (Tri. Bang) and M/s Tumkar Minerals Private Limited – 2016 (41) S.T.R. 434 (Tri Mumbai), hence these case laws are also applicable to the present appeal.

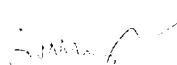
15. In view of the above discussion, I hold that the refund of Swachh Bharat Cess as well as Krishi Kalyan Cess, paid on the taxable services received by the appellant and used for export of goods, is admissible to them.

S. M.

16. From appeal memorandum, the appellant has also submitted that the impugned order has been issued in gross violation of the principles of natural justice in as much as the adjudicating authority has rejected their refund claim to the extent of Rs.3,38,823/- without issuing any show cause notice to them to explain as to why this amount should not be rejected; that they were never called upon to explain their side as to why the said amount was admissible to them. They have also submitted that out of the said refund amount of Rs.3,38,823/-, the amount of Rs.1,59,317/-, which had already been sanctioned and disposed vide earlier OIOs dated 29.4.16, 30.6.16 & 29.9.16, has been recovered vide the impugned OIO which is totally illegal and arbitrary because the same could not have been recovered unless and until the 03 OIOs under which the said amount was sanctioned were reviewed and an appeal against the same was filed and decided in favour of the department.

16.1 I have gone through the impugned OIO and I find that before rejecting the refund claim for the amount of Rs.3,38,823/- i.e. refund claimed for Swatchh Bharat Cess and Krishi Kalyan Cess, as discussed hereinabove, apparently no show cause notice was issued to the appellant by adjudicating authority asking them to show why said refund claim should not be rejected. Instead the adjudicating authority has straightway decided the refund claim through the impugned OIO. I agree to the contention of the appellant that this is a gross violation of principles of natural justice. The adjudicating authority should have given an opportunity to appellant to defend their case. I hold that the impugned OIO is totally illegal and arbitrary and hence not sustainable on this count also.

16.2 Similarly, from impugned OIO, I find that the adjudicating authority has deducted an amount of Rs.1,59,317/- from the refund claim holding that the said refund of Swatchh Bharat Cess was wrongly sanctioned and disbursed to the appellant vide earlier OIOs No.ST/145/2016-17 dated 29.04.16, ST/235/2016-17 dated 30.06.16 and ST/360/2016-17 dated 23.09.16. I find that the impugned OIO nowhere states that these OIOs were reviewed by the department and



appeals were filed against the said OIOs. Further impugned OIO also does not state whether any protective show cause notice was issued to the appellant for recovery of the said erroneous refund. Further more, the said impugned OIO does not state if appeals filed then whether said appeals had been decided in favour of the department. If no such procedures have been followed, then how an adjudicating authority can suo-moto deduct the amount of refund, already sanction through previous OIOs, from the subsequent refund claim filed by party. I find it is definitely a gross violation of principle of natural justice. The adjudicating authority has passed the impugned OIO without application of mind with illogical and arbitrary way. Hence, I hold that the impugned OIO is not sustainable on this count also.

17. In view of above discussion and findings, I allow the appeal filed by the appellant and set aside the impugned order which relates to rejection of refund of Swachh Bharat Cess and Krishi Kalyan Cess.

18. The appeal is disposed of in above terms.

सत्यापित.
16/08/2018
प्रवाण प्रोफट
अधीक्षक (अपील)

(Sunil Kumar Singh)
Commissioner (Appeals)/
Commissioner,
CGST & Central Excise,
Gandhinagar

By Regd. Post AD

F. No.: V2/106/GDM/2017

Date: 16.08.2018

To,
M/s Adani Wilmar Ltd.,
Village : Dhruh
Mundra-Kutch-370421

Copy to:

- (1) The Chief Commissioner, CGST & Central Excise, Ahmedabad.
- (2) The Commissioner (Appeals), CGST & Central Excise, Rajkot
- (3) The Commissioner, CGST & Central Excise, Kutch (Gandhidham)
- (4) The Assistant Commissioner, CGST & C. Ex., Division_____
- (5) The Assistant Commissioner (Systems), CGST, Rajkot.
- (6) The Superintendent, CGST & Central Excise AR-_____.
- (7) PA to Commissioner of CGST & Central Excise, Gandhinagar.
- (8) Guard file.

4

1

3

3