::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
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/18/GDM/2018-19	LTU/MUM/CX/DC/KKP-13/2016-17	23-12-2016

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

KCH-EXCUS-000-APP-153-2018-19

आदेश का दिनांक / Date of Order: **03.10.2018** जारी करने की तारीख / Date of issue: **04.10.2018**

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Kumar Santosh**, Commissioner (Appeals), Rajkot

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 **Appellant &** Respondent :-

M/s. Man Industries (India) Ltd.485/2, Anjar Mundra Highway,Village Khedoi, Tal: Anjar,Dist: Kutch-370110.

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 अपीलें सीमा शुल्क, केंद्रीय 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, 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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/-.

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(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 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" मे 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 होगे।/
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 मामलो 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 क्रेडीट 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 है।/
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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो 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 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 ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

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

:: ORDER IN APPEAL ::

M/s Man Industries (India) Ltd, 485/2, 503/1 &492, Anjar Mundra Highway, Village Khedoi, Anjar, District Kutch (*hereinafter referred to as* "Appellant") filed appeal No. V2/18/GDM/2018-19 against Order-in-Original No. LTU/MUM/CX/DC/ KKP-13/2016-17 dated 23.12.2016 (*hereinafter referred to as* 'impugned order') passed by the Deputy Commissioner, Central Excise & Service Tax, LTU, Mumbai (*hereinafter referred to as* 'lower adjudicating authority') :-

2. The brief facts of the case are that the Appellant having Registration No. AAACM2675GXM003 and engaged in the manufacture of pipes falling under Chapter 73 of the Central Excise Tariff Act, 1985 was availing area based exemption under Notification No. 39/2001-CE dated 31.07.2001. As per scheme of this Notification, exemption was available by way of refund of Central Excise duty paid in cash through PLA, as per rates prescribed under Notification No. 16/2008(N.T.) dated 27.03.2008. The refund was subject to condition that the manufacturer had to first utilize all Cenvat credit available to them on the last day of month under consideration for payment of duty on goods cleared during such month and pay only the balance amount in cash. The Appellant commenced commercial production on 27.03.2005 and was eligible for exemption for 5 years i.e. till 27.3.2010 in terms of Notification No. 39/2001-CE dated 31.07.2001. The Appellant was eligible for refund at the rate of 39% of gross duty paid in terms of Notification No. 16/2008(N.T.) dated 27.03.2008.

2.1. The Appellant filed rebate claims before the rebate sanctioning authority who sanctioned the rebate claims but restricted rebate payment in cash to the extent of FOB value of exports and ordered for re-credit of balance amount in Appellant's Cenvat Account during the years 2007-08 and 2008-09 as per following details:

(Amount Rs. in Lakh)

Sl. No.	Rebate Order No. & Date	Re-credit amount In Cenvat Account
1.	2219/07-08 dated 24.3.2008	39.97
2.	2165/07-08 dated 10.3.2008	0.04
3.	2166/07-08 dated 10.3.2008	0.96
4.	168/07-08 dated 4.6.2008	7.36
5.	462/07-08 dated 8.12.2008	2.55
6.	461/07-08 dated 8.12.2008	0.92
7.	460/07-08 dated 8.12.2008	5.79
8.	1974/07-08 dated 19.12.2007	18.52
	Total	76.11

2.2 The Appellant did not take re-credit in Cenvat Account but challenged the orders before the then Commissioner (Appeals), Rajkot who vide Orders-in-Appeal No. 132-134/2008/Commr(A)/Raj dated 26.5.2008 and 242-246/2008/

Commr(A)/Raj dated 29.8.2008 rejected the appeals. Being aggrieved, the Appellant filed Revision Applications before the Joint Secretary(RA), New Delhi.

2.3 On Audit scrutiny of Cenvat register for the month of March, 2010 forwarded by the Appellant along with refund claim sanctioned vide Refund Order dated 06.5.2010, it was found that the Appellant had availed Cenvat credit of Rs. 76.11 lakh on 30/31.03.2010 i.e. after their exemption period of 5 years under Notification No. 39/2001-CE dated 31.7.2001 was over, in respect of rebate sanction orders listed in Para 2.1 *supra*. It was alleged that the Appellant delayed availing of Cenvat credit in respect of said rebate orders in respective months in the year 2007-08 and 2008-09 in order to enhance duty payment through PLA which led to grant of excess refund of Rs. 29.68 lakhs (39% of Rs. 76.11 lakhs) to them.

2.4 Show Cause Notice No. LTU/Mum/CX/GLT-6/MAN/CERA/397/2011/PT-1 dated 7.10.2013 was issued to the Appellant calling them to show cause as to why erroneously refunded amount of Rs. 29,68,000/- should not be recovered from them under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as "Act") along with interest under Section 11AB *ibid* and proposing imposition of penalty under Section 11AC of the Act.

2.5 The Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order who held that non availment of re-credit amount in Cenvat Account by the Appellant during the relevant period resulted in more payment of duty through PLA which resulted in sanction of excess refund of duty of Rs. 29,68,000/- under Notification No. 39/2001-CE dated 31.07.2001, which is recoverable from them along with interest.

2.6 The lower adjudicating authority vide the impugned order confirmed demand of Rs. 29,68,000/- under Section 11A(4) of the Act and ordered for its recovery along with interest under Section 11AB upto 07.11.2011 and under Section 11AA thereafter and imposed penalty of Rs. 29,68,000/- under Section 11AC of the Act.

3. Being aggrieved with the impugned order, Appellant preferred appeal on the following grounds:-

(i) The lower adjudicating authority has wrongly confirmed the demand and imposed penalty without considering factual position and submission of the Appellant. The Appellant had challenged the order of the Commissioner (Appeals) before the Joint Secretary (RA) by filing Revision Application. Vide Order No. 1587-1589-10-CX dated 20.10.2010, the Jt. Secretary remanded the matter to the original authority with direction that if any excess duty is paid,

the same being a deposit with Government, is to be returned to the party in the manner in which it was paid. Duty was paid in cash from PLA in the rebate orders involved in the present case. Hence, amount ordered to be re-credited has to be refunded in cash. The revision order of Jt. Secretary (RA) is final and cannot be challenged by the Department as held by the Hon'ble CESTAT in the case of Ind Metal extrusions Pvt Ltd-2013(289) ELT 106.

(ii) The Appellant waited for a long period after filing Revision Application before the Jt. Secretary for favourable order. However, due to delay in deciding Revision Application involving huge amount of Rs. 76.11 lakh, their financial condition was getting affected. Hence, on the basis of Order-In-Original, they took said Cenvat credit of Rs. 76.11 on 30/31.03.2010. The said amount of Rs. 76.11 lakh was paid by the Appellant in cash towards duty on clearance of their export goods and thus no relation to Cenvat account and cannot be reckoned as credit balance as envisaged in Notification No. 39/2001-CE. When the adjudicating authority would allow rebate in cash pursuant to remand order of Jt. Secretary, the Appellant will reverse the credit so availed on 30/31.03.2010, there will neither be any issue of non taking of Cenvat credit by Appellant during relevant period as per rebate orders nor there will be issue of excess refund.

(iii) The rebate claim for the month of March,2010 was governed by Notification No. 39/2001-CE dated 31.7.2001 and was eligible for refund of 39% of the duty paid through PLA. Therefore, in 8 rebate claims, payment made in cash amounting to Rs. 76.11 lakh was directed for re-credit, the Appellant had to invest more money in their business for getting the rebate in cash during the period from the date of sanction of rebate till re-credit was taken on 30/31.03.2010. Therefore, it was the Appellant who was affected for late crediting of said amount instead of Revenue. Had the Appellant taken the said credit immediately after rebate sanctioning order, then they could have utilized the said credit for payment of duty on export goods and utilized less cash amount for payment of such duty, thereby could invest such cash differential amount to boost their business. Therefore, it is clear that the Appellant is loser for the delay in accounting for the re-credit amount.

(iv) The orders of the rebate sanctioning authority were defective as the Jt. Secretary (RA) in Order dated 20.10.2010 has held that duty paid to be rebated in the manner it was paid. Therefore, such duty ordered for re-credit having been paid in cash was available for cash rebate to the Appellant at the time of sanction of rebate claims. Hence, such defective orders cannot be used to illegally recover Rs. 29,68,000/-.

(v) The contention of the adjudicating authority that by voluntary taking re-credit by them in March, 2010 when their Revision Application was pending, the order of Revision Application becomes infructuous is baseless and without any authority. Merely taking credit by them, the issue/dispute does not get decided automatically when the appeal proceedings are pending and the Appellant is pursuing the dispute. The department is bound to follow the instructions/order passed by the Jt. Secretary (RA) and decide the issue of rebate claim afresh.

(vi) The finding of the lower adjudicating authority that the Appellant did not avail credit and paid more amount of duty by cash in order to avail more refund is baseless. They incorporated re-credit for the month of March,2010 in their monthly ER-1 return for the month of March, 2010.Hence, the fact of re-credit was in the knowledge of the Department. Therefore, extended period of limitation is not invokable in this case and no penalty can be imposed. The Appellant relied on the following case laws:-

(a) MTR Foods Ltd- 2012(282)ELT 196;
(b) Orissa Bridge & Construction Corp. Ltd-2011 (264)ELT 14;
(c) Kushal Fertilisers (P) Ltd- 2009(238) ELT 21;
(d) Rajkamal Plastics-2004(163)ELT 312;
(e) Maheshwari Mills Ltd-2004(165) ELT 246;
(f) Raja Ram Corn Products-2004(167)ELT 410;
(g) Syncom Formulation(I) Ltd- 2004 (172) ELT 77.

(vii) That penalty under Section 11AC of the Act comes into play in the matter of fraud, collusion, wilful mis-statement or suppression of facts with intent to evade payment of duty. In this case, no such ingredient is present. Everything was in the knowledge of the Department. Further, the emergence of case is due to erroneous rebate order passed by the sanctioning authority. Therefore, imposition of penalty under Section 11AC is not correct and legal.

3.1. In Personal Hearing, Shri Ankur Upadhyay, Advocate appeared on behalf of the Appellant and reiterated the grounds of appeal and submitted that the demand notice dated 9.10.2013 is time barred as it has raised their action of 2007-08 & 2008-09 i.e. beyond period of 5 years; that in view of above appeal may be allowed.

Findings:-

4. I have carefully gone through the facts of the case, the impugned order, written as well as oral submissions made by the Appellant. The issue to be decided is whether the Appellant has availed excess refund under Notification No. 39/2001-CE dated 31.07.2001 or not.

5. I find that the lower adjudicating authority has confirmed demand on the

grounds that the Appellant intentionally did not avail re-credit in their Cenvat account pursuant to rebate claims sanctioned during the years 2007-08 and 2008-09 when the Appellant was availing the benefit of exemption Notification No. 39/2001-CE dated 31.7.2001 and took Cenvat credit of Rs. 76.11 lakhs in their Cenvat account on 30/31.3.2010 after exemption period of 5 years in terms of notification *supra* was over, which resulted in excess payment of Rs. 29,68,000/- during said period. On the other hand the Appellant has argued that the refund claim for the month of March,2010 was governed by Notification No. 39/2001-CE dated 31.7.2001. The Appellant was eligible for refund of 39% of the duty paid through PLA. Therefore, in 8 rebate claims, payment made in cash amounting to Rs. 76.11 lakh was directed for re-credit, the Appellant had to invest more money in their business for getting the rebate in cash during the period from the date of sanction of rebate till re-credit was taken on 30/31.03.2010. Therefore, it was the Appellant who was affected for late crediting of said amount instead of Revenue.

5.1 On going through the records, I find that the Appellant was availing exemption under Notification No. 39/2001-CE dated 31.07.2001, as amended, during the period from 27.3.2005 to 27.3.2010. This exemption was operated by way of refund of Central Excise duty paid in cash through PLA. As per terms of the said exemption Notification, the manufacturer had to first utilize all Cenvat credit available to them on the last day of month under consideration, towards payment of duty on goods cleared during such month and thereafter pay only the balance amount in cash through PLA. The relevant provisions contained in clause 1A of Notification *supra* are reproduced as under:

> "In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be subject to the condition that the manufacturer first utilizes whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash."

5.2 After examining the provisions of Notification No. 39/2001, I find that it was obligatory on the part of the Appellant to take re-credit in their Cenvat account pursuant to rebate claims sanctioned during the years 2007-08 and 2008-09 in view of the phrase *"subject to the condition that the manufacturer first utilizes whole of the CENVAT credit* ***available to him****"* appearing in clause 1A reproduced above. By not availing re-credit in their Cenvat account during the years 2007-08 and 2008-09, they were able to pay more duty in cash from their PLA account which resulted in grant of excess refund to them, as correctly held by the lower adjudicating authority.

5.3 The Appellant has pleaded that had they taken the said credit

immediately after rebate sanctioning order, then they could have utilized the said credit for payment of duty on export goods and could have utilized less cash amount for payment of such duty, thereby could invest such cash differential amount to boost their business and hence the Appellant is loser for the delay in accounting for the re-credit amount. I find that this plea of the Appellant cannot be entertained as when statutory provisions are clear and unambiguous, there was no plausible reason for the Appellant not to follow them. I, therefore, discard this plea of the Appellant being devoid of merit.

6. The Appellant has relied upon order dated 20.10.2010 passed by the then Jt. Secretary(RA), New Delhi in their own case wherein the matter was remanded to the rebate sanctioning authority with a direction that if any excess duty is paid, the same being a deposit with Government, is to be returned to the party in the manner in which it was paid. The Appellant has contended that since duty was paid in cash from PLA in the rebate orders involved in the present case, amount ordered to be re-credited in Cenvat account should have been refunded in cash. I have gone through the said order dated 20.10.2010 passed by the Jt. Secretary (RA), New Delhi as well as rebate sanctioned orders involved in the present case. I find that claim of the Appellant that duty was paid in cash in 8 rebate claims involved in the present case is contrary to facts as evident from details of rebate claims reproduced herein under:

(Amount in Rs.)

Sl. No.	Rebate order No & Date	Total rebate claim	Duty paid from PLA	Duty paid from Cenvat
1.	2219/07-08 dated 24.3.2008	3,02,02,833	1,30,203	3,00,72,630
2.	2165/07-08 dated 10.3.2008	2,28,44,767	2,27,75,499	69,268
3.	2166/07-08 dated 10.3.2008	31,91,044	20,03,990	11,87,054
4.	168/07-08 dated 4.6.2008	1,03,66,749	47,82,761	55,83,988
5.	462/07-08 dated 8.12.2008	73,92,614	35,47,147	38,45,467
6.	461/07-08 dated 8.12.2008	3,23,35,930	3,16,37,269	6,98,661
7.	460/07-08 dated 8.12.2008	90,36,689	20,58,066	69,78,623
8.	1974/07-08 dated 19.12.2007	9,90,01,847	6,68,75,198	3,21,26,649

6.1 It is apparent from the above that the Appellant had paid duty in cash as well from Cenvat account. The rebate sanctioning authority deducted the duty paid in cash from rebate claim amount and arrived at rebate sanctionable amount due to reason that the Appellant has already availed refund of duty paid in cash from PLA in the subsequent month in terms of Notification No. 39/2001-

CE dated 31.7.2001. Thus, the rebate claim amount was entirely consisted of duty paid from Cenvat account only. The rebate sanctioning authority sanctioned the rebate claims but restricted the rebate payment in cash to the extent of FOB value of exports and ordered for re-credit of balance amount in Appellant's Cenvat Account. I find that the orders passed by the rebate sanctioning authority are in consonance with the direction of the Jt. Secretary(RA), New Delhi to the extent of returning the excess amount in the manner in which it was paid. The contention of the Appellant is, thus, contrary to the facts and I have no option but to discard the same.

7. The Appellant has contended that Show Cause Notice was issued after scrutiny of Cenvat register for the month of March, 2010 forwarded along with Refund claim; that they had incorporated details of re-credit in their ER-1 return for the month of March, 2010 and that fact of re-credit was in the knowledge of the Department and hence extended period of limitation is not invokable and no penalty can be imposed. I find that the Appellant had availed re-credit of Rs. 76.11 lakhs in their Cenvat account on 30/31.3.2010 which pertained to rebate claims sanctioned in the years 2007-08 and 2008-09. The Appellant was required to avail said re-credit at material time in 2007-08 and 2008-09. The non-availment of re-credit in Cenvat account in 2007-08 and 2008-09 by the Appellant was not voluntarily disclosed by the Appellant but it was revealed during audit scrutiny of Cenvat register for the month of March, 2010 submitted along with refund claim. Thus, the Appellant had suppressed this material fact from the Department which resulted in sanction of excess refund to the Appellant to the tune of Rs. 29.68 lakhs during the years 2007-08 and 2008-09. Thus, ingredients required for invoking extended period of limitation under Section 11A(4) of the Act existed in the present case. Hence, extended period of 5 years was rightly invoked in the Show Cause Notice for demanding erroneously sanctioned refund in terms of Section 11A of the Act. Merely because the Department had acquired knowledge of the irregularity of the Appellant, the suppression would not be obliterated. I rely on the judgement passed by the Hon'ble High Court of Gujarat in the case of **Neminath Fabrics Pvt. Ltd.** reported as 2010 (256) E.L.T. 369 (Guj.), wherein it has been held that,

> "16. The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.
>
> 17. The proviso cannot be read to mean that because there is knowledge the

suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section (1) of Section 11A, is, clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified thereunder, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom."

7.1 In view of above, I uphold confirmation of demand under Section 11A(4) of the Act. It is natural consequence that the confirmed demand is paid along with interest at applicable rate under Section 11AB/11AA of the Act. I, therefore, also uphold the order to pay interest on confirmed demand.

7.2 Regarding imposition of penalty under Section 11AC of the Act, I have already held in para *supra* that the Appellant had suppressed the material facts from the Department with intent to evade payment of duty. Hence, the Appellant was rightly held liable to penalty under Section 11AC of the Act. I therefore uphold the penalty imposed under Section 11AC of the Act.

8. In view of above, I uphold the impugned order and reject the appeal.

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

8.1 The appeal filed by the Appellant is disposed off as above.

सत्यापित,

विपुल शाह
अधीक्षक (अपील्स)

(कुमार संतोष) 31/10/2018
आयुक्त(अपील्स)

By R.P.A.D.

To,
M/s Man Industries (India) Ltd,
485/2, 503/1 &492,
Anjar Mundra Highway,
Village Khedoi, Anjar,
District Kutch.

Copy to:-

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for kind information please.
2) The Commissioner, GST & Central Excise, Gandhidham Commissionerate, Gandhidham for necessary action.
3) The Dy. Commissioner, Central Excise & Service Tax, LTU, GLT-8, 29th floor, World Trade Centre, Cuffe Parade, Mumbai.
4) Guard File.