::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर 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 – 2477952/2441142Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्डडाकए.डी.द्वारा :- **DIN-20210264SX000000C688**

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIO No.	दिनांक/ Date
	V2/461-472/RAJ/2010	**33-44/2010-11**	**13.05.2010**

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

KCH-EXCUS-000-APP-088-TO-099-2021

आदेश का दिनांक / Date of Order: **24.02.2021** जारी करने की तारीख / Date of issue: **25.02.2021**

श्री अखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,
Rajkot / Jamnagar / Gandhidham :

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

M/s. Euro Multivision Ltd, Survey No. 508-509, Bhachau-Dudhai Road, Bhachau, District Kutch

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त 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 असार्वा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 dutydemand/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,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में 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 accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied or 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 more than fifty Lakhs rupees, in the form of crossed 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 R

(i) वित अधिनियम,1994की 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 Commissionerauthorizing 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 वितीय 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) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वितीय (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 कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई,वित 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 छूट (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 outsideIndia 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 (नं. 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 variousnumbers 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 वैबसाइट 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 Euro Multivision Ltd, Bhachau, District - Kutch (hereinafter referred to as "Appellant") filed Appeal Nos. V2/461-472/RAJ/2010 against Refund Order No. 33 to 44/2010-11 dated 13.5.2010 (hereinafter referred to as "impugned order") passed by the Deputy Commissioner, erstwhile Central Excise Division, Gandhidham (hereinafter referred to as "refund sanctioning authority").

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of CD-R, DVD-R falling under Chapter sub-Heading No. 85234090 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AABCE3143NXM001. The Appellant was availing benefit of exemption under Notification No. 39/2001-CE dated 31.07.2001, as amended (hereinafter referred to as 'said notification'). As per scheme of the said Notification, exemption was granted by way of refund of Central Excise duty paid in cash through PLA as per prescribed rates and refund was subject to condition that the manufacturer has 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 said notification was amended vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008, which altered the method of calculation of refund by taking into consideration the duty payable on value addition undertaken in the manufacturing process, by fixing percentage of refund ranging from 15% to 75% depending upon the commodity.

2.1 The appellant had filed refund application for the period from April, 2009 to April, 2010 for refund of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid from PLA amounting to Rs. 1,64,01,167/- on clearance of finished goods manufactured by them.

2.2 On scrutiny of refund applications, it was observed by the refund sanctioning authority that,

(i) the Appellant had installed new plant and machinery after cut-off date i.e. after 31.12.2005, which resulted in increase in production capacity; that the Appellant is not eligible for refund of Central Excise duty paid on goods manufactured out of plant and machinery installed after cut-off date in terms of Board's letter F.No. 110/21/2006-CX-3 dated 10.7.2008.

(ii) the Appellant was eligible for exemption only at the rates prescribed vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008 and the Appellant was not entitled to re-credit full amount paid through PLA.

(iii) exemption under the said notification was available only to Central Excise Duty and the said notification did not cover Education Cess and Secondary & Higher Education Cess and hence, the appellant was not entitled for refund of Education Cess and S.H.E. Cess.

(iv) the Appellant wrongly added freight in assessable value in respect of goods sold on FOR basis in contravention of Section 4(iii) of the Act and thereby increased the value to get more refunds.

3. The refund sanctioning authority partially sanctioned refund to the tune of Rs. 55,23,755/- vide the impugned order and rejected the remaining amount.

4. Being aggrieved, the appellant has preferred the present appeals, *inter-alia,* on the grounds that,

(i) As per original scheme of the Notification No. 39/2001-CE dated 31.7.2001, the units located in Kutch were allowed refund of entire duty paid from PLA. Subsequently, the said notification was amended by notification 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008 and thereby, the benefit of the notification has been restricted by allowing refund to the extent of duty paid, on notified value addition or duty paid from PLA whichever is less; that the said amendment was challenged before the Hon'ble Gujarat High Court in the case of SAL Steel Ltd -2010 (260) E.L.T. 185 (Guj.), who held that subsequent amendment restricting benefit of area based notification is hit by promissory estoppel. Hence, the refund restricted vide the impugned order by taking prescribed rate is not legally sustainable and liable to be set aside.

(ii) The Notification No. 39/2001-CE dated 31.7.2001 puts condition of original investment in plant and machinery at the time of commencement of commercial production; that on the basis of said original investment, unit's eligibility will be decided by the empowered committee. Once, eligibility criteria are being decided by the empowered committee, all the clearances from that unit is eligible for

benefit of the said notification; that the said notification does not contain any such provision that goods manufactured out of additional plant and machinery installed after 31.12.2005 will not be eligible for benefit of the notification even though the unit has already started commercial production of their products well before 31.12.2005; that the clarification letter dated 10.07.2008 relied upon by the adjudicating authority clarifies such matter which is not stated anywhere in the notification and the same has been clarified without any support of law; that the said letter dated 10.07.2008 is not issued under Section 37B of the Central Excise Act, 1944 and hence, the same is not binding in nature. Hence, the refund rejected by the adjudicating authority on the ground of non-eligibility of refund of duty paid on goods manufactured with the aid of new plant anti machinery installed after 31.12.2005 is not legal and sustainable and hence the impugned order is not legal and sustainable to that extent.

(iii) That the refund sanctioning authority has erred in rejecting refund of Education Cess and SHE Cess; that as per Section 93(3) of the Finance Act, 2004 and Section 138 of the Finance Act, 2007, all provision of Central Excise Act, including those relating to refund, exemption will also apply to Education Cess and SHE Cess. Hence, exemption containing in Notification No. 39/2001-CE dated 31.7.2001 will also apply to Education Cess and SHE Cess also and relied upon case law of Bharat Box Factory Ltd - 2007(214) ELT 534 (Tri. Delhi).

(iv) That the refund sanctioning authority has deducted refund of Rs. 12,41,792/- from the on the ground that freight amount was included in assessable value in respect of sale on FOR basis; that the refund sanctioning authority himself had allowed refund for the past period from April, 2005 to March, 2009 where freight amount was included in the assessable value; that by deducting freight amount, the refund sanctioning authority had re-opened /reviewed his own order, which is not legally sustainable.

5. The Appeals were transferred to callbook in view of pendency of appeals filed by the Department against the orders of Hon'ble High Court of Gujarat in the case of VVF Ltd & others in similar matter before the Hon'ble Supreme Court. The said appeals were retrieved from callbook in view of the judgement dated 22.4.2020 passed by the Hon'ble Supreme

Court and have been taken up for adjudication.

5.1 Personal hearing in the matter was scheduled in virtual mode on 6.8.2020, 25.8.2020, 28.9.2020, 29/30.12.2020 and 12.1.2021 and communicated to the Appellant by Email/Speed Post. However, no consent has been received from the Appellant for appearing in virtual hearing nor any request for adjournment has been received. I, therefore, proceed to decide the appeals on the basis of available records and grounds raised in appeal memoranda.

6. I have carefully gone through the facts of the case, impugned order and submissions made by the appellant in grounds of appeals. The issues to be decided in the present appeals are whether,

(i) the Appellant is eligible for refund of Central Excise duty at full rate of duty or at the rates prescribed vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008 ?

(ii) The Appellant is eligible for refund of Education Cess and Secondary & Higher Education Cess under the provisions of the Notification No. 39/2001-CE dated 31.07.2001, as amended?

(iii) The Appellant is eligible for refund of Central Excise duty paid on goods manufactured out of plant and machinery installed after cut-off date i.e. after 31.12.2005 ?

(iv) The Appellant is eligible for refund of Central Excise duty paid on freight element which was included in the assessable value in respect of goods sold on FOR basis?

7. On perusal of the records, I find that the Appellant was availing the benefit of area based Exemption Notification No. 39/2001-CE dated 31.7.2001, as amended. As per scheme of the said Notification, exemption was granted by way of refund of Central Excise duty paid in cash through PLA as per rates prescribed vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008. I find that the appellant had filed refund applications for the period from April, 2009 to April, 2010 for refund of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid from PLA totally amounting to Rs. 1,64,01,167/- on clearance of finished goods manufactured by them. The sanctioning authority partially sanctioned refund to the tune of Rs. 55,23,755/- and rejected the balance amount vide the

impugned order.

8. The Appellant has made first contention that they were eligible for refund of Central Excise duty at full rate of duty as per Notification No. 39/2001-CE dated 31.7.2001 and that amendments made in said notification subsequently vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008 restricting the refund of duty to the extent of duty paid on notified value addition was not legally sustainable in as much as that this issue was challenged before the Hon'ble Gujarat High Court in the case of SAL Steel Ltd & others Vs. Union of India reported as 2010 (260) E.L.T. 185 (Guj.), who held that subsequent amendment restricting benefit of area based notification is hit by promissory estoppel. Hence, the refund restricted vide the impugned order by taking prescribed rate is not legally sustainable and liable to be set aside.

8.1. I find that Notification No. 39/2001-CE dated 31.7.2001 was amended vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008, which altered the method of calculation of refund by taking into consideration the duty payable on value addition undertaken in the manufacturing process, by fixing percentage of refund ranging from 15% to 75% depending upon the commodity. Thus, a manufacturer was eligible for refund of Central Excise duty only at the rates prescribed in the said notifications. I find that the Hon'ble Gujarat High Court in the case of SAL Steel Ltd & Others-2010 (260) E.L.T. 185 (Guj.), held the said amending notifications as hit by promissory estoppel. However, I find that the said decision of the Hon'ble Gujarat High Court has been reversed by the Hon'ble Supreme Court of India in the case of Union of India Vs. VVF Ltd & Others as reported in 2020 (372) E.L.T. 495 (S.C.). The Hon'ble Apex Court has held as under:

> "14.3 As observed hereinabove, the subsequent notifications/industrial policies do not take away any vested right conferred under the earlier notifications/industrial policies. Under the subsequent notifications/industrial policies, the persons who establish the new undertakings shall be continue to get the refund of the excise duty. However, it is clarified by the subsequent notifications that the refund of the excise duty shall be on the actual excise duty paid on actual value addition made by the manufacturers undertaking manufacturing activities. Therefore, it cannot be said that subsequent notifications/industrial policies are hit by the doctrine of promissory estoppel. The respective High Courts have committed grave error in holding that the subsequent notifications/industrial policies impugned before the respective High Courts were hit by the doctrine of promissory estoppel. As observed and held

hereinabove, the subsequent notifications/industrial policies which were impugned before the respective High Court can be said to be clarificatory in nature and the same have been issued in the larger public interest and in the interest of the Revenue, the same can be made applicable retrospectively, otherwise the object and purpose and the intention of the Government to provide excise duty exemption only in respect of genuine manufacturing activities carried out in the concerned areas shall be frustrated. As the subsequent notifications/industrial policies are "to explain" the earlier notifications/industrial policies, it would be without object unless construed retrospectively. The subsequent notifications impugned before the respective High Courts as such provide the manner and method of calculating the amount of refund of excise duty paid on actual manufacturing of goods. The notifications impugned before the respective High Courts can be said to be providing mode on determination of the refund of excise duty to achieve the object and purpose of providing incentive/exemption. As observed hereinabove, they do not take away any vested right conferred under the earlier notifications. The subsequent notifications therefore are clarificatory in nature, since it declares the refund of excise duty paid genuinely and paid on actual manufacturing of goods and not on the duty paid on the goods manufactured only on paper and without undertaking any manufacturing activities of such goods.

15. In view of the above and for the reasons stated above and once it is held that the subsequent notifications/industrial policies which were impugned before the respective High Courts are clarificatory in nature and are issued in public interest and in the interest of the Revenue and they seek to achieve the original object and purpose of giving incentive/exemption while inviting the persons to make investment on establishing the new undertakings and they do not take away any vested rights conferred under the earlier notifications/industrial policies and therefore cannot be said to be hit by the doctrine of promissory estoppel, the same is to be applied retrospectively and they cannot be said to be irrational and/or arbitrary.

16. Under the circumstances, the respective High Courts have committed a grave error in quashing and setting aside the subsequent notifications/industrial policies impugned before the respective High Courts on the ground that they are hit by the doctrine of promissory estoppel and that they are retrospective and not retroactive. Consequently, all these appeals are *ALLOWED.* The impugned Judgments and Orders passed by the respective High Courts, which are impugned in the present appeals, quashing and setting aside the subsequent notifications/industrial policies impugned in the respective writ petitions before the respective High Courts, are hereby quashed and set aside."

8.2 By respectfully following the above judgement passed by the Hon'ble Supreme Court in the case of Union of India Vs. VVF Ltd & others, I hold that

the Appellant is eligible for refund of duty only at the rates prescribed under Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008 and following the terms prescribed therein. I, therefore, uphold the impugned order to that extent.

9. As regards the second issue, I find that the refund sanctioning authority had sanctioned refund of Central Excise duty under Notification No. 39/2001-CE dated 31.7.2001, as amended, but had not sanctioned refund of Education Cess and Secondary & Higher Education Cess on the ground that exemption under the said notification was available only to Central Excise Duty and the said notification did not cover Education Cess and Secondary & Higher Education Cess and hence, the appellant was not entitled for refund of Education Cess and S.H.E. Cess. On the other hand, the Appellant has pleaded that as per Section 93(3) of the Finance Act, 2004 and Section 138 of the Finance Act, 2007, all provisions of Central Excise Act, 1944, including those relating to refund, will also apply to Education Cess and S.H.E. Cess and that exemption relating to Central Excise duty will automatically apply to Education Cess and S.H.E. Cess also.

9.1 I find that issue regarding refund of Education Cess and Secondary and Higher Education Cess is no longer *res integra* and stand decided by the Hon'ble Supreme Court in the case of Unicorn Industries reported at 2019 (370) ELT 3 (SC), wherein it has been held that,

> "40. Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9-9-2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A

notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in Modi Rubber Limited (supra), which has been followed by another three-Judge Bench of this Court in Rita Textiles Private Limited (supra). "

9.2 In view of the above, I hold that the appellant is not eligible for refund of Education Cess and Secondary & Higher Education Cess. Accordingly, I uphold the impugned order to that extent.

10. As regards the third issue, I find that the Appellant had installed new plant and machinery after cut-off date i.e. after 31.12.2005 stipulated in the said notification. The refund sanctioning authority denied refund of Central Excise duty paid on goods manufactured out of plant and machinery installed after cut-off date on the ground that installation of new plant and machinery resulted in increase in production capacity. On the other hand, the Appellant has contended that the notification No. 39/2001-CE dated 31.7.2001 puts condition of original investment in plant and machinery at the time of commencement of commercial production and that on the basis of said original investment, unit's eligibility will be decided by the empowered committee. Once, eligibility criteria are being decided by the empowered committee, all the clearances from that unit is eligible for benefit of the said notification. It has also been argued that the said notification does not contain any such provision that goods manufactured out of additional plant and machinery installed after 31.12.2005 will not be eligible for benefit of the notification even though the unit has already started commercial production of their products well before 31.12.2005. It was also contended that the clarification letter dated 10.07.2008 relied upon by the adjudicating authority clarifies such matter which is not stated anywhere in the notification and the same has been clarified without any support of law.

10.1 I have gone through the provisions of Notification No. 39/2001-CE dated 31.7.2001 relevant to the present case. I find that the Notification granted exemption by way of refund of Central Excise duty paid in cash through PLA. The said notification prescribed cut-off date of 31.12.2005 for installation of plant and machinery and for commencement of commercial production in order to be eligible for exemption under said notification. The relevant portion of the said notification is reproduced as under:

"3. The exemption contained in this notification shall be subject to the following conditions, namely :-

(i) It shall apply only to new industrial units, that is to say, units which are set up on or after the date of publication of this notification in the Official Gazette but not later than the 31st day of December, 2005;

...

...

Explanation 1: For the purpose of this notification, -

(i) ...

(ii) the expression "set up on or after the date of publication of this notification in the Official Gazette but not later than the 31st day of December,2005 shall mean that,

(a) any civil construction work on its factory premises and any installation of plant and machinery therein commences only on or after the date of publication of this notification in the Official Gazette.

(b) the said civil construction work on its factory premises and installation of plant and machinery therein is completed, and the unit starts commercial production, not later than the 31st day of December, 2005."

10.2 It is observed from the legal provisions discussed above that they prescribe in unambiguous terms that installation of plant and machinery is completed and the unit starts commercial production by 31.12.2005, in order to become eligible for exemption under said notification. I find that the Appellant had installed new plant and machinery after cut-off date of 31.12.2005, which resulted in increase in their production capacity, as per the findings recorded by the refund sanctioning authority in the impugned order. These facts have not been disputed by the Appellant. If that be the case, allowing exemption in respect of goods manufactured by using plant and machinery installed after the cut-off date of 31.12.2005 would amount to expanding the scope of the notification, which is not permissible.

10.3 I rely on the Order passed by the Hon'ble CESTAT, Ahmedabad in the case of Ratnmani Metals And Tubes Ltd. Vs. Commissioner of C. EX., Rajkot reported as 2012 (276) E.L.T. 230 (Tri. - Ahmd), wherein it has been held that,

"6. After carefully considering submissions made by both the sides, we find that there is no dispute about the fact that the goods, in respect of which refund stands denied by lower authorities, were manufactured with the machinery installed after 31-12-05. The notification, in question, is available in respect of manufacturing units, which has made the investments and started their production before 31-12-05. As such, it can be reasonably concluded that the legislature intended to cover only those units in the Kutch area, wherein the investment was complete by 31-12-05. The benefit of the said notification is being extended to the appellant in respect of the

goods manufactured with the plant and machinery installed prior to the said date.

7. The question which arises is as to whether subsequent expansion of the unit by installing new machines after 31-12-05 would get covered by the said notification or not. Admittedly the second tube mill was installed after 31-12-05. If viewed from another angle, it can be reasonably observed as if the appellant have installed a second factory in the said area for manufacture of the goods. If the machines, instead of being installed in the same factory, would have been installed in a separate factory, the benefit of the notification was admittedly not available to the appellant. As such, merely because the second tube mill stand installed in the same factory, which was earlier enjoying the exemption, would not result in grant of exemption to the second tube mill.

8. Even if viewed from the conditions of the notifications, it is clearly mentioned that the benefit of notification would be available in respect of those units which have been fully complete prior to 31-12-05 and has started their production prior to the said date. There is nothing in the said notification as regards extension of the said date of 31-12-05 in respect of the subsequent instalment of plant and machinery. As rightly contended by learned SDR, when the notifications are unambiguous and clearly lay down the conditions, the scope of the same cannot be extended by referring to the legislative intent. Such notifications are required to be interpreted in accordance with the words of the notification.

9. Even if we go by the legislative intent, the same becomes clear from the various circulars and clarifications issued by the Government. The TRU letter F. No. 356/02/01-TRU, dated 17-10-01 addressed to the Chief Commissioner of Customs, Vadodara seeking clarifications raised by the Chief Commissioner supports the Revenue's case. For better, appreciation, we reproduce the clarification on issue No. '4' :-

Issue in brief	View of Chief Commissioner, Customs & C. Ex., Vadodara	Board's decision
4. Whether any extra benefit of exemption in terms of the proviso to the first para is to be given for the value of any subsequent investment increasing the capacity of the unit.	The reference in the Notification being only to the original value of investment in plant and machinery on the date of commencement of commercial production, subsequent investment should be ignored.	"We agree. The intention was to keep the operation of the scheme simple. Giving benefit of subsequent investments would not only complicate the scheme, the quantum of benefit available to a unit would also keep changing."

10. Reference may be made to Circular No. 110/11/2006/CX.3, dated 10-7-08. The relevant part of said circular clarifying the issue is as under:-

> *"Point No. 1 :* Whether the benefit of exemption would be available to goods/products that the units starts manufacturing after the cut off date for the commencement of commercial production i.e. 31-12-2005.
>
> *Comments :* There would be two situations. First is that where a unit introduces a new product by installing fresh plant, machinery or capital goods after the cut off date in such a situation, exemption would not be available to this new product. The said new product would be cleared on payment of duty, as applicable, and separate records would be required to be maintained to distinguish production of these products from the products which are eligible for exemption.
>
> The other situation is the one where a unit starts producing some products (after the cut off date) using the plant and machinery installed upto

the cut off date and without any addition to the plant and machinery. For example, in case of plastic moulded products a unit may commence the production of different products simply by changing the moulds and dies. In that case, the unit would be eligible for the benefit of Notification because the plant and machinery used for manufacture has remained the same. In this connection, it is further clarified that for the purpose of computing the original value of plant and machinery, the value of plant and machinery installed on the date of commencement of commercial production only shall be considered."

11. Admittedly the clarification issued by the said letter reflects upon the legislative intent that the benefit under the said notification is intended to be restricted only to those units, which have started commercial production or before 31-12-05 and the benefit cannot be extended to the products manufactured by installing fresh plant and machinery. To the similar effect is another letter written by TRU on 25th April 2000 addressed to the Secretary General, Federation of Industries of India, indicating that the benefit of the notification would not be available to those new industrial units, which commences commercial production after 31-12-05.

In as much as the appellant had admittedly installed a new second tube mill after 31-12-05, though in the same factory, which was earlier enjoying the exemption, we are of view that the benefit of the notification would not be available to the appellant in as much as the object of the notification was to invite investors for promotion of the Kutch area and to complete such investments before 31-12-05. Allowing of exemption in respect of subsequent instalments of plant and machinery would defeat the very purpose of issuance of the notification and the legislative intent.

12. In view of the above, the appeals are rejected."

(Emphasis supplied)

10.4 I also rely on the decision rendered by the Hon'ble Gujarat High Court in the case of Saurashtra Ferrous Pvt. Ltd reported as 2014 (309) E.L.T. 49 (Guj.), wherein it has been held that,

"8. Heard learned Advocates for the respective parties, at length. At the outset, it is required to be noted that the petitioners are denied the benefits contained in the Notification No. 39/2001, dated 31-7-2001, on the manufacture of cast iron articles and Pig Iron. It is an admitted position, so far as the unit/plant and machineries for manufacture of cast iron articles, with an investment of Rs. 92 lacs, was made prior to 31-12-2005. It also appears that even the commencement of commercial production in that Unit for manufacture of cast iron articles was also done prior to 31-12-2005. It is also an admitted position and or not disputed by the learned Advocate for the petitioner that the unit/plant and machineries were not commissioned and or set-up for manufacture of Pig Iron prior to 31-12-2005, and therefore, as such, no commercial production of Pig Iron could have been done prior to 31-12-2005. It also emerges that the entire unit/plant and machineries were fully commissioned and set-up for manufacture of Pig Iron after 31-12-2005, and therefore, even the commencement of commercial production of such Unit of Pig Iron was after 31-12-2005. In the above back-drop, the question which is posed for the consideration of this Court is, as to whether the petitioner shall be entitled to the exemption/benefits under the Notification No. 39/2001 on manufacture/production of cast iron articles and Pig Iron or not?

9. As such, the identical question came to be considered by the Division Bench of this Court in the case of "M/s. Plastene India Ltd." (supra) and considering the very Scheme and the Notification No. 39/2001, this Court has held and observed as under;

"(5.2) Now, so far as the reliance placed upon the Circular No. 110/21/2006-CX.3, dated 10-7-2008 by the petitioners is concerned, it is absolutely misplaced. Under the aforesaid clarificatory circular, it is mentioned that in case a unit introduces the new product manufactured from raw material by installing fresh plant and machinery after the cut-off

> date i.e. 31-12-2005, in such a situation, exemption would not be available to the said new product and the said new product would be cleared on payment of duty as applicable and separate records will be required to be maintained to distinguish production of these products from the products which are eligible for exemption. It also further clarifies that where a unit starts producing some products (after the cut-off date) using the plant and machinery installed up to cut-off date and without any addition to the plant and machinery, in that case, the unit would be eligible for the benefit of exemption notification because the plant and machinery used for manufacturing has remained the same. In the present case, admittedly, there is no new product by installing fresh plant, machinery or capital goods after the cut-off date i.e. 31-12-2005. The same product is manufactured/continued to be manufactured however, some additional machineries have been installed. ..."
>
> 10. Considering the aforesaid decision and even the original Scheme contained in Notification No. 39/2001, dated 31-7-2001, and the purpose and object of granting the benefit to the industries to be established in the Kutchh District, at the relevant point of time, it can safely be concluded that so far as the exemption/benefits contained in the Notification No. 39/2001 are concerned, same shall not be available to the petitioner with respect to the production of Pig Iron, as admittedly, the plant/unit and machinery for production of Pig Iron were not commissioned/installed (Fully) prior to 31-12-2005. Under the circumstances, no error or illegality has been committed by the concerned respondents in denying the exemption/benefit of Scheme contained in the Notification No. 39/2001, with respect to the production of Pig Iron."

10.5 By respectfully following the decisions of the Hon'ble Tribunal as well as of the Hon'ble High Court mentioned above, I hold that the Appellant is not eligible for refund of Central Excise duty paid on goods manufactured out of new plant and machinery installed after cut-off date of 31.12.2005. Accordingly, I uphold the impugned order to that extent.

11. As regards the fourth issue, I find that the refund sanctioning authority rejected refund to the tune of Rs. 12,41,792/- on the ground that the Appellant had wrongly increased the value of goods sold on FOR basis by adding freight in assessable value, in contravention of Section 4(iii) of the Act in order to get more refund. I find that the issue regarding inclusion of freight in assessable value for the purpose of charging Central Excise duty in respect of FOR sale has been decided by the Hon'ble Supreme Court in the case of Ispat Industries Ltd - 2015 (324) E.L.T. 670 (S.C.), wherein it has been held that 'place of removal' defined under Section 4(3)(c) of the Act is always with reference to manufacturer's premises and it can never be buyer's premises. The Apex Court held that freight is not includible in assessable value even in cases when goods are sold at buyer's premises. By following the Apex Court's judgement passed in the case of Ispat Industries Ltd *supra*, I, hold that freight was not includible in assessable value in respect of goods cleared by the Appellant on FOR basis. The Appellant would have received more refund by paying Central Excise duty on freight element, which is not admissible to them, as rightly held by the refund sanctioning authority. I, therefore, uphold the

impugned order to that extent.

11. In view of above discussion and findings, I hold that,

(i) the Appellant is eligible for refund of Central Excise duty not at full rate, but at rates prescribed under Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008, wherever applicable.

(ii) The Appellant is not eligible for refund of Education Cess and Secondary and Higher Education Cess.

(iii) The Appellant is not eligible for refund of Central Excise duty paid on the goods manufactured out of plant and machinery installed after cut-off date i.e. 31.12.2005.

(iv) The Appellant is not eligible for refund of Central Excise duty paid on freight element, which was included in the assessable value in respect of goods sold on FOR basis.

12. In view of above, I uphold the impugned order and reject the appeals.

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

13. The appeals filed by the Appellant are disposed off as above.

24th February, 2021

(Akhilesh Kumar)
Commissioner(Appeals)

Attested

(V.T.SHAH)
Superintendent(Appeals)

By R.P.A.D.

To,
M/s Euro Multivision Ltd
Survey No. 508-509,
Bhachau-Dudhai Road,
Bhachau, District Kutch.

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।

2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।

3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अंजार- भचाउ मण्डल, गांधीधाम को आवश्यक कार्यवाही हेतु।

गार्ड फाइल।