



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



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

रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

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रजिस्टर्ड डाक ए.डी.द्वारा :-

DIN- 20210664SX000032323C

क	अपील / फाइल नं./ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/319/RAJ/2010 & V2/107/RAJ/2011	535 to 541/2009-10	23.03.2010
	अपील आदेश संख्या (Order-In-Appeal No.):		

KCH-EXCUS-000-APP-170-TO-171-2021

आदेश का दिनांक / Date of Order:	31.05.2021	जारी करने की तारीख / Date of issue:	09.06.2021
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श्री अखिलेश कुमार, आयुक्त (अपील), राजकोट द्वारा पारित /
Passed by Shri Akhilesh Kumar, Commissioner (Appeals), Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर, राजकोट / जामनगर / गांधीधामा द्वारा
उपरलिखित जारी मूल आदेश से मूजित: /
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. Aroma Hightech Ltd., Survey No. 578/2,580, N. H. 15, Village: Lakadia, Taluka: Bhachau, Dist. Kutch.,

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

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) बर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर.के. पुरम, नई दिल्ली, को की जानी चाहिए।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (मिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग, व्याज 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 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 रजिस्ट्रार 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 नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है 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, व्याज 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 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 रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is upto 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/-.

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is upto 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 महायुक्त 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 Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एक 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 रुपये 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) सेनबेट जमा की ली गई गलत राशि
 (iii) सेनबेट 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 अर्जी 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 पुनरीक्षणवाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने में 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 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 संग्रहण 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 साथ के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। / The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ङं से किया जाना चाहिये। इस तथ्य के होते हुए भी की निष्ठा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various umbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.

- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की 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 में 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 Aroma High-Tech Ltd, Kutch (hereinafter referred to as "Appellant") has filed present appeals against Re-credit Orders mentioned below (hereinafter referred to as "impugned orders") passed by the Deputy Commissioner, erstwhile Central Excise Division, Gandhidham (hereinafter referred to as "sanctioning authority") :

Sl. No.	Appeal No.	Refund Order No. & Date	Period	Re-credit Application amount (in Rs.)	Re-credit amount sanctioned (in Rs.)	Re-Credit amount rejected (in Rs.)
1	2.	3.	4.	5.	6.	7.
1.	319/2010	535-541/2009-10 dated 23.3.2010	July, 2009 to January, 2010	55,14,705/-	42,80,434/-	12,34,271/-
2.	107/2010	253-258/2010-11 dated 20.1.2011	April, 2010 to Oct, 2010 (except August, 2010)	23,38,174/-	14,92,208/-	7,82,878/-

1.1 Since issue involved in above mentioned appeals is common, I take up both appeals together for decision vide this common order.

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of excisable goods falling under Chapter Nos. 84, 74, 39 and 85 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AABCA2943GXM001. 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 subsequently 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. The Appellant had opted for availing the facility of re-credit, in terms of para 2C(a) of the said notification.

2.1 The appellant had filed Re-credit applications for the period as



mentioned in column No. 4 of Table above for re-credit of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid from PLA as detailed in column No. 5 of Table above in terms of notification *supra* on clearance of finished goods manufactured by them.

2.2 On scrutiny of re-credit applications, it was observed by the sanctioning authority that,

(i) 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 refund of full amount paid through PLA.

(ii) 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.

3. The sanctioning authority vide the impugned order determined correct eligible re-credit amount as mentioned in column No. 6 of Table above and rejected excess claimed amount as mentioned in column No. 7 of Table above.

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

(i) They had made investment on the basis of Notification No. 39/2001-CE dated 31.07.2001; that they are aggrieved by the amendment made vide Notification No. 16/2008-CE dated 27.3.2008. The Central Government had promised by way of notification for full exemption from payment of duty from PLA and cannot reduce / restrict refund on the basis of value addition. Any amendment in Notification No. 39/2001-CE dated 31.07.2001 is against the spirit of the original notification and violation of principles of promissory estoppels; that the Hon'ble Gujarat High Court vide Order dated 18.3.2010 in SCA No. 6299/2008 filed by M/s SAL Steel Ltd has quashed the Notification No. 16/2008-CE dated 27.3.2008. However, the adjudicating authority has not followed the said decision and hence, the impugned order is bad in law.

(ii) the sanctioning authority has erred in calculating re-credit amount by taking into consideration only Basic Excise Duty and ignored 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; that this declaration in the section leaves no room for doubt that Education Cess is a duty of excise for the purpose of exemption notification. Thus, contention of the adjudicating authority that Education Cess is outside the purview of exemption notification No. 39/2001-CE dated 31.7.2001 is clearly illegal and impugned order is liable to be quashed and set aside and relied upon case laws of Bharat Box Factory Ltd - 2007(214) ELT 534 (Tri. Delhi) and Sun Pharmaceuticals Ltd - 2007 (207) ELT 673.

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 matters 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 disposal.

5.1 Hearing in the matter was scheduled in virtual mode on 13.4.2021, 18.5.2021 and 25.5.2021 and communicated to the Appellant by Speed Post at the address mentioned in appeal memorandum. However, no consent was received from the Appellant nor any request for adjournment was received. I, therefore, take up the appeals for decision on merits on the basis of available records and grounds raised in Appeal Memorandum.

6. I have carefully gone through the facts of the case, impugned orders and submissions made by the appellant in appeal memoranda. The issues to be decided in the present appeals is 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?

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 prevalent at the relevant time. I find that the Appellant had opted for availing the facility of re-credit, in terms of para 2C(a) of the said notification. The appellant had filed re-credit applications for the period from July, 2009 to January, 2010 and April, 2010 to October, 2010 (except August, 2010) for re-credit of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid from PLA on clearance of finished goods manufactured by them. The sanctioning authority, after determination, partially restricted the re-credit amount and ordered for its recovery vide the impugned orders on various counts mentioned in the impugned orders.

7.1 The Appellant has contended that the Central Government had promised by way of notification for full exemption from payment of duty and hence, any amendment in Notification No. 39/2001-CE dated 31.07.2001 is against the spirit of the original notification and violation of principles of promissory estoppels and relied upon Order dated 18.3.2010 passed by the Hon'ble Gujarat High Court in SCA No. 6299/2008 filed by M/s SAL Steel Ltd.

8. 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, it is further observed 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 in this case 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



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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.”

8.1 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 orders to that extent.

9. As regards the second issue, I find that the 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 re-credit 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, including those relating to refund, exemption will also apply to Education Cess and SHE Cess; that this declaration in the section leaves no room for doubt that Education Cess is a duty of excise for the purpose of exemption notification.

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



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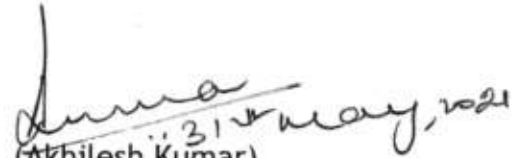
Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education 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. I, uphold the impugned orders to that extent.

10. In view of above, I uphold the impugned orders and reject the appeals.

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

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


(Akhilesh Kumar)
Commissioner(Appeals)

Attested



(V.T.SHAH)
Superintendent(Appeals)



By R.P.A.D.

To,
M/s Aroma High-Tech Ltd,
Survey No. 578/2, 580,
National Highway No. 15,
Village Lakdia, Taluka 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 फ़ाइल।

