::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय 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: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्डडाकए.डी.द्वारा:-DIN- 20210964SX0000666ACC

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/298/RAJ/2009	71/2008-2009	21.05.2009

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

KCH-EXCUS-000-APP-202-2021

आदेश का दिनांक / Date of Order:	27.08.2021	जारी करने की तारीख / Date of issue:	06.09.2021

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. Gallantt Metal Ltd.,,Survey No. 176,,Near Toll Gate,,Vill:Samakhiyali, Bhachau, 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) 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 रजिस्ट्रार 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,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/-.

(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 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 वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

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

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

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।/

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, 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 मॉल 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 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 (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 ।
जैहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण का एक अपील या केंद्रीय 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-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 है । /
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 Gallant Metal Ltd, Kutch (hereinafter referred to as "Appellant") has filed Appeal No.. V2/298/RAJ/2009 against Refund Order No. 71/2008-09 dated 21.5.2009 (*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 excisable goods falling under Chapter No. 72 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AACCG2934JXM001. 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.

2.1 The Appellant had filed Refund applications for the period from June, 2008 to September, 2008 for refund of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid from PLA in terms of notification *supra* on clearance of finished goods manufactured by them.

3. The refund sanctioning authority sanctioned refund @39% totally amounting to Rs. 8,64,35,808/-, as per Sl. No. 8 of Table inserted in Para 2 of said notification vide Notification No. 33/2008-CE dated 10.6.2008.

3.1 Being aggrieved, the Appellant filed appeal before the then Commissioner(Appeals), Central Excise, Rajkot who vide his Order-in-Appeal No. 266 to 269/2009 dated 2.2.2009 remanded the matter to the refund sanctioning authority with a direction to decide the issue afresh in light of Board's clarification dated 15.10.2008 in respect of clearance of final product

after 10.6.2008 and the Appellant was also directed to produce data regarding consumption of non specified bought out items used in the manufacture of finished goods.

3.2 In *de novo* proceedings, the refund sanctioning authority vide the impugned order held that,

(i) The Appellant was eligible for refund considering value addition computed @75% in respect of goods manufactured from specified inputs in terms of Notification No. 39/2001-CE dated 31.07.2001, as amended and the Appellant was eligible for refund considering value addition computed @39% in respect of goods manufactured from non-specified inputs.

(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.

3.3 The refund sanctioning authority sanctioned differential refund of Rs. 2,20,50,010/- vide the impugned order and rejected the remaining claimed amount.

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

(i) The Refund sanctioning authority has not appreciated the fact that they manufactured the iron & steel products falling under chapter 72, starting from iron ore in their factory itself. Vide notification no. 33/2008-CE dated 10-6-2008, it was specifically mentioned at sl. No. 15 of the Table that if the manufacture starts from iron ore in the same factory for manufacture of iron & steel products falling under chapter 72 & 73, then the manufacturers will be eligible for refund of 75% of the total duty paid. The Refund sanctioning authority failed to appreciate the facts on record that the appellants are manufacturing the final products i.e. MS Billets, MS Round Bars, etc right from iron ore inside their own factory. Their main raw material is iron ore. They manufacture sponge iron from iron ore, which is captively consumed for manufacture of billets and round bars within the same factory. They also procured MS scrap from other sources which they were using for manufacture of Sponge Iron but the facts remain that they were starting

their manufacturing from Iron ore to produce their final product in their factory. They are maintaining private records for stage wise production. i.e. from iron ore to sponge iron, from sponge iron to MS Billet, from MS Billet to MS Round bars / TMT Bars. Moreover, the notification 33/2008-CE dated 10-6-2008 does not lay down any such condition of maintaining separate records. The Refund sanctioning authority is also not correct in vivisecting the production of goods out of sponge iron made out of iron ore in the factory.

(ii) That the rejection of Education Cess and Secondary and Higher Education Cess from the refund claimed under notification 39/2001-CE dated 31-7-2009, is not sustainable. 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. Since Education Cess & SHE Cess were duties of excise which were paid on the aggregate of duties of excise leviable under the three Acts, which were named in the Notification no. 39/2001 CE, it should be treated to have been levied under those Acts and, therefore, along with the refund, which was admissible in respect of the duties paid under the said three Acts, even the Education Cess & SHE Cess in the nature of excise duty paid at the rate of 2% & 1% respectively thereof, was required to be refunded and relied upon case laws of Bharat Box Factory Ltd - 2007(214) ELT 534 (Tri. Delhi) and Dharmpal Premchand Ltd. - 2007 (218) ELT 610.

(iii) That levy and collection of Education Cess & SHE Cess under Finance Acts cannot stand on its own independent of levy and collection of excise duties under the Central Excise Act, 1944 and other laws for the time being in force. If there is no levy and collection by virtue of any exemption of the excise duties which otherwise would be payable under the Central Excise Act, 1944 or under any other law which could be levied and collected by the Ministry of Finance, there would be no occasion to calculate Education Cess in the nature of excise duty under Section 93 of the Finance Act, 2004. There is no need to provide any scheme of exemption from Education Cess in the nature of excise duty, because if the excise duty in respect of which it is required to be calculated is itself exempted, automatically, no question of levy of the said Education Cess in the nature of excise duty can ever arise. Therefore there is no need to incorporate the provisions for refund of

both the Cess being levied under the Finance Acts, in the said Notification No. 39/2001-CE dated 31.7.2001.

5. The Appeal was 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 appeal was retrieved from callbook in view of the judgement dated 22.4.2020 passed by the Hon'ble Supreme Court and has been taken up for disposal.

6. Hearing in the matter was scheduled in virtual mode through video conferencing on 17.8.2021 and communicated to the Appellant. In reply, the Appellant vide letter dated 18.8.2021 waived the opportunity of personal hearing and stated that their submissions in appeal memorandum are final and requested to dispose the appeal accordingly.

7. I have carefully gone through the facts of the case, impugned order and submissions made by the Appellant in appeal memorandum. The issues to be decided in the present appeals are whether,

(i) the finished goods manufactured by the Appellant are eligible for refund @75% under Sl. No. 15 of Table at Para 2 of Notification No. 39/2001-CE dated 31.7.2001, as amended or not ?

(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 or not ?

8. 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. The Appellant had filed refund applications for refund of Central Excise Duty, Education Cess and S.H.E. Cess paid from PLA on clearance of finished goods manufactured by them. The refund sanctioning authority partially rejected the refund claim amount on various counts mentioned in the impugned order.

8.1 The Appellant has contended that their final products MS Billets, MS

Round Bars etc. were manufactured from Iron Ore in the same factory and hence, they were eligible for refund @75% as per Sl. No. 15 of Table given under Notification No. 39/2001-CE dated 31.7.2001, as amended. The Appellant further submitted that they manufactured Sponge Iron from Iron Ore, which was captively consumed for manufacture of Billets and Round Bars within the same factory. They procured MS scrap from other sources which they were using for manufacture of Sponge Iron but they were starting their manufacturing from Iron ore to produce their final product in their factory. The Appellant contended that the Refund sanctioning authority erred in vivisecting the production of goods out of Sponge Iron made out of Iron Ore in the factory.

9. 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 Appellant had claimed refund @75% in respect of final products manufactured by them in terms of Sl. No. 15 of Table appearing at Para 2 of said notification, which is reproduced as under:

> "2. The duty payable on value addition shall be equivalent to the amount calculated as a percentage of the total duty payable on the said excisable goods of the description specified in column (3) of the Table below (hereinafter referred to as the said Table) and falling within the Chapter of the said First Schedule as are given in the corresponding entry in column (2) of the said Table, when manufactured starting from inputs specified in the corresponding entry in column (5) of the said Table in the same factory, at the rates specified in the corresponding entry in column (4) of the said Table :

TABLE

S. No.	Chapter of the First Schedule	Description of goods	Rate	Description of inputs for manufacture of goods in column (3)
(1)	(2)	(3)	(4)	(5)
1.	29	All goods	29	Any goods
2.	30	All goods	56	Any goods
3.	33	All goods	56	Any goods
4.	34	All goods	38	Any goods
5.	38	All goods	34	Any goods
6.	39	All goods	26	Any goods
7.	40	Tyres, tubes and flaps	41	Any goods

S. No.	Chapter of the First Schedule	Description of goods	Rate	Description of inputs for manufacture of goods in column (3)
(1)	(2)	(3)	(4)	(5)
8.	72 or 73	All goods	39	Any goods, other than iron ore
9.	74	All goods	15	Any goods
10.	76	All goods	36	Any goods
11.	85	Electric motors and generators, electric generating sets and parts thereof	31	Any goods
12.	25	Cement or cement clinker	75	Limestone and gypsum
13.	17 or 35	Modified starch/glucose	75	Maize
14.	18	Cocoa butter or powder	75	Cocoa beans
15.	72 or 73	Iron and steel products	75	Iron ore
16.	Any chapter	Goods other than those mentioned above in S. Nos. 1 to 15	36	Any goods

9. In backdrop of the above and on perusal of detailed month wise calculation given in the impugned order, I find that the sanctioning authority determined refund amount @75% in respect of finished goods manufactured out of specified input i.e. Iron Ore, in terms of Notification No. 33/2008-CE dated 10.6.2008. Further, the sanctioning authority determined refund amount by considering value addition @ 39% in respect of finished goods, which were manufactured out of non-specified inputs i.e. bought out Sponge Iron and bought out scrap. Apparently, Sponge Iron and scrap are not listed as specified input under Notification No. 33/2008-CE dated 10.6.2008. Hence, the Appellant is not eligible for refund @75% in respect of finished goods which were manufactured out of non-specified inputs i.e. bought out Sponge Iron and bought out scrap. I also find that the Appellant had provided details of goods manufactured out of specified input and non-specified input duly certified by the Chartered Engineer, as recorded in the impugned order. Considering the facts emerging from records, I hold that the Appellant is not eligible for refund @75% in respect of finished goods manufactured out of non-specified inputs. I, therefore, uphold the impugned order to that extent.

10. 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, including those relating to refund, exemption will also apply to Education Cess and SHE Cess. Since Education Cess & SHE Cess were duties of excise which were paid on the aggregate of duties of excise leviable under the Act, Education Cess & SHE Cess being in the nature of excise duty was also required to be refunded along with Central Excise duty.

10.1 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)."

10.2 By respectfully following the above judgement, I hold that the appellant is not eligible for refund of Education Cess and Secondary & Higher Education Cess. I, uphold the impugned order to that extent.

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

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

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

सत्यापित,

विपुल शाह
अधीक्षक (अपील्स)

Kumar 25th August, 2021.

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To,
M/s Gallant Metal Ltd,
Survey No. 175/1,
Village Samkhiali,
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।
4) गार्ड फ़ाइल।