



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



सत्यमेव जयते

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

रेस कोर्स रिंग रोड / Race Course Ring Road

राजकोट / Rajkot - 360 001

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रजिस्टर्ड डाक ए.डी.द्वारा:-DIN-20211064SX000000B3BD

क	अपील / फाइल नं./ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/61-63/GDM/2016	02-04/Refund/2016-17	30.08.2016

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

KCH-EXCUS-000-APP-225 to 227-2021

आदेश का दिनांक / Date of Order:	30.09.2021	जारी करने की तारीख / Date of issue:	01.10.2021
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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 एवं सेवाकर, राजकोट / जामनगर / गांधीधामा 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. Genus Electrotech Ltd., Survey No. 43., Meghpar Borichi, Galpadar Road, Taluka Anjar (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 मूलांकन 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 (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा 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 नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती 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 of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां 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 या 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 (सेनवेट) 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/देय करोड़ रूपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
- धारा 11 डी के अंतर्गत रकम
 - सेनवेट जमा की ली गई गलत राशि
 - 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 अर्जी 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 :
- amount determined under Section 11 D;
 - amount of erroneous Cenvat Credit taken;
 - amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर मन्त्रि, 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:
- 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
 - भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर चरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिवेट) 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.
 - 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.
 - सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इट्टी 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 समायाचिधि 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.
 - 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 संश्लेषण 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.
 - पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
 - यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त बंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की निम्नलिखित 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.
 - 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-I in terms of the Court Fee Act, 1975, as amended.
 - सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में बर्णित एवं अन्य संबंधित 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.
 - उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in का 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 Genus Electrotech Ltd, Kutch (hereinafter referred to as "Appellant") has filed below mentioned appeals against Refund Orders as per details given below (hereinafter referred to as "impugned orders") passed by the Assistant Commissioner, erstwhile Central Excise Division, Anjar (hereinafter referred to as "refund sanctioning authority") :

Table -I

Sl. No.	Appeal Nos.	Refund Order No. & Date	Period	Refund rejection amount (in Rs.)	
				Education Cess and SHE Cess	Refund of Cenvat credit
1.	2.	3.	4.	5.	6.
1.	61/2016	2/Refund/2016-17 dated 30.8.2016	December, 2007 and January, 2008	8,789/-	3,16,416/-
2.	62/2016	2/Refund/2016-17 dated 30.8.2016	May, 2006 to February, 2007 and August, 2007 to November, 2007	61,118/-	7,11,195/-
3.	63/2016	4/Refund/2016-17 dated 30.8.2016	March, 2007 to June, 2007	11,429/-	2,53,796/-

1.1 Since issues involved in above mentioned appeals are common, I take up all 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 No. 85 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AABCG9645HXM001. 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 notification applied to only those units which were set up on or after 31.7.2001 but not later than 31.12.2005. Further, the said notification defined the term 'set up' to mean that the new unit commenced civil construction work in its factory and



any installation of plant and machinery on or after 31.7.2001 but not later than 31.12.2005 and that unit commenced commercial production on or before 31.12.2005.

2.1 The Appellant had filed Refund applications for the period as mentioned at column No. 2 of Table below 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:

Table -II

Sl. No.	Period of refund claim	Refund Order No. & Date	OIA No. & Date	CESTAT Order No. & Date
1	2.	3.	4.	5.
1.	December, 2007 and January, 2008	256/2007-08 dated 1.2.2008, 271/2007-08 dated 20.2.2008	118-119/ 2008/ Commr(A) RAJ dated 8.5.2008	A/11621-11622/ 2015 dated 10.11.2015
2.	May, 2006 to February, 2007 and August, 2007 to November, 2007	153/2007-08 dated 4.10.2007, 175/2007-08 dated 7.11.2007, 188/2007-08 dated 30.11.2007, 191/2007-08 dated 13.12.2007	49 to 52/ 2008/ Commr(A) RAJ dated 29.2.2008	A/11571-11574/ 2015 dated 27.10.2015
3.	March, 2007 to June, 2007	85/2007-08 dated 14.6.2007, 90/2007-08 dated 20.6.2007, 107/2007-08 dated 20.7.2007, 108/2007-08 dated 20.7.2007	357 to 360/2007/ Commr(A) RAJ dated 13.12.2007	A/11436-11439/ 2015 dated 21.9.2015

2.2 On scrutiny of refund applications, it was observed by the refund sanctioning authority that the three products i.e. EPS Mould (Thermocol), Corrugated Box and T.V. Moulded Parts were not manufactured by the Appellant using plant and machinery installed on or before the cut-off date of 31.12.2005 and hence, they were not eligible for refund of duty paid on clearance of the said products under said notification. The refund sanctioning authority vide the impugned orders as mentioned at column No. 3 of Table-II above rejected refund in respect of said three products.

2.3 Being aggrieved, the Appellant filed appeals before the then Commissioner (Appeals), Rajkot who vide his Orders-in-Appeal mentioned at column No. 4 of Table-II above ordered that,

“(i) I uphold that portion of the order of the Lower Authority pertaining to the rejection of refund claims in respect of Corrugated



Boxes, EPS Mould (Thermocol) and T.V. Moulded parts manufactured and cleared by the appellant subject to the condition that the appellants are eligible to avail the CENVAT credit on the inputs used in the ineligible products.

(ii) I set aside the Lower Authority's order to the extent where the Lower Authority has wrongly adjusted the entire CENVAT credit only towards the eligible products and adjusting the amount of duty paid in PLA towards ineligible products instead of adjusting proportionate credit available on the eligible products as per the proviso (2) of the Notification No. 39/2001-CE dated 31.07.2001 subject to verification of documents and quantification of the CENVAT credit of the credit of ineligible products by the Lower Authority."

2.4 Being aggrieved, the Appellant filed appeals before the Hon'ble CESTAT, Ahmedabad who vide its Orders mentioned at column No. 5 of Table-II above remanded the matter to the adjudicating authority with a direction to decide afresh the eligibility of said notification in light of Board's Circular No. 110/21/2006-CX3 dated 10.7.2008.

2.5 Pursuant to CESTAT's remand directions, the refund sanctioning authority has in the impugned orders observed that,

(i) The plant and machinery for manufacture of Corrugated Box and T.V. Mould Parts were already installed prior to cut off date of 31.12.2005 and hence, they were eligible for exemption under said notification. The product EPS Mould (Thermocol) was not eligible for exemption under said notification as the same was manufactured out of plant and machinery installed after 31.12.2005.

(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.

(iii) As per doctrine of merger, there cannot be two operative orders at the same time. When the Hon'ble CESTAT had remanded the matter for fresh adjudication, refund of Cenvat credit of ineligible product i.e. EPS Mould (Thermocol) cannot be granted in terms of the Orders of the Commissioner (Appeals), as only order of the higher appellate authority



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i.e. CESTAT, Ahmedabad is to be complied with.

2.6 The refund sanctioning authority vide the impugned orders mentioned at column No. 3 of Table-I sanctioned refund of Central Excise duty pertaining to products Corrugated Box and T.V. Mould Parts but rejected remaining claimed amount in respect of Education Cess and Secondary and Higher Education Cess and refund of Cenvat credit of ineligible product i.e. EPS Mould (Thermocol). The Appellant had not claimed refund in respect of EPS Mould (Thermocol) in *de novo* proceedings, as recorded in the impugned orders.

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

(i) They had filed a refund claim for various products out of which refund claim of Basic Excise duties and Education Cess and SHE cess paid on EPS Mould (Thermocol) was found ineligible and was rejected on the ground that the same were manufactured and cleared out of the machines installed after the sunset clause i.e. 31.12.2005. Since the refund of the amount of Basic Excise Duties were rejected, the appellant should be allowed re-credit of the Cenvat credit taken on the inputs used in the manufacture of the goods cleared on payment of duty and for which the refund claimed was rejected.

(ii) In *de novo* proceedings, they had pleaded before the refund sanctioning authority that the Cenvat credit be allowed to them in view of the Commissioner (Appeals) pertaining to ineligible product i.e. EPS Mould (Thermocol) for which refund was not sanctioned. However, refund of Cenvat credit was not allowed by the refund sanctioning authority.

(iii) The refund sanctioning authority did not sanction refund of Cenvat credit on the grounds that according to Doctrine of Merger, there cannot be two operative orders at the same time and that after passing of the order by the Hon'ble CESTAT, vide which it has been ordered that the matter may be adjudicated afresh in respect of the three products viz. Corrugated Box, T.V. Moulded Parts and EPS Mould (Thermocol), the refund cannot be granted in terms of the order of the Commissioner(Appeals). The appellant submitted that once the Ld Commissioner appeals has allowed the refund of Cenvat credit, then the refund sanctioning authority cannot overrule the order of the Commissioner (Appeals) and is bound by the judicial discipline, and the



order of the commissioner appeals is binding on the refund sanctioning authority.

(iv) The sanctioning authority has wrongly applied the doctrine of merger in this case. The doctrine of merger applies only to such items of appeal which is argued before the Hon'ble Tribunal i.e. the superior forum. In the present case, the issue of allowance of Cenvat credit by the Commissioner (Appeals), was not the ground of appeals before the Tribunal, which was in the favour of the appellant. Moreover, the Department had also not filed any appeals against the Order of the then Commissioner (Appeals), to the extent of allowance of refund of Cenvat credit. Therefore, the refund sanctioning authority has wrongly invoked the doctrine of merger to deny the refund claim of the Cenvat credit, which was allowed by the then Commissioner (Appeals) and relied upon case law of Kirloskar Oil Engine Ltd - 2015 (322) ELT 227 (Bom.).

4. 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. Hearing in the matter was scheduled in virtual mode through video conferencing on 27.8.2021. Shri R. Subramanya, Advocate, appeared on behalf of the Appellant and re-iterated the submissions made in appeal memoranda.

6. I have carefully gone through the facts of the case, impugned orders and submissions made by the Appellant in appeal memoranda. The issue to be decided in the present appeals is whether the Appellant is eligible for refund of Cenvat credit of ineligible product EPS Mould (Thermocol) or not?

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 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 Appellant had filed refund applications



for refund of Central Excise Duty, Education Cess and S.H.E. Cess paid from PL^A on clearance of finished goods manufactured by them. The refund sanctioning authority had partially rejected the refund claim amount in respect of duty paid on three products EPS Mould (Thermocol), Corrugated Box and T.V. Moulded Parts on the grounds that the same were not manufactured by the Appellant using plant and machinery installed on or before the cut-off date of 31.12.2005. The then Commissioner(Appeals) upheld the rejection of refund amount in respect of said three products but held that the refund sanctioning authority wrongly adjusted the entire CENVAT credit for payment towards the eligible products instead of adjusting proportionate credit available on the eligible products subject to verification of documents. The Appellant challenged that portion of Order-in-Appeal before the Tribunal which had rejected refund in respect of said three products. The Tribunal remanded the matter said matter to the refund sanctioning authority with a direction to examine the eligibility of refund on said three products in light of Board's Circular No. 110/21/2006-CX3 dated 10.7.2008.

8. In de novo proceedings, the refund sanctioning authority sanctioned refund in respect of products Corrugated Box and T.V. Mould Parts but did not sanction refund in respect of product EPS Mould (Thermocol) and rejected refund of Education Cess and Secondary and Higher Education Cess. The Appellant has not contested rejection of refund on these counts before me but only contested on the issue of rejection of refund of Cenvat credit of ineligible product EPS Mould (Thermocol).

8.1 The refund sanctioning authority rejected refund of Cenvat credit of ineligible product i.e. EPS Mould (Thermocol) vide the impugned orders on the grounds that as per doctrine of merger, there cannot be two operative orders at the same time. When the Hon'ble CESTAT had remanded the matter for fresh adjudication, refund of Cenvat credit of ineligible product i.e. EPS Mould (Thermocol) cannot be granted in terms of the Orders of the Commissioner (Appeals), as only order of the higher appellate authority i.e. CESTAT, Ahmedabad is to be complied with.

8.2 The Appellant contended that once the Commissioner (Appeals) had allowed the refund of Cenvat credit, then the refund sanctioning authority cannot overrule the order of the Commissioner (Appeals) and is bound by the judicial discipline, and the order of the commissioner appeals is binding on the refund sanctioning authority. The Appellant further contended that the sanctioning authority has wrongly applied the doctrine of merger in this case.



The doctrine of merger applies only to such items of appeal which is argued before the Hon'ble Tribunal i.e. the superior forum. In the present case, the issue of allowance of Cenvat credit by the Commissioner (Appeals), was not the ground of appeals before the Tribunal, which was in their favour. Moreover, the Department had also not filed any appeals against the Order of the then Commissioner (Appeals), to the extent of allowance of refund of Cenvat credit. Therefore, the refund sanctioning authority has wrongly invoked the doctrine of merger to deny the refund claim of the Cenvat credit, which was allowed by the then Commissioner (Appeals) and relied upon case law of Kirloskar Oil Engine Ltd - 2015 (322) ELT 227 (Bom.).

9. I find that the then Commissioner (Appeals) had, *inter alia*, held that the Appellant was entitled to utilize the Cenvat credit of inputs used in the manufacture of ineligible products towards payment of duty on the said ineligible products and directed the then refund sanctioning authority to adjust proportionate Cenvat credit available on the eligible final products towards payment on eligible products subject to verification of documents and quantification of Cenvat credit of ineligible products. I find that the said portion of the Orders-in-Appeal had attained finality, in absence of any contrary evidences brought on record by the refund sanctioning authority about filing of appeals by the Department. Under the circumstance, judicial discipline required the refund sanctioning authority to have followed the directions of the then Commissioner (Appeals). However, the refund sanctioning authority wrongly applied the doctrine of merger and held that he was required to comply to the direction of higher appellate authority i.e. CESTAT, Ahmedabad. It is on record that the Appellant had challenged that portion of Orders-in-Appeal before the Hon'ble CESTAT wherein refund on duty paid on three products EPS Mould (Thermocol), Corrugated Box and T.V. Moulded Parts was rejected by the then refund sanctioning authority. Hence, issue before the Hon'ble CESTAT was limited only to admissibility of refund of duty paid on said three products, since the Department had not challenged the order of the then Commissioner (Appeals) regarding Cenvat credit of ineligible product before the Hon'ble CESTAT, Ahmedabad. In view of the above, the Hon'ble CESTAT remanded the matter only to decide afresh issue regarding admissibility of refund of duty paid on said three products as evident from the relevant portion of the Hon'ble CESTAT's order reproduced as under:

"5. In view of the above, we direct the adjudicating authority to decide the matter afresh on the eligibility of benefit of Notification in respect of the 3 products as stated above in the light of the Board Circular and to pass order



in accordance with law. ...”

9.1 After analyzing the facts of the case as above, it is clear that Orders-in-Appeal passed by the then Commissioner (Appeals) as it related to refund of Cenvat credit on ineligible products was not merged with the Orders of the Hon'ble CESTAT, Ahmedabad and consequently, doctrine of merger is not applicable in the present case. I rely on the judgment passed by the Hon'ble Supreme Court in the case of Pearl Drinks Limited reported as 2010 (255) E.L.T. 485 (S.C.), wherein it has been held that,

“14. Applying the above test to the case at hand the doctrine would have no application for the plain and simple reason that the subject matter of the appeal filed by the assessee against the adjudicating authority's order in original was limited to disallowance of two out of eight deductions claimed by the assessee. The Tribunal was in that appeal concerned only with the question whether the adjudicating authority was justified in disallowing deductions under the said two heads. It had no occasion to examine the admissibility of the deductions under the remaining six heads obviously because the assessee's appeal did not question the grant of such deductions. Admissibility of the said deductions could have been raised only by the Revenue who had lost its case qua those deductions before the adjudicating authority. Dismissal of the appeal filed by the assessee could consequently bring finality only to the question of admissibility of deductions under the two heads regarding which the appeal was filed. The said order could not be understood to mean that the Tribunal had expressed any opinion regarding the admissibility of deductions under the remaining six heads which were not the subject matter of scrutiny before the Tribunal. That being so, the proceedings instituted by the Commissioner, Central Excise pursuant to the order passed by the Central Board of Excise and Customs brought up a subject matter which was distinctively different from that which had been examined and determined in the assessee's appeal no matter against the same order, especially when the decision was not rendered on a principle of law that could foreclose the Revenue's case. The Tribunal obviously failed to notice this distinction and proceeded to apply the doctrine of merger rather mechanically. It failed to take into consideration a situation where an order may be partly in favour and partly against a party in which event the part that goes in favour of the party can be separately assailed by them in appeal filed before the appellate Court or authority but dismissal on merits or otherwise of any such appeal against a part only of the order will not foreclose the right of the party who is aggrieved of the other part of this order. If the doctrine of



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merger were to be applied in a pedantic or wooden manner it would lead to anomalous results inasmuch as a party who has lost in part can by getting his appeal dismissed claim that the opposite party who may be aggrieved of another part of the very same order cannot assail its correctness no matter the appeal earlier disposed of by the Court or authority had not examined the correctness of that part of the order.”

10. In view of above discussion, I hold that the refund sanctioning authority has wrongly applied the doctrine of merger in the case and did not follow the directions of the Commissioner (Appeals), Rajkot in the matter. I, therefore, set aside the impugned orders to the extent of rejection of refund of Cenvat credit of ineligible product i.e. EPS Mould (Thermocol). I direct the refund sanctioning authority to comply with the directions given by the Commissioner (Appeals), Rajkot in the various orders dated passed in the matter and pass speaking orders by adhering to the principles of natural justice.

11. I set aside the impugned orders to the extent of rejection of refund of Cenvat credit and dispose off the appeals by way of remand to refund sanctioning authority.

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

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

सत्यापित,



विपुल शाह

अधीक्षक (अपीलेंस)

Akhilesh Kumar
30th September, 2021

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To,
M/s Genus Electrotech Ltd,
Survey No. 43, Meghpar Borichi,
Galpadar Road, Taluka : Anjar,
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-भचाड मण्डल, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 4) मॉडि फ़ाइल।



