



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



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

रेस कोर्स रिंग रोड / Race Course Ring Road

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सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा:- DIN-20211064SX0000000E2A

क्र.	अपील / फाइल नं./ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/21/EA2/RAJ/2009	08/2008-09	17/04/2009
	V2/22/EA2/RAJ/2009	53/2008-09	01/05/2009
	V2/23/EA2/RAJ/2009	54/2008-09	01/05/2009
	V2/24/EA2/RAJ/2009	66/2008-09	12/05/2009

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

KCH-EXCUS-000-APP-233 to 236-2021

आदेश का दिनांक /
Date of Order: **11.10.2021** जारी करने की तारीख /
Date of issue: **11.10.2021**

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 एवं सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सूचित: /
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. Gran Electronics Pvt. Ltd., Survey No. 113,, Varsamedi, Tal: Anjar - Kutch., .

इस आदेश (अपील) में व्यक्त 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 प्रांते 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 मामलों 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) 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) नियमवली, 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 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। स्वयं 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 एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रामाणित 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 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। स्वयं 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 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/-



- (ii) 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 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 का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (iii) 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 इस कठोर रूप से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
- धारा 11 की 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 होगा।
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 कोपुनरीक्षण 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 सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिन, 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 (i)id:
- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) मुनिधित 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 समायावधि 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 उत्पाद 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। 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 ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा 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 संबंधित 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 से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

:: ORDER-IN-APPEAL::

The Deputy Commissioner, erstwhile Central Excise Division, Gandhidham has filed Appeal Nos. V2/21-24/EA2/RAJ/2009 on behalf of the Commissioner, erstwhile Central Excise, Rajkot (hereinafter referred to as "Appellant Department") in pursuance of the direction and authorization issued under sub-section(2) of Section 35E of the Central Excise Act, 1944 (hereinafter referred to as 'Act') against Refund Orders mentioned below (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, erstwhile Central Excise Division, Gandhidham (hereinafter referred to as "refund sanctioning authority") :

Sl. No.	Appeal Nos.	Refund Order No. & Date	Period	Refund claim amount (in Rs.)
1.	2.	3.	4.	5.
1.	V2/21-24/EA2/2009	8/08-09 dated 17.4.2009	December, 2008	7,56,936/-
2.		53/08-09 dated 1.5.2009	January, 2009	10,43,465/-
3.		54/08-09 dated 1.5.2009	February, 2009	22,56,413/-
4.		66/08-09 dated 12.5.2009	March, 2009	27,75,306/-

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 Respondent was engaged in the manufacture of excisable goods falling under Chapter No. 84 and 85 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AACCG4003AXM001. The Respondent 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 Respondent had filed refund applications for the period as mentioned in column No. 4 of Table above for refund 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. The refund applications were processed and sanctioned by the refund sanctioning authority vide the impugned orders mentioned at column No. 3 of Table above.

3. The above refund orders were reviewed by the Appellant Department and appeals have been filed on the grounds that,

(i) The impugned order to the extent of granting refund on Fully Automatic Washing Machines, Electric Motors (other than 45W & 125W) and parts of Washing Machine, which were added/manufactured after cut-off date of 31.12.2005 is not correct, legal and proper. Though the unit stated commercial production on 29.12.2005 but the manufacture of said products has not taken place before the cut-off date of 31.12.2005. As per the Board's clarification dated 10.07.2008, the unit would be eligible for the benefit of Notification for the plant and machinery used for manufacture which has remained the same. The adjudicating authority has failed to observe that the plant and machinery used for manufacture of products namely (i) Fully Automatic Washing Machines, (ii) Electric Motors (other than 45W & 125W) and (iii) parts of Washing Machine were never used before 31.12.2005. Hence, these products are not eligible for exemption under said notification.

(ii) The exemption under the said Notification No. 39/2001-CE dated 31.7.2001 is from payment of Central Excise duty only. The notification explicitly states that the exemption is from duties 'leviable.... under any of the said Acts. Education Cess and Secondary & Higher Education Cess are levied by the Government under Section 91 of the Finance Act, 2004 and Section 136 of the Finance Act, 2007, respectively, and not under any of the three Acts mentioned in the notification. While issuing notification No. 39/2001-CE, the Government has not made any reference to any of the legal provisions/enactments under which Education Cess or Secondary & Higher Education Cess is levied. As such, the exemption under Notification No. 39/2001-CE does not cover the levies under Section 91 of the Finance Act, 2004 and Section 136 of the Finance Act, 2007. Further, exemption from basic excise duty would not mean exemption from Education cess also. If the Government had

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intention to grant exemption from payment of Education cess, the exemption from these levies has to be specifically granted as in the case of notification no. 42/2001-CE (NT).

(iii) For grant of any exemption, the Government has to issue an appropriate exemption notification in exercise of powers conferred under Section 5A of the Central Excise Act, 1944, granting exemption from payment of Education Cess and Secondary & Higher Education Cess leviable under section 91 of the Finance Act, 2004 and section 136 of the Finance Act, 2007, respectively. In the absence of any such exemption notification, the exemption from payment of the two types of cess cannot be presumed merely because the source of powers to grant exemption is common in respect of Central Excise duties and Education/Secondary & Higher Education Cess. Mere conferment of power on the Government to grant exemption from payment of more than one levy cannot mean that grant of exemption from payment of one levy would also mean exemption from other levies. For any exemption to be available, the same has to be specifically granted by the Government.

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 15.9.2021, 30.9.2021 and 8.10.2021, which was communicated to the Respondent by Speed Post at the address mentioned in impugned orders. However, no consent was received from the Respondent 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 grounds raised by the Appellant Department in appeal memorandum. The issues to be decided in the present appeals are whether,

the impugned orders sanctioning refund on finished goods manufactured / added by the Respondent after cut-off date of



31.12.2005 are correct, legal and proper or not ?

- (ii) the impugned orders sanctioning 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 are correct, legal and proper or not ?

7. On perusal of the records, I find that the Respondent 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 Respondent 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, which were sanctioned by the refund sanctioning authority.

7.1 The Appellant Department has contended that the refund sanctioning authority erred in sanctioning refund on Fully Automatic Washing Machines, Electric Motors (other than 45W & 125W) and parts of Washing Machine, as the same were manufactured after cut-off date of 31.12.2005. It has been further contended that though the unit stated commercial production on 29.12.2005 but the manufacture of said products has not taken place before the cut-off date of 31.12.2005 and hence, the said products were not eligible for exemption under said notification.

8. As recorded in the impugned orders, the unit of the Respondent was a new industrial unit set up with original value of investment of Rs. 22,02,28,340/- in plant and machinery and that commercial production was commenced on 29.12.2005. These facts are not under dispute.

8.1 I find it pertinent to examine the findings of the refund sanctioning authority, which are reproduced as under:

"In the instant case, the Assessee vide their letter/undertaking enclosing therein a copy of certificate issued by the Chartered Engineer dated 12.03.2009, has stated and confirmed that all the items introduced / added till date were manufactured from the plant and machinery installed on or before 31.12.2005 in their factory. Hence, the products namely (i) Fully Automatic Washing Machines (CETSH 84501100), (ii) Electric Motors [(other than 45W & 125W) CETSH 85011019 / 85015190]} and (iii) parts of Washing Machine (CETSH 84509090), added/manufactured after 31.12.2005 were / have been manufactured from the plant & machinery installed up to the cut-



off date i.e. 31.12.2005 but the production of these items were started after 31.12.2005. The claimant has also given declaration for the month under consideration that they have not increased production capacity or added any new product.

It has been clarified vide Board's letter F. No. 110/21/2006-CX-3 dated 10.07.2008, in Point No.1 that where a unit introduces a new product by installing fresh plant, machinery or capital goods after the cut-off date, in such a situation, exemption would not be available to this new product. The said new product would be cleared on payment of duty, as applicable and separate records would be required to be maintained to distinguish production of these products from the products which are eligible for exemption. Further, in another situation where unit starts producing some products (after the cut-off date) using the plant and machinery installed up to the cut-off date and without any addition to the plant and machinery, the unit would be eligible for the benefit of Notification No.39/2001-CE dated 31.07.2001 as amended, because the plant are used for manufacture has remained the same. Accordingly the clarification given by TRU Vide letter 332/07/2006-TRU dated 25.04.2006 on subject point has been modified vide said letter dated 10.07.2008. Thus, the products/waste and scrap added/manufactured/cleared, if any, after 31.12.2005 using the plant and machinery installed up to the cut-off date (i.e.31.12.2005) and without any addition to the plant and machinery are eligible for the benefit of notification No 39/2001-CE Dated 31.07.2001 as amended.

In view of the facts and circumstances as discussed above, the products namely (i) Fully Automatic Washing Machines (CETSH 84501100), (ii) Electric Motors [(other than 45W & 125W) CETSH 85011019 / 85015190] and (iii) parts of Washing Machine (CETSH 84509090), are eligible for the benefit of Notification No.39/2001-CE dated 31.07.2001 as amended, in light of the clarifications given by the TRU and information/declaration furnished by the said Assessee."

8.2 In light of the above findings of the refund sanctioning authority, it is evident that the goods in question were manufactured from the plant & machinery installed up to the cut-off date i.e. 31.12.2005 but the production of said goods was started after 31.12.2005. These facts are not under dispute. I find that if the manufacturing of goods commenced after 31.12.2005 but the same were manufactured out of plant and machinery installed prior to cut off date of 31.12.2005, then in that case, such goods are eligible for benefit of said notification. I find that the Board has issued clarification on this issue vide letter F.No. 119/21/2006-CX.3 dated 10-7-2008. The relevant portion is reproduced as under:

"Point No 1. Whether the benefit of exemption would be available to goods/products that unit starts manufacturing after the cut off date for the commencement of commercial production i.e. 31-12-2005.

Comments : There would be two situations. First is that where a unit introduces a new product by installing fresh plant, machinery or capital goods after the cut off date in such a situation, exemption would not be available to this new product. The said product would be cleared on payment of duty, as



applicable, and separate records would be required to be maintained to distinguished production of these products from the products which are eligible for exemption.

The other situation is the one where a unit starts producing some products (after the cut-off date) using the plant and machinery installed upto the cut off date and without any addition to the plant and machinery. For example, in case of plastic moulded products a unit may commence the production of different products simply by changing the mould and dies in that case the unit would be eligible for the benefit of Notification because the plant and machinery used for manufacture has remained the same. In this connection, it is further clarified that for the purpose of computing the original value of plant and machinery, the value of plant and machinery installed on the date of commencement of commercial production only shall be considered.”

8.3 I rely on the Order passed by the Hon'ble CESTAT, Ahmedabad in the case of Bharat Foods Co-Op. Ltd Vs. C.C.E., C. (Adj.), Kutch reported as 2016 (341) E.L.T. 267 (Tri. - Ahmd.), wherein it has been held that,

7. We have considered the rival submissions and perused the records. The short point needs to be addressed is as to whether the appellant are eligible to the benefit of Notification No. 39/2001-C.E., dated 31-7-2001, in respect of 'Acid Oil' manufactured after the cut off date, that is, 31-12-2005. Initially, while rejecting the refund claim on 'Acid Oil', the adjudicating authority observed that the same was manufactured after the cut off date, hence, not eligible. The Id. Commissioner (Appeals), however, had observed that the appellant had failed to submit evidences that the 'Acid Oil' was manufactured out of the same plant and machinery that were installed in their premises before the cut off date. We find that with regard to the objection that 'Acid Oil' being manufactured after the cut off date, hence not eligible to the benefit of notification, is no more *res integra*, in view of the decisions of this Tribunal in the aforesaid cases and also as clarified in the C.B.E. & C. Circular dated 10-7-2008. The only fact that needs to be examined for extending the benefit Notification No. 39/2001-C.E., dated 31-7-2001, to the product 'Acid Oil' is, whether it was manufactured using the same plant and machinery installed prior to 31-12-2005. From the record, we find that a categorical submission has been advanced by the appellant before the Id. Commissioner (Appeals), and evidences of installation of plant and machinery prior to 31-12-2005, capable to manufacture 'Acid Oil' were produced and also before us a categorical submission has been advanced by the Id. Advocate for the appellant that the Acid Oil had been manufactured,



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without addition of any plant and machinery to the existing line of manufacture of goods, after the cut off date 31-12-2005. The observation of the Id. Commissioner (Appeals), on the other hand rests on conjectures and surmises. In these circumstances, we are of the opinion that the appellant had since complied with all the conditions of the notification in respect of the product Acid Oil, hence, eligible to the benefit of Notification No. 39/2001-C.E., dated 31-7-2001.

8.4 I also rely on the Order passed by the Hon'ble CESTAT, Ahmedabad in the case of Commissioner Of Central Excise, Rajkot Vs Meena Agency Pvt. Ltd. reported as 2010 (249) E.L.T. 114 (Tri. - Ahmd.), wherein it has been held that,

“There is no dispute that the machineries were installed and commercial production had started therefore, we are left with the only issue that as to whether the manufactured products of the disputed goods subsequent to 31-12-2005 would make them ineligible for the duty paid in terms of the Notification. For this purpose, clarification issued by the Board have been considered by the Commissioner rightly. Even though we are aware of the fact that Tribunal is not bound by the clarification issued by the Board, we find that in this case clarification issued by the Board is elaborate and expands the scope of Notification and makes intention clear. Basically what emerges from the clarification is that the purpose of the clarification is to ensure that plant and machinery is installed within the duty date, commercial production started and the value of the plant and machinery is as per the requirement of the Notification. The intention behind the Notification is to encourage investment and industrial growth in Kutchh area of Gujarat State and this development should take place within a particular date. Thus going by the intention behind the Notification read with clarification issued by the Board, we find that in this case, except for the fact that these two products produced were at a later date, all other conditions have been fulfilled. What is required to be considered is whether the products have been produced by using the same plant and machinery. We find that the appellants have fulfilled all the conditions of the Notification. Therefore, we do not find any merit in the appeal filed by the Revenue and accordingly reject the same.”

8.5 In view of the discussion made above, I hold that the Respondent was eligible for the benefit of said notification in respect of duty paid on Fully Automatic Washing Machines, Electric Motors (other than 45W & 125W) and parts of Washing Machine. The refund sanctioning authority had correctly sanctioned refund on the said goods. I, therefore, uphold the impugned orders



to that extent.

9. As regards the second issue, I find that the refund sanctioning authority had sanctioned refund of Central Excise duty, Education Cess and Secondary & Higher Education Cess under Notification No. 39/2001-CE dated 31.7.2001, as amended. The Appellant Department has contended that the exemption under the said notification is from payment of Central Excise duty only. Education Cess and Secondary & Higher Education Cess were levied by the Government under Section 91 of the Finance Act, 2004 and Section 136 of the Finance Act, 2007, respectively. While issuing Notification No. 39/2001-CE, the Government had not made any reference to any of the legal provisions/enactments under which Education Cess or Secondary & Higher Education Cess were levied. As such, the exemption under notification No. 39/2001-CE did not cover the levies under Section 91 of the Finance Act, 2004 and Section 136 of the Finance Act, 2007. Further, exemption from basic excise duty would not mean exemption from Education cess also. If the Government had intention to grant exemption from payment of Education cess, exemption from these levies would have been specifically granted.

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

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



and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in Modi Rubber Limited (supra), which has been followed by another three-Judge Bench of this Court in Rita Textiles Private Limited (supra). ”

9.2 By respectfully following the above judgement, I hold that the Respondent is not eligible for refund of Education Cess and Secondary & Higher Education Cess. I, therefore set aside the impugned orders to that extent. The Respondent is required to deposit erroneously sanctioned Education Cess and Secondary & Higher Education Cess.

10. In view of the discussions made above, I partially allow the appeals filed by the Appellant Department and set aside the impugned orders to the extent of sanction of Education Cess and Secondary & Higher Education Cess. The remaining impugned orders are upheld.

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

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

सत्यापित,

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विपुल शाह
अधीक्षक (अपील्स)

Takhilesh Kumar
11 October, 2011
TAKHILESH KUMAR
Commissioner (Appeals)

By R.P.A.D.

To,
M/s Gran Electronics Pvt Ltd
Survey No. 113,
Varsamedi, 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-भचाउ मण्डल, गांधीधाम को आवश्यक कार्यवाही हेतु।
गार्ड फ़ाइल।



