::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-20211064SX000000D508

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/79 /RAJ/2010	330/2009-10	31.12.2009

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

KCH-EXCUS-000-APP-253-2021

आदेश का दिनांक / Date of Order:	29.10.2021	जारी करने की तारीख / Date of issue:	02.11.2021

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. Welspun Power & Steel Ltd.,, Survey No. 650 & 652, Vill.: Varsamedi, Tal.: Anjar, Dist. Kutchh

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 असावा 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 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 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 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 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 Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति 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 माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported 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।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल 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 पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers 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. Welspun Power & Steel Limited, Survey No. 650 & 652, Village - Varsamedi, Taluka: Anjar, Kutch (hereinafter referred to as "Appellant") has filed appeal No. V2/79/RAJ/2010 against Re-Credit Order No. 330/2009-10 dated 31.12.2009 (*hereinafter referred to as "impugned order"*) passed by the Deputy Commissioner, erstwhile Central Excise Division, Gandhidham-Kutch (*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. AAACW5308GXM001. The Appellant was availing benefit of exemption under Notification No. 39/2001-CE dated 31.07.2001, as amended (hereinafter referred to as 'said notification'). As per scheme of the said Notification, exemption was granted by way of refund of Central Excise duty paid in cash through PLA as per prescribed rates and refund was subject to condition that the manufacturer has to first utilize all Cenvat credit available to them on the last day of month under consideration for payment of duty on goods cleared during such month and pay only the balance amount in cash. The said notification was subsequently amended vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008, which altered the method of calculation of refund by taking into consideration the duty payable on value addition undertaken in the manufacturing process, by fixing percentage of refund ranging from 15% to 75% depending upon the commodity. The Appellant had exercised the option of re-credit for the Financial Year 2008-09 in terms of para 2C(c) of the said notification.

2.1 The Appellant had filed annual claim of re-credit for the differential duty paid on clearance of goods during the Financial Year 2008-09 in terms of Para 2.2 of the said Notification. The refund sanctioning authority vide the impugned order sanctioned differential amount of Rs. 1,75,69,696/- and rejected excess claimed amount.

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

(i) The Adjudicating Authority has not appreciated the fact that the appellant is manufacturing the iron and steel products falling under Chapter 72 starting from iron ore in their factory itself; that they have not bought any sponge iron from outside; that they

had only used some scrap for mixing with the factory (captive) produced sponge iron, during an intermediate process of manufacture of MS Billets, TMT Bars etc.; that they had produced all his final products in the factory starting from iron ore and therefore, they are eligible for refund @ 75% of the duty paid through PLA;

(ii) The Adjudicating Authority has allowed 39% of the total duty paid in terms of Entry at Sl. No. 8 of the Notification No. 16/2008-CE dated 27.03.2008; that the said Notification was amended vide another notification No. 33/2008-CE dated 10.06.2008 wherein it was mentioned at Sl. No. 15 the table, that if manufacture starts from iron ore in the same factory for manufacture of iron and steel products failing under Chapter 72 & 73, then the manufacturer will be eligible for refund of 75% of the total duty paid.

(iii) The Adjudicating Authority has failed to appreciate the report of the Superintendent of Central Excise, Gandhidham Range, who has reported in his reports pertaining to the said period that the appellant is manufacturing the final products i.e. MS Billets, MS Round Bars, etc. right from iron or inside their factory itself.

(iv) Their main raw material is iron ore; that they manufactures sponge iron from iron ore, which is captively consumed for manufacture of billets and round bars within the same factory; they also procure MS Scrap from other sources which are used for manufacture of sponge iron; that but the fact remains that they have started his manufacture from iron ore to produce his final products inside their factory only.

(v) He further submitted that in terms of Notification No. 33/2008-CE dated 10.06.2009, there can be only two types of bifurcation (a) Goods produced out of sponge iron made out of iron ore in the factory (specified inputs) - 75% (b) Goods produced out of sponge iron procured from outside (non-specified inputs) - 39%; that as they have manufactured all the sponge iron required for further manufacture of his final products, out of the iron ore in his own same factory.

(vi) They have produced finished goods out of sponge iron manufactured out of the iron ore inside his own factory by adding bought out scrap in it; but the Adjudicating Authority has failed to appreciate the fact that sponge iron which is the intermediate product for manufacture of TMT Bars have been manufactured out of iron ore in the appellant's own factory which is also not disputed by the department.

(vii) Notification No. 33/2008-CE does not allow to bifurcate each and every intermediate product and then calculate the eligibility; that there can be only two bifurcation of their final products, one originating from iron ore (specified input), and one originating from bought out raw material (non-specified inputs).

(viii) As they satisfied all the conditions as prescribed in Notification No. 33/8-CE dated 10.06.2008, they are rightly eligible for refund @ 75% of the total duty, subject to the actual amount of duty paid from PLA, as per Sl. No. 15 of the Table of the said Notification; the Adjudicating Authority is not right in restricting the refund amount to 39% as per Sl. No. 15 of the Table of the said notification.

(ix) 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. The exemption provisions of notification 39/2001 CE dated 31.07.2001, as amended, is also applicable to the Education Cess & Secondary & Higher Secondary Education Cess. Hence, the appellant had rightly claimed refund of Education Cess and of Secondary & Higher Secondary Education Cess. Thus, the impugned refund order rejecting refund of Education Cess and of Secondary & Higher Secondary Education Cess is not legal and sustainable and hence is liable to be set aside to that extent; that he relied upon the decision of (a) Bharat Box Factory Ltd. Vs. CCE - reported in 2007 (06) LCX 0044, (b) Dharmpal Premchand Ltd. Vs. CCE - reported in 2007 (218) ELT 610, (c) decision of Hon'ble Rajasthan High Court in case of Banswara Syntex Limited V/s.

Union of India reported in AIT-2007-459-HC (d) M/s. Sun Pharmaceutical Industries Vs. CCE reported in 2007 (207) ELT 673 (Tri. Del)

4. 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.

5. Hearing in the matter was scheduled in virtual mode through video conferencing on 20.10.2021. Shri R. Subramanya, Advocate, appeared on behalf of the Appellant. He reiterated the submissions made in appeal memorandum and further stated that he would make additional written submission.

5.1 In additional written submission dated 22.10.2021, the grounds raised in appeal memorandum are reiterated and decision of the Hon'ble Gauhati High Court rendered in the case of Topcem India - 2021 (376) ELT 573 is relied upon.

6. I have carefully gone through the facts of the case, impugned order and submissions made by the Appellant in appeal memorandum. The issue to be decided in the present appeal is whether the impugned order has correctly determined differential duty in terms of Para 2.2 of Notification No. 39/2001-CE dated 31.07.2001, as amended 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 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 annual re-credit application for the Financial Year 2008-09 for differential duty paid on clearance of goods in terms of Para 2.2 of the said Notification. The refund sanctioning authority partially rejected the re-credit claim amount vide the impugned order.

8. The Appellant has contended that the refund sanctioning authority erroneously considered rate of value addition of 39%, but they are eligible for refund on MS Billets/MS Ingots/MS Round Bars/TMT Bars @75% of value addition as for manufacture of these products, they had used sponge iron manufactured

out of own iron ore, which is captively consumed along with procured MS Scrap. As they had fulfilled all the conditions prescribed in the Notification No. 33/2008-CE dated 10.06.2018, the appellant is eligible for refund considering value addition of 75%. Hence, the rate of value addition mentioned in the impugned re-credit order is not legal and sustainable.

8.1 I find that the issue regarding eligibility of refund of duty @75% under Sl. No. 15 of Table Para 2 of Notification No. 39/2001-CE dated 31.7.2001, as amended for the finished goods manufactured by the Appellant from non-specified input is decided against the Appellant vide Order-in-Appeal No. KCH-EXCUS-000-APP-248-2021 dated 26.10.2021 passed in Appellant's own case for the period from April 2008 to October, 2009. The relevant portion of the order passed by the Commissioner (Appeals), Rajkot is reproduced as under:

> "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

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

9.1 It is pertinent to examine relevant findings recorded by the sanctioning authority in the impugned order, which are reproduced as under:

> "The Superintendent of Central Excise Range, Kharirohar vide above cited verification reports has submitted the duty payments for the goods falling under Chapter 72 manufactured / cleared by the claimant, under the exemption Notification No. 39/2001-CE dated 31.07.2001 as amended, from March, 2008 (sic) to October, 2009 (both months inclusive) and computation of re-credit amount in accordance with the Notification No. 39/2001-CE dated 31.07.2001 as amended. As per the CBEC Circulars/Letter F. No. 101/18/2008-CX-3 dated 15.10.2008 and further letter F. No. IV/16-06/MP/2006 dated 11.11.2008 for clarification issued by Joint Commissioner, Central Excise, HQ, Rajkot higher rate of value addition of 75% for the good, when goods are manufacturing starting from specified inputs in the same factory. The claimant manufacturer Sponge Iron and use same for further manufacture of Ingots/Bills along with bought out scrap. As per the circular benefit of 75% is admissible on the Sponge Iron captively consumed subject to the condition that separate product records showing the quantity produced starting from specified inputs and from other bought out inputs is furnished by the claimant. The claimant has produced the separate records of production and clearance of the goods produced out of own produced Sponge and bought out Scrap along with the Certificate of the Chartered for the respective months under consideration, but it seems that all the goods have not been manufactured exclusively starting from Iron Ore only within the same factory. Hence, the claim is restricted to 75% on goods manufactured out of specified Input and 39% on goods produced/cleared out of non-specified input. … …"

9.2 Considering the above findings as well as table showing detailed calculation in the impugned order, I find that the sanctioning authority determined refund amount by considering value addition @39% in respect of finished goods, which were manufactured out of non-specified input i.e. bought out scrap.

Apparently, scrap is 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 input. I also take note of the clarification issued by the Board vide letter F. No. 101/18/2008-CX.3 dated 15.10.2008, which is reproduced as under:

> "Issue: Rate of refund in cases where higher rate is prescribed but final product is not manufactured solely from prescribed raw material or where at intermediate stage other material is also used.
>
> Clarification: Notification prescribes a higher rate of value addition of 75% for specified goods when the goods are manufactured starting from the specified inputs in the same factory. The intention of the amendment is to prescribe a higher rate of value addition for the units using non cenvatable raw materials like mineral ores and agriculture product. Therefore, if a unit is not manufacturing the final product starting from the specified raw material in the same factory then the higher rate should not be applicable to him. Therefore, if ingots are manufactured out of bought out Scrap / Sponge iron the benefit of higher rate cannot be given for the quantity of ingot manufactured out of non-specified input. However, the benefit of higher rate would be available only for the quantity of final products which have been manufactured starting from the specified inputs. Therefore, if a unit manufactures the final product (say iron and steel ingot) out of specified inputs (say iron ore) and also from bought out material (say scrap / sponge iron), in that case, the assessee needs to keep separate production records showing the quantity produced starting from specified inputs (say iron ore) and other bought out inputs and the higher rate shall be applicable only for the quantity of products manufactured from specified input. A certificate from Chartered Engineer may also be produced by the assessee for this purpose. "

9. The Appellant has further contended that rejection of Education Cess and Secondary and Higher Education Cess from the refund claimed under Notification No. 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. The exemption provisions of Notification 39/2001 CE dated 31.07.2001, as amended, is also applicable to the Education Cess & Secondary & Higher Secondary Education Cess.

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 appellant is not eligible for refund of Education Cess and Secondary & Higher Education Cess.

10. I have examined the relied upon decision of the Hon'ble Gauhati High Court rendered in the case of Topcem India - 2021 (376) ELT 573. In the said case, refund of Education Cess and Secondary and Higher Education Cess was sanctioned to the party on the basis of judgment of the Apex Court rendered in the case of SRD Nutrients Pvt. Ltd. Subsequently, Show Cause Notices was issued to the party for recovery of said refund on the grounds that judgment of the Apex Court in the case of SRD Nutrients Pvt. Ltd was subsequently held to be *per incuriam* by the Apex Court in the case of M/s. Unicorn Industries and hence, the refunds earlier granted to the petitioner on the strength of the judgment in M/s. SRD Nutrients Pvt Ltd had become erroneous refunds. In that factual backdrop, the Hon'ble High Court has held that,

> "57. From the judgment of the Apex Court discussed above, it is evident that a "Judgment" decides the rights between the parties to a lis. Once a Court renders a judgment on the issues viz-a-viz the rights of the parties, such a

judgment can only be re-visited by the established judicial norms, namely, a review or an appeal or revision in some cases. Unless, the findings of a Court arrived at by way of legal proceeding is sought to be reopened in the manner discussed above, the operative portions in the judgment viz-a-viz parties will attain finality. A subsequent change in law arrived at by a Court by way of the separate judicial proceeding, wherein the earlier law laid down has been held to be not a good law or that the earlier law will cease to have precedential value, will not ipso facto reverse the position of the party viz-a-viz their rights which were declared and concluded by way of an earlier judicial proceedings."

10.1 However, facts involved in the present case are totally different. In the present case, the refund sanctioning authority had not sanctioned refund of Education Cess and Secondary and Higher Education Cess, which has been challenged by the Appellant by way of filing the present appeal. Since, the matter is not finally settled and issue is yet to be decided, the Apex Court's judgement passed in the case of Unicorn Industries - 2019 (370) ELT 3 (SC) *supra* will be applicable to the present case. I, therefore, hold that the relied upon case law of Topcem India is not applicable in the present case.

11. In view of the discussion made 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.

29 October, 2021.

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To,
M/s Welspun Power & Steel Limited,
Survey No. 650 & 652,
Village 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।
4) गार्ड फ़ाइल।