



::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

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा:-

DIN-20211264SX000000D777

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/29 /GDM /2021	06/UrbanRef/2020-21	23-02-2021

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

KCH-EXCUS-000-APP-263-2021

आदेश का दिनांक / Date of Order:	29.12.2021	जारी करने की तारीख / Date of issue:	30.12.2021
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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 मूलित: /
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. Synergy Seaports Private Limited, Office No. 201A, 2nd Floor, Rajkamal-1, Plot No. 34B, Ward 12B, Gandhidham, Kutch (Gujarat)

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 अपीलार्थ न्यायाधिकरण क प्रांत अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 का धारा 35B क 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:-

(ii) बर्गीकरण 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.

(iii) उपरोक्त परिच्छेद 1(a) में ब्रह्मण्ड गण अपीलार्थ के अलावा शेष सभी अपीलार्थ सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (मिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहामाली 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 मांग, व्याज की मांग और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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 मार्बलिन 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/- रुपये 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 नियमवारी, 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 मांग, व्याज की मांग और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम 5 लाख रुपये या 50 लाख रुपये तक अथवा 50 लाख रुपये 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 मार्बलिन 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/- रुपये 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/-



- (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 सकती 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 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 (सेस्टैट) 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 करोड़ रूप से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनबेट जमा की ली गई गलत राशि
(iii) सेनबेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन 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 कोपनरीक्षण 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 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 छूटी 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 निर्यात की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील)नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संशेषण 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 O.I.O 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 चाहिए। इस तथ्य के होते हुए भी की लिखा पडी 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 टिकट 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 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 Synergy Seaport Ltd, Gandhidham (*hereinafter referred to as "Appellant"*) has filed Appeal No. V2/29/GDM/2021 against Order-in-Original No. 6/UrbanRef/2020-21 dated 23.2.2021 (*hereinafter referred to as 'impugned order'*) passed by the Assistant Commissioner, Central GST & Central Excise, Gandhidham Urban Division, Gandhidham Commissionerate (*hereinafter referred to as 'refund sanctioning authority'*).

2. The facts of the case, in brief, are that the appellant was engaged in the providing Shipping/Steamer Agent Service to foreign shipping lines and was registered with Service Tax Department having Registration No. AAPCS1210GSD001.

2.1. The services of transportation of goods by a vessel from a place outside India upto Custom station was earlier exempt from levy of service tax by virtue of Exemption Notification No. 25/2012-ST dated 20.6.2012. The said exemption was withdrawn vide Notification No. 1/2017-ST dated 12.1.2017. Further, Notification No. 30/2012-ST dated 20.6.2012 was amended vide Notification No. 3/2017-ST dated 12.1.2017 to provide that service tax was to be discharged on ocean freight service by Shipping line or their agents in India on reverse charge basis with effect from 22.1.2017. Notification No. 30/2012-ST dated 20.6.2012 was further amended vide Notification No. 15/2017-ST dated 13.4.2017 to provide that service tax on ocean freight service was to be discharged by importer of goods on reverse charge basis.

2.2 The Appellant had filed refund claim for an amount of Rs. 1,85,79,431/- before the refund sanctioning authority under Section 11B of the Central Excise Act, 1944 on 23.11.2020 on the basis of decision rendered by the Hon'ble Gujarat High Court in the case of SAL Steel Ltd reported as 2020 (37) GSTL 3 (Guj.).

3. The refund sanctioning authority observed that the refund claim was filed beyond one year from the relevant date specified under Section 11B of the Central Excise Act, 1944 and accordingly rejected the refund claim vide the impugned order on the ground of limitation.

4. Being Aggrieved, the Appellant has filed the present appeal, *inter alia*, on the grounds that,

- (i) It is no longer a matter of dispute that the levy of service tax on ocean freight is ultra vires the Finance Act, 1994 and is an unconstitutional



levy in violation of Article 265 of the Constitution of India. Thus, the amount of INR 1,85,79,431/- paid by them towards service tax on ocean freight during the relevant period is collected by the Department without any authority of law and is liable to be refunded to them. However, the impugned order has rejected the refund claim on the grounds that the Appellant was not a party to the judgment passed by the Hon'ble High Court in the case of M/s Sal Steel Ltd. and that the claim of the Appellant is time barred.

(ii) It is settled law that once any provision is struck down as unconstitutional by the Hon'ble High Court or the Hon'ble Supreme Court of India, the same is deemed to have never existed. Thus, the Appellants are eligible for the refund of service tax paid on ocean freight during the entire period prior to the judgment of the Hon'ble High Court of Gujarat in the case of M/s SAL Steel Ltd.

(iii) That the allegation of the Department in the show cause notice that the Appellant was not eligible to claim refund since they are not a party to the judgment passed in M/s SAL Steel Ltd. is bad in law. The decision passed by the Court in M/s SAL Steel Ltd. is applicable in rem and the mere fact that the Department is in the process of filing an appeal before the Supreme Court is not a reason for not following a precedent decision passed by the High Court.

(iv) The Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd- 1997 (89) ELT 247 has held that once a levy has been held to be unconstitutional, a refund claim of such tax is outside the purview of the enactment as the Act itself cannot provide for what it does not envisage. Thus, the provisions of limitation as prescribed under Section 11B of the Central Excise Act, 1944 as made applicable under Section 83 of the Finance Act, 1994 will not be applicable to the refund application of the Appellant. Since the amount has been collected by the State without any authority of law in violation of Article 265 of the Constitution of India, it casts an obligation on the State to refund such amount and a right to refund arises in terms of Article 265 of the Constitution of India. The Hon'ble Supreme Court has further held that in such cases, the period of limitation for claiming refund is required to be calculated by taking into account the principle underlying Section 17(1)(c) of the Limitation Act, 1963 and not in terms of the enactment under which the tax was paid.



Section 17(1)(c) of the Limitation Act, 1963 prescribes the limitation period for filing of a suit or application for any relief arising from the consequences of a mistake and the same is prescribed as 3 years from the date of knowledge of the mistake. In the present case, they realized that the amount of service tax paid on ocean freight was a mistake only upon the impugned entries of the Notifications being struck down by the Hon'ble High Court as unconstitutional by its order dated 6.9.2019 in the case of M/s SAL Steel Ltd. Thus, the refund claim of the Appellants seeking refund is well within the limitation period of 3 years prescribed under the Limitation Act, 1963 and relied upon case law of Joshi Technologies International - 2016 (339) ELT 21 (Guj.).

5. Hearing in the matter was conducted on 17.12.2021 in virtual mode through video conferencing with prior consent of the Appellant. Ms. Devanshi Sharma, Advocate, appeared on behalf of the Appellant. She reiterated the submissions made in appeal memorandum.

6. I have carefully gone through the facts of the cases, the impugned order, the appeal memorandum and the submissions made during the personal hearing. The issue to be decided in the present appeal is whether rejection of refund claim in this case by the refund sanctioning authority on the ground of limitation is correct, legal and proper or not.

7. On perusal of the records, I find that the Appellant had filed refund claim under Section 11B of the Act before the refund sanctioning authority on the ground that they had erroneously discharged service tax on ocean transportation service. The refund claim was rejected by the refund sanctioning authority on the ground of limitation vide the impugned order.

7.1 The Appellant has contended that levy of service tax on ocean freight is *ultra vires* the Finance Act, 1994 and is an unconstitutional levy in violation of Article 265 of the Constitution of India. Thus, the amount of Rs. 1,85,79,431/- paid by them towards service tax on ocean freight during the relevant period is collected by the Department without any authority of law and is liable to be refunded to them. However, their refund claim was rejected as time barred.

8. I find that the refund claim was rejected by the refund sanctioning authority on limitation under Section 11B of the Central Excise Act, 1944. Since, the refund claim was rejected on limitation, it would be pertinent to examine



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whether the doctrine of limitation prescribed under Section 11B *ibid* is applicable to the refund claim or not. I find that refund claim under Section 11B *ibid* is required to be filed within one year from the relevant date i.e. date of deposit of service tax in the present case. The relevant provisions of Section 11B are reproduced as under:

“SECTION 11B. Claim for refund of duty and interest, if any, paid on such duty — (1) Any person claiming refund of any duty of excise and interest, if any, paid on such duty may make an application for refund of such duty and interest, if any, paid on such duty to the Assistant Commissioner of Central Excise or Deputy Commissioner of Central Excise before the expiry of one year from the relevant date in such form and manner as may be prescribed and the application shall be accompanied by such documentary or other evidence (including the documents referred to in section 12A) as the applicant may furnish to establish that the amount of duty of excise and interest, if any, paid on such duty in relation to which such refund is claimed was collected from, or paid by, him and the incidence of such duty and interest, if any, paid on such duty had not been passed on by him to any other person :

... ..”

8.1 I find that service tax was deposited by the Appellant during the period from 22.1.2017 to 31.10.2017 and refund claim was filed on 23.11.2020 i.e. beyond one year from date of deposit of service tax. Thus, the refund claim was rightly rejected as barred by limitation provided under Section 11B *ibid*. It appears that the Appellant had filed refund claim apparently after pronouncement of favourable decision by the Hon'ble Gujarat High Court on 6.9.2019 in Special Civil Application No. 20785/2018 filed by M/s SAL Steel Ltd reported as 2020 (37) G.S.T.L. 3 (Guj.). Even in such a situation, where refund claim is filed on the basis of favourable decision rendered in some other assessee's case, it is a settled position of law that refund claim is to be filed within limitation prescribed under the respective Act, as held by the Hon'ble Supreme Court in the case of Mafatlal Industries Ltd reported as 1997 (89) E.L.T. 247 (S.C.), wherein it has been held that,

“70. *Re : (II)* : We may now consider a situation where a manufacturer pays a duty unquestioningly - or he questions the levy but fails before the original authority and keeps quiet. It may also be a case where he files an appeal, the appeal goes against him and he keeps quiet. It may also be a case where he files a second appeal/revision, fails and then keeps quiet. The orders in any of the situations have become final against him. Then what happens is that after an year, five years, ten years, twenty years or even much later, a decision is rendered by a High Court or the Supreme Court in the case of another person holding that duty was not payable or was payable at a lesser rate in such a case. (We must reiterate and emphasize that while dealing with this situation we are keeping out the situation where the provision under which the duty is levied is declared unconstitutional by a court; that is a separate category and the discussion in this paragraph does not include that situation. In other words, we are dealing with a case where the duty was paid on account of mis-construction, mis-application or wrong interpretation of a provision of law, rule, notification or regulation, as the case may be.) Is it open to the manufacturer to say that the decision of a High Court or the Supreme Court, as the case may be, in the case



of another person has made him aware of the mistake of law and, therefore, he is entitled to refund of the duty paid by him? Can he invoke Section 72 of the Contract Act in such a case and claim refund and whether in such a case, it can be held that reading Section 72 of the Contract Act along with Section 17(1)(c) of the Limitation Act, 1963, the period of limitation for making such a claim for refund, whether by way of a suit or by way of a writ petition, is three years from the date of discovery of such mistake of law? *Kanhaiyalal* is understood as saying that such a course is permissible. Later decisions commencing from *Bhailal Bhai* have held that the period of limitation in such cases is three years from the date of discovery of the mistake of law. With the greatest respect to the learned Judges who said so, we find ourselves unable to agree with the said proposition. Acceptance of the said proposition would do violence to several well-accepted concepts of law. One of the important principles of law, based upon public policy, is the sanctity attaching to the finality of any proceeding, be it a suit or any other proceeding. Where a duty has been collected under a particular order which has become final, the refund of that duty cannot be claimed unless the order (whether it is an order of assessment, adjudication or any other order under which the duty is paid) is set aside according to law. So long as that order stands, the duty cannot be recovered back nor can any claim for its refund be entertained.

Once this is so, it is un-understandable how an assessment/adjudication made under the Act levying or affirming the duty can be ignored because some years later another view of law is taken by another court in another person's case. Nor is there any provision in the Act for re-opening the concluded proceedings on the aforesaid basis. We must reiterate that the provisions of the Central Excise Act also constitute "law" within the meaning of Article 265 and any collection or retention of tax in accordance or pursuant to the said provisions is collection or retention under "the authority of law" within the meaning of the said article. In short, no claim for refund is permissible except under and in accordance with Rule 11 and Section 11B. An order or decree of a court does not become ineffective or unenforceable simply because at a later point of time, a different view of law is taken. If this theory is applied universally, it will lead to unimaginable chaos.

... .. We are, therefore, of the clear and considered opinion that the theory of mistake of law and the consequent period of limitation of three years from the date of discovery of such mistake of law cannot be invoked by an assessee taking advantage of the decision in another assessee's case. All claims for refund ought to be, and ought to have been, filed only under and in accordance with Rule 11/Section 11B and under no other provision and in no other forum. An assessee must succeed or fail in his own proceedings and the finality of the proceedings in his own case cannot be ignored and refund ordered in his favour just because in another assessee's case, a similar point is decided in favour of the manufacturer/assessee. (See the pertinent observations of Hidayatullah, CJ. in *Tilokchand Motichand* extracted in Para 37). The decisions of this Court saying to the contrary must be held to have been decided wrongly and are accordingly overruled herewith."

(Emphasis supplied)

9. The Appellant contended that the Hon'ble Supreme Court in the case of *M/s Mafatlal Industries Ltd- 1997 (89) ELT 247* has held that once a levy has been held to be unconstitutional, a refund claim of such tax is outside the purview of the enactment and hence, the provisions of limitation as prescribed under Section



11B of the Act will not be applicable to their refund claim. The Appellant further contended that in such cases, the period of limitation for claiming refund is required to be calculated by taking into account the principle underlying Section 17(1)(c) of the Limitation Act, 1963, which prescribes 3 years from the date of knowledge of the mistake. In the present case, they realized that the amount of service tax paid on ocean freight was a mistake only upon the impugned entries of the Notifications being struck down by the Hon'ble High Court as unconstitutional by its order dated 6.9.2019 in the case of M/s SAL Steel Ltd. Thus, the refund claim of the Appellants seeking refund is well within the limitation period of 3 years prescribed under the Limitation Act, 1963 and relied upon case law of Joshi Technologies International - 2016 (339) ELT 21 (Guj.).

9.1 I find that in the said case of M/s Mafatlal Industries Ltd, the Hon'ble Supreme Court has observed at Para 108 of the judgement as under:

“Where, however, a refund is claimed on the ground that the provision of the Act under which it was levied is or has been held to be unconstitutional, such a claim, being a claim outside the purview of the enactment, can be made either by way of a suit or by way of a writ petition.”

9.2 I find that in the present case the Appellant had filed refund claim after pronouncement of decision of the Hon'ble Gujarat High Court in the case of M/s SAL Steel Ltd wherein the Hon'ble Court has held Rule 2(1)(d)(EEC) of the Service Tax Rules, 1994 and Notification Nos. 15/2017-S.T. and 16/2017-S.T. both dated 13.4.2017 seeking to levy and collect service tax on ocean transportation service rendered and consumed outside India as ultra vires Sections 66B, 67 and 94 of the Finance Act, 1994. Whereas unconstitutional levy is one where a provision of the Act under which tax is levied is struck down as unconstitutional for transgressing constitutional limitations. So, this is not a case involving an unconstitutional levy as contemplated by the Hon'ble Supreme Court in the case cited *supra*. Even in case of unconstitutional levy, refund claim is to be filed by way of suit or writ petition, as held by the Hon'ble Supreme Court in the case of M/s Mafatlal Industries Ltd *supra*. I, therefore, discard the contention of the Appellant being devoid of merit.

10. I have examined the relied upon decision of the Hon'ble Gujarat High Court rendered in the case of Joshi Technologies International - 2016 (339) ELT 21 (Guj.). I find that the said decision was rendered by the Hon'ble High Court by invoking powers vested under Article 226 of the Constitution of India in writ jurisdiction whereas this appellate authority is a creature of statute and has to function within the ambit of the statute which has created it and cannot assume powers and jurisdictions of constitutional courts such as the Hon'ble High Court. I,



therefore, cannot condone delay in filing refund application, ignoring the limitation prescribed under Section 11B of the Act. My views are supported by the Order of the Larger Bench of the Hon'ble CESTAT, Chandigarh passed in the case of Veer Overseas Ltd. reported as 2018 (15) G.S.T.L. 59 (Tri. - LB), wherein it has been held that,

“8. Here it is relevant to note that in various cases the High Courts and the Apex Court have allowed the claim of the parties for refund of money without applying the provisions of limitation under Section 11B by holding that the amount collected has no sanctity of law as the same is not a duty or a tax and accordingly the same should be returned to the party. We note such remedies provided by the High Courts and Apex Court are mainly by exercising powers under the Constitution, in writ jurisdiction. It is clear that neither the jurisdictional service tax authority nor the Tribunal has such constitutional powers for allowing refund beyond the statutory time-limit prescribed by the law. Admittedly, the amount is paid as a tax, the refund has been claimed from the jurisdictional tax authorities and necessarily such tax authorities are bound by the law governing the collection as well as refund of any tax. There is no legal mandate to direct the tax authority to act beyond the statutory powers binding on them. The Hon'ble Supreme Court in *Mafatlal Industries Ltd. (supra)* categorically held that no claim for refund of any duty shall be entertained except in accordance with the provisions of the statute. Every claim for refund of excise duty can be made only under and in accordance with Section 11B in the forms provided by the Act.

(Emphasis supplied)

11. In view of above discussion and findings, I hold that the refund claim filed beyond limitation prescribed under Section 11B of the Act was correctly rejected by the refund sanctioning authority vide the impugned order.
12. In view of above, I uphold the impugned order and reject the appeal.
13. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
13. The appeal filed by the appellant is disposed off as above.

सत्यापित,

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विपुल शाह
अधीक्षक (अपील्स)

Akhil
29th December, 2021
(AKHILESH KUMAR)
Commissioner (Appeals)



By R.P.A.D.

<p>To, M/s Synergy Seaport Pvt Ltd Office No. 201A, 2nd floor, Rajkaml-1, Plot No. 348, Ward 12B, Gandhidham, District Kutch.</p>	<p>सेवा में, मेसर्स सिनर्जी सीपोर्ट प्राइवेट लिमिटेड कार्यालय संख्या 201ए, दूसरी मंजिल, राजकमल-1, प्लॉट नंबर 348, वार्ड 12बी, गांधीधाम, जिल्ला कच्छ ।</p>
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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, गांधीधाम (शहरी) मण्डल, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।

