::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-20220164SX000071287A

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/28/GDM/2021	**44/DC/Anjar Bhachau/20-21**	**17/3/2021**

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

KCH-EXCUS-000-APP-264-2021-22

आदेश का दिनांक / Date of Order:	**28.01.2022**	जारी करने की तारीख / Date of issue:	**31.01.2022**

श्रीअखिलेश 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 theAppellant&Respondent :-

M/s. Gallant Metal Limited (Survey No. 176,Near Toll Gate,), Village-Samakhiyali,Taluka-Bhachau, Dist: Kutch, .

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधीकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क आधीनियम ,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 dutydemand/interest/penalty/refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक 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 is more Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम,1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissionerauthorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

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

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

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

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार कोपुनरीक्षण आवेदन :**
Revision application to Government of India:

इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामला में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 केडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढी कार्य मे बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एके 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 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 Gallant Metal Ltd, Kutch (hereinafter referred to as "Appellant") has filed Appeal No. V2/28/GDM/2021 against Order-in-Original No. 44/DC/Anjar-Bhachau/2020-21 dated 17.03.2021 (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, Central GST, Anjar-Bhachau Division, Gandhidham Commissionerate (hereinafter referred to as 'adjudicating authority').

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of excisable goods falling under Chapter No. 72 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AACCG2934JXM001. The Appellant was availing benefit of exemption under Notification No. 39/2001-CE dated 31.07.2001, as amended (hereinafter referred to as 'said notification'). As per scheme of the said Notification, exemption was granted by way of refund of Central Excise duty paid in cash through PLA as per prescribed rates and refund was subject to condition that the manufacturer has to first utilize all Cenvat credit available to them on the last day of month under consideration for payment of duty on goods cleared during such month and pay only the balance amount in cash.

2.1 The appellant had filed refund claims for the Central Excise duty paid through PLA for the excisable goods cleared during the Months of August-2010, September-2010 and October, 2010. The Assistant Commissioner, erstwhile Central Excise, Gandhidham Division vide his various orders passed during F.Y. 2010-11 sanctioned refund of Central Excise duty but rejected the claims of Education Cess and Secondary and Higher Education Cess.

2.2 Being aggrieved, the Appellant filed appeals before the then Commissioner (Appeals), Central Excise, Rajkot, who vide his Order-in-Appeal No. KCH-EXCUS-000-APP-235 TO 237-2018-2019 dated 31.12.2018 allowed the appeals by relying upon the Hon'ble Supreme Court's judgement passed in the case of SRD Nutrients Pvt. Ltd. - 2017 (355) E.L.T. 481 (SC). In pursuance of the said Order-in-Appeal, the Appellant was sanctioned refund totally amounting to Rs. 12,17,643/- vide Refund Order No. 30/Refund/2018-19 dated 20.2.2019.

2.3 Subsequently, the Appellant was issued Show Cause Notice No. IV/9-7/SCN/Gallant/Anjar Bhachau/20-21 dated 7.10.2020 for recovery of erroneously sanctioned refund in view of judgment dated 6.12.2019 passed by

the Hon'ble Supreme Court in the case of Unicorn Industries - 2019 (370) ELT 3.

2.4 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order, who confirmed demand of Rs. 12,17,643/- under Notification No. 39/2001-CE dated 31.7.2001, as amended read with Sections 11A of the Central Excise Act, 1944, along with interest under Section 11B of the Act.

3. Being aggrieved, the Appellant has preferred the present appeal contending, *inter-alia*, as under:

(i) It is submitted that once Commissioner (Appeals), Central Excise & GST, Rajkot, vide OIA No., KCH-EXCUS-000-APP-235-to 237-2018-2019, dated 31.12.2018, has held the matter, in their favour, the said proceedings cannot be conducted again by issuance of Show Cause Notice, for the same matter. It is also not under the domain of Assistant Commissioner, to review the Order, passed by Commissioner (Appeals), Central Excise & GST, Rajkot, on the ground that Commissioner (Appeals), Central Excise & GST, has not passed Order, considering all points, referred in Show Cause Notice/impugned Order-in-Original. One Authority, cannot be allowed to say in a collateral proceedings that what was done by another Authority, was an erroneous thing. In other words, it is submitted that the Assistant Commissioner, is not legally empowered to review the Order passed by Commissioner (Appeals), Central Excise, Rajkot, and therefore, the impugned Order is liable to be set-aside.

(ii) It is also not permissible to say that the Refund amounting to Rs. 12,17,643 pursuant to Order-in-Appeal No., KCH-EXCUS000-APP-235-to-237-2018-2019, dated 31.12.2018, passed by the Assistant Commissioner, CGST, Anjar-Bhachau Division, vide Order-in-Original No., 30/Refund/2018-19, dated 20.2.2019, sanctioned Refund, in compliance of Order-in-Appeal No., KCHEXCUS-000-APP-235-to-237-2018-2019, dated 31.12.2018, passed by Commissioner (Appeals), Central Excise & GST, Rajkot. These Orders dated 31.12.2018, passed by Commissioner (Appeals),Central Excise & GST, Rajkot and dated 20.2.2019, passed by the Assistant Commissioner, CGST, Anjar-Bhachau Division, have attained finality. It is settled principle of law that without reviewing the Order by any higher Appellate Authority, the Adjudicating Authority, on his own, cannot review his own Order,

as after passing initial Order, the Adjudicating Authority becomes, functus officio and cannot lay his hands on the same matter as held in the case of Eveready Industries Ltd -2016 (337) E.L.T. 189 (MAD).

(iii) This issue is no longer res integra and stand decided by the Hon'ble Gauhati High Court in the case of Topcem India - 2021 (376) E.L.T. 573 (Gau.) and also by the Hon'ble Tripura High Court in the case of Tripura Ispat - 2021-VIL-45-TRI-CE.

4. Personal hearing in the matter was scheduled on 17.12.2021 and 30.12.2021. The Appellant vide letter dated 24.12.2021 waived the requirement of Personal Hearing and requested to decide the case on the basis of submission made in their appeal memorandum.

5. I have carefully gone through the facts of the case, impugned order and submissions made by the appellant in grounds of appeal. The issue to be decided in the present case is whether the impugned order confirming demand of Rs. 12,17,643/- under the provisions of Notification No. 39/2001-CE dated 31.7.2001, as amended, read with Section 11A of the Central Excise Act, 1944, along with interest under Section 11B of the Act, is correct, legal and proper or not.

6. On perusal of records, I find that the refund claims filed by the Appellant under Notification No. 39/2001-CE dated 31.7.2001, as amended, were restricted by the refund sanctioning authority by denying the Education Cess and Secondary and Higher Education Cess involved in the claim. On an appeal, the then Commissioner(Appeals), Central Excise, Rajkot held that the Appellant was eligible for refund of Education Cess and Secondary and Higher Education Cess by relying upon the judgment of SRD Nutrients Ltd. The Appellant was sanctioned refund totally amounting to Rs. 12,17,643/-. However, demand Show Cause Notice was issued to the Appellant for recovery of said refund. The impugned order confirmed demand considering the said sanction of refund as erroneous based on subsequent Apex Court's judgment passed in the case of Unicorn Industries - 2019 (370) ELT 3 (SC).

6.1 The Appellant has contended that Order-in-Appeal dated 31.12.2018 and refund Order dated 20.2.2019 have attained finality. It is settled principle of law that without reviewing the Order by any higher Appellate Authority, the Adjudicating Authority, on his own, cannot review his own Order, as after

passing initial Order, the Adjudicating Authority becomes, *functus officio* and cannot lay his hands on the same matter. The Appellant further contended that the issue is not more res integra and stand decided by the Hon'ble Gauhati High Court in the case of Topcem India - 2021 (376) E.L.T. 573 (Gau.).

7. I find that the Appellant was sanctioned refund of Education Cess and Secondary and Higher Education Cess pursuant to Order-in-Appeal dated 31.12.2018. The said Order was admittedly not challenged by the Department before higher appellate forum. Further, the refund Order dated 20.2.2019 under which the refund of Cess was sanctioned to the Appellant has also not been challenged before higher appellate authority. In absence of any contrary facts brought on records by the adjudicating authority, it is evident that both Orders i.e. Order-in-Appeal dated 31.12.2018 and Refund Order dated 20.2.2019, have attained finality. In that backdrop of factual position, initiation of recovery proceedings by way of issuance of demand Show Cause Notice based on subsequent judgement of the Apex Court passed in the case of Unicorn Industries, is bad in law and not sustainable. It is settled position of law that the proceedings which attained finality cannot be reopened based on subsequent favourable judgment. I rely on the decision rendered by the Hon'ble Guahati High Court in the case of M/s TopCem India reported as 2021 (376) E.L.T. 573 (Gau.), wherein the Hon'ble Court, in identical facts, has held that,

> "52. From the Judgments discussed above, it is seen that the term "erroneous" any error deviating from law. A change of law subsequently would not make an action taken earlier by Quasi Judicial Authority in terms of law as it stood then, to be held to be erroneous so as to enable the Departmental Officer to invoke powers under Section 11A of the Central Excise Act. On perusal of Section 11A reveals that the power under Section 11A for recovery of duties not levied or not paid or short levied or short paid or erroneously refunded will be available to the departmental Officer only on the decisions mentioned in sub-section (4) unless the concerned departmental Officer is satisfied that the refund granted earlier was because of any or all of the conditions mentioned under sub-section (4), the refunds cannot be treated to be erroneous. The mandate of section requires the departmental Officer to apply its mind and only upon satisfaction of the conditions mentioned under sub-section (4) of Section 11A can any refund granted earlier be treated to have been erroneously.
>
> 53. The Department proceeded to issue, the impugned demand-cum-show cause notices on the premise that once the judgment on the basis of which the refunds were granted have been held to be *per incuriam,* the refunds sanctioned/granted earlier will become unavailable to the petitioners because of the change in law and, therefore, the same will be an erroneous refund enabling the Department to invoke its statutory powers under Section 11A read with Section 11AA of the Central Excise Act, 1944. What cannot be lost sight of is that the Department sanctioned the refunds demanded/claimed by the petitioners on the basis of the Judgment in *SRD Nutrients* without any demur. The

contention of the departmental counsel that the refunds sanctioned become erroneous by virtue of the Apex Court holding the judgment of *SRD Nutrients* to be rendered *per incuriam* as the still earlier Judgments of the Apex Court rendered in *Modi Rubber* (supra) and *Rita Textile* (supra) were not considered, cannot accepted. It is not disputed that pursuant to the judgment of the *SRD Nutrients*, a review application was filed by the Department and which was dismissed on 10-7-2018.

54. As such a perusal of the law discussed above, it can be held that the concerned departmental Officer exercising power under Section 11A of the Central Excise Act must arrive at finding that the earlier order/refunds as have been granted in the present proceedings, were contrary to the law and therefore, erroneous and that the same are required to be reopened or recovered by invoking the powers under Section 11A. The refunds were granted by the Department in terms of the Judgment in "*M/s. SRD Nutrients Private Limited*" (supra). As discussed above, the Department accepted the Judgment of the Apex Court in "*M/s. SRD Nutrients Private Limited* (supra)" and sanctioned the refunds. As such, the contention of the Department that the refunds granted earlier were erroneous and could be recovered under Section 11A cannot be accepted. The grounds urged by the Department supporting impugned show cause notices do not satisfy the requirements of Section 11A(4). The Division Bench of this Court in *Shri Rajendra Singh* (supra) and *Victor Cane Industries* (supra) are binding precedents and I respectfully concur with the same. Therefore, the refunds granted earlier cannot be considered "erroneous" to invoke the powers under Section 11A of the Central Excise Act, 1944 only on the premise that the Judgment of the Apex Court in "*M/s. SRD Nutrients Private Limited*" (supra) held to be "*per incuriam*" by the Apex Court subsequently in "*M/s. Unicorn Industries Private Limited*".

55. Binding effect of a Judgment and Principle of res judicata

It is also not disputed that in respect of the some of the petitioners since the refunds were not granted, writ petitions were filed before this Court and this Court by orders on different dates held that the petitioners were entitled to refunds claimed in terms of the judgment of the Apex Court in "*M/s. SRD Nutrients Private Limited*" (supra). There is no appeal or review filed in respect of these orders also which have been since attained finality. Accordingly, the refunds which were granted by the Department were pursuant to judicial proceedings before the Apex Court and/or the Gauhati High Court, the refunds sanctioned/released were on the basis of orders passed by the Apex Court and/or the Gauhati High Court. Consequently, once a judgment or judicial order is passed by a Court of law against the Department, the remedy available to the Department is by way of an appeal to a higher Court or review. Since, the review filed before the Supreme Court were dismissed and since no further appeal and/or review was passed against the different orders passed by the Gauhati High Court, the *lis* between the parties, namely, the petitioners and the Department of Central Excise has attained finality in respect of the issues which are now sought to be re-opened by way of the demand-cum-show cause notice impugned in the present proceedings. Such a procedure sought to be invoked by the Department is completely alien in law as established by the constitution as well as the law laid down by the Apex Court in a catena of judgments.

... ...

67. The Officers of the Central Excise Department exercise Quasi judicial functions. The orders passed by the Department Officers being in exercise of Quasi Judicial powers cannot be co-laterally revoked/reviewed except when

permitted under the Statute. It is seen that against sanction orders passed the concerned officers, the statute does not provide for any review of such order passed. However, under Section 35, there is a provision for appeal, which however has not been resorted to by the Department seeking revocation/recall of orders already passed sanctioning the refund in terms of "*M/s. SRD Nutrients* (supra)". The refund orders passed cannot be unilaterally revoked by application of Section 11A unless the requirements of sub-section (4) of Section 11A are satisfied. This will amount to impeaching collaterally a finding rendered by a quasi judicial authority. The Apex Court in "*Abdul Kuddus*" reported in (2019) 6 SCC 604 has very succinctly laid down the law regarding impermissibility of collateral impeachment of orders passed by Quasi Judicial bodies. The relevant paragraphs of the Judgment is extracted as under :-

... ...

68. In view of the above discussions, this Court holds that the refund granted/sanctioned earlier in terms of the Judgment of the Apex Court rendered in "*M/s. SRD Nutrients Private Limited*" (supra) as well as in terms of orders passed by this Court directing such refunds of Education Cess and Secondary and Higher Education Cess in terms of "*M/s. SRD Nutrients Private Limited*" (supra), cannot be revoked co-laterally by a Quasi Judicial Authority of the Department without taking recourse to the statutory and/or judicial remedies available to the Department. In view of dismissal of the earlier review petition filed by the Department against the Judgment of the Apex Court in "*M/s. SRD Nutrients Private Limited*" (supra) and also in view that no appeal or review having been preferred against orders of this Court directing entitlement of refund of Education Cess and Secondary and Higher Education Cess to the petitioners, the issue between the parties to the *lis* having attained finality, the later Judgment of the Apex Court in "*M/s. Unicorn Industries*" (supra) holding "*M/s. SRD Nutrients Private Limited*" (supra) to be *per incuriam*, will not permit the Department to unilaterally revoke or re-open the issue without taking recourse to the remedies available to them before a judicial forum. Such actions initiated by issuance of the impugned show cause notices, if permitted, will amount to revoking the earlier orders passed by the departmental officers exercising Quasi Judicial powers unilaterally and which action cannot be permitted in view of the law laid down by the Apex Court in "*Abdul Kuddus*" (supra)."

7.2 I also rely on the decision rendered by the Hon'ble Tripura High Court in the case of Tripura Ispat reported as 2021-TIOL-146-HC-TRIPURA-CX, wherein the Hon'ble Court has held that,

"12. Section 11A thus makes a distinction between the cases of duty of excise not having been levied, paid or short levied or short paid or erroneously refunded for the reason of fraud, collusion or any misstatement or suppression of facts or contravention of the provisions of the Act or the rules with intent to evade payment of duty and in cases where none of these elements is present. Under sub-section 1 of Section 11A when any such duty of excise has not been levied, paid or short levied or short paid or erroneously refunded for reasons other than fraud, collusion etc. the Central Excise Officer would within 2 years from the relevant date serve a notice on the person chargeable to the duty calling upon him to show cause why the amount specified in the notice along with interest not be recovered. Sub-section 1 of Section 11A thus authorizes the Central Excise Officer to recover any duty of excise, besides others, which has been erroneously refunded. It is in this context that the term erroneously refunded assumes significance. Before we refer to certain decisions on the

question of erroneously refunded or erroneously ordered, we may briefly state that when the Excise Officer passed the order of refund, he was applying the law laid down by the Supreme Court which by virtue of Article 142 of the Constitution is the law of the land. He had no other choice but to follow the decision of the Supreme Court in case of SRD Nutrients (supra). Any other action on his part would be wholly illegal. His order of refund thus was in consonance with the law declared by the Supreme Court at the time when he was passing the order. In our view any subsequent change in the legal position, would not permit him to invoke the powers under Section 11A of the Central Excise Act. As is well settled, all legal proceedings on the date when they are being decided by any Court, would be governed by the law laid down by the Supreme Court which prevails on such date. As is often happens, a decision of the Supreme Court is reviewed, reconsidered or overruled by larger Bench. Such subsequent decision would undoubtedly clarify the position in law and such declaration would undisputedly apply to all pending proceedings, the proceedings which are closed in the meantime, cannot be reopened on the basis of subsequent declaration of law by the Supreme Court. Any other view would lead to total anarchy. Based on the judgment of the Supreme Court several proceedings would have been decided. If years later such view is reversed, the parties who had not carried the proceedings in higher forum and thus not kept the proceedings alive, cannot trigger a fresh look at the decision already rendered by the competent court on the basis of the previous judgment of the Supreme Court which was correctly applied at the relevant time.

13. If the department was aggrieved by the refund order passed by the Assistant Commissioner, it was open for the department to file appeal against such order as is provided in Section 35 of the Central Excise Act, 1944. It is well settled that under section 35 even the department can be stated to the person aggrieved against an order that the competent authority may pass. Thus the order of assessing officer is open to challenge at the hands of the department under Central Excise Act unlike in case of Income Tax Act, 1961 where the assessing officer's order of assessment cannot be appealed against by the department and a limited review is available under Section 263 of the Income Tax Act, 1961.

14. We have briefly touched on this difference in statutory scheme of the Central Excise Act against the Income Tax Act in order to drive home the point that if the department was desirous of pursuing the question of leviability of education and higher education cess when the basic duty of excise was exempt, it ought to have carried the order of refund passed by the Assistant Commissioner in appeal. Only if such appeal was pending or could have been filed within the period of limitation subject to power of condonation of delay, can the department take advantage of the change of law declared by the Supreme Court.

15. Section 11A of the Central Excise Act does not authorize the Assistant Commissioner to revise or review his own order. In the show cause notice effectively what he proposes to do is revise and recall his own order on the ground that the law that he applied when he passed order of refund, has since been changed. This in our opinion is wholly impermissible."

7.3 By respectfully following the above decisions of Hon'ble High Court, I hold that confirmation of demand by the adjudicating authority is not legally sustainable and is required to be set aside and I order to do so. Since, demand

is set aside, recovery of interest is also set aside.

8. In view of the above, I set aside the impugned order and allow the appeal filed by the Appellant.

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

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

सत्यापित,

विपुल शाह
अधीक्षक (अपील)

(AKHILESH KUMAR)
Commissioner (Appeals)

By RPAD

To,
M/s Gallant Metal Ltd,
Survey No. 176, Near Toll Gate,
Village Samkhiali,
Taluka : Bhachau,
District: Kutch.

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अंजार-भचाउ मण्डल, गांधीधाम को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।