



::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



सत्यमेव जयते

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रजिस्टर्ड डाक ए.डी.द्वारा

DIN-20220164SX0000888EBF

क	अपील / फाइल नं./ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/31/GDM/2021	46/DC/Anjar-Bhachau/20-21	18/3/2021

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

KCH-EXCUS-000-APP-265-2021-22

आदेश का दिनांक / Date of Order:	28.01.2022	जारी करने की तारीख / Date of issue:	31.01.2022
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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 / 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. Hans Ispat Limited (Survey no. 5/P, 9-13, Village: Budharmora, Bhuj-Bhachau Road), Taluka: Anjar, Distt: Kutch, .

इस आदेश (अपील) में 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) सामान्य शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण के प्रांत अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 का 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) बर्गीकरण मूल्यांकन से सम्बन्धित सभी मामलों में सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ 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 बताया गए अपीलों के अलावा शेष सभी अपीलों में सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण (मिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन अमरावो 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) अपीलार्थ न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवाली, 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, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलार्थ न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलार्थ न्यायाधिकरण की शाखा स्थित है। स्वयं आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demanded/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 the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलार्थ 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 सकती है एवं उसके साथ जिन 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, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलार्थ न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलार्थ न्यायाधिकरण की शाखा स्थित है। स्वयं आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is 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/-



- (ii) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की 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 of 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.
- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेन्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एक 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 जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए में अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
- धारा 11 डी के अंतर्गत रकम
 - सेनवेट जमा की ली गई गलत राशि
 - सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं- 2) अधिनियम 2014 के अर्थ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थान अर्थात् अपील को लागू नहीं होगा।
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
- Under Central Excise and Service Tax, "Duty Demanded" shall include :
- amount determined under Section 11 D;
 - amount of erroneous Cenvat Credit taken;
 - amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामला में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, समद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
- यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
 - भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर 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.
 - 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.
 - मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इच्छी 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.
 - उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
 - 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.
 - 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 पत्री कार्य में 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 numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
 - यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क 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.
 - सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में बर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
 - 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. Hans Ispat Ltd, District: Kutch (hereinafter referred to as "Appellant") has filed Appeal No. V2/31/GDM/2021 against Order-in-Original No. 46/DC/Anjar-Bhachau/2020-21 dated 18.03.2021 (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 goods falling under CETSH No. 73 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AABCH2447QXM001. 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 April-2008 to June-2008, January-2009, August-2009, September-2009, March-2010 to May-2010, July-2010, and September-2010 to December-2010. The Assistant Commissioner, erstwhile Central Excise, Gandhidham Division vide his various orders passed during F.Y. 2009-10 and 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-145 TO 152-2018-2019 dated 04.10.2018 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. 30,12,962/- vide Refund Order No. 23/Refund/2018-19 dated 9.1.2019.



2.3 Subsequently, the Appellant was issued Show Cause Notice No. IV/9-6/SCN/Hans Ispat/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 (SC).

2.4 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order, who confirmed demand of Rs. 30,12,962/- 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-140-to152-2018-2019, dated 4.10.2018, 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. 30,12,962.00 pursuant to Order-in-Appeal No., KCH-EXCUS000-APP-140-to-152-2018-2019, dated 4.10.2018, passed by the Assistant Commissioner, CGST, Anjar-Bhachau Division, vide Order-in-Original No., 23/Refund/2018-19, dated 9.1.2019, sanctioned Refund, in compliance of Order-in-Appeal No., KCHEXCUS-000-APP-140-to-152-2018-2019, dated 4.10.2018, passed by Commissioner (Appeals), Central Excise & GST, Rajkot. These Orders dated 4.1.2018, passed by Commissioner (Appeals), Central Excise & GST, Rajkot and dated 9.1.2019, 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 held on 30.12.2021 in virtual mode through video conferencing. Shri Dhaval Shah, Advocate, appeared on behalf of the Appellant. The advocate reiterated the submissions made in the 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 and oral submission made at the time of hearing. The issue to be decided in the present case is whether the impugned order confirming demand of Rs. 30,12,962/- 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. 30,12,962/-. 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 4.10.2018 and Refund Order dated 9.1.2019 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 4.10.2018. The said Order was admittedly not challenged by the Department before higher appellate forum. Further, the refund Order dated 9.1.2019, 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 4.10.2018 and refund Order dated 9.1.2019, 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.



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 the 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,

VS

विपुल शाह

अधीक्षक (अपील्स)

Akhil
28 January 2022
(AKHILESH KUMAR)
Commissioner (Appeals)

By RPAD

To M/s. Hans Ispat Ltd, Survey No. 5, Village Budhamora, Bhuj - Bhachau Road, Taluka : Anjar, District Kutch.	प्रति, हंस इस्पात लिमिटेड, सर्वेक्षण संख्या 5, ग्राम बुधमोरा, भुज-भचाऊ रोड, तालुका: अंजार, जिला कच्छ।
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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, अंजार भचाऊ मंडल, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।

