::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), GST &CENTRAL EXCISE
[redacted]
रेस कोर्स रिंग रोड / Race Course Ring Road
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: commrappl3-cexamd@nic.in

रजिस्टर्ड डाक ए.डी.द्वारा:- **DIN-20220464SX0000419420**

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/39 /GDM /2021	**06/AC/Mundra/2020-21**	**26-03-2021**

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

KCH-EXCUS-000-APP-001-2022

आदेश का दिनांक / Date of Order:	**27.04.2022**	जारी करने की तारीख / Date of issue:	**28.04.2022**

श्री अखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Akhilesh Kumar, Commissioner (Appeals), Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर,राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham :

घ अपीलकर्ता/प्रतिवादी का नाम एवं पता /Name & Address of the Appellant/Respondent :-

M/s.Jindal Saw Limited (AC & CWC), Village : Nanakapaya, Bhuj (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 न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-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 प्रतियाँ में दर्ज किया जाना चाहिए । इनमें से कमें 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 रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand /interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना,रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

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

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

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

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

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

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

Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

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

(C) **भारत सरकार कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिक निम्नलिखित मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

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

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various umbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते 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 Jindal Saw Ltd, Kutch (hereinafter referred to as "Appellant") has filed Appeal No. V2/39/GDM/2021 against Order-in-Original No. CEX/GIM/SCN/JSL-AC&CWC/2009-10 dated 26.3.2021 (*hereinafter referred to as "impugned order"*) passed by the Assistant Commissioner, CGST, Mundra 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 Nos. 39, 72 & 73 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AABCS7280CXM006. 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'). The said notification granted exemption from payment of Central Excise duty levied under the Central Excise Act, 1944, Additional Duties of Excise levied under the Additional Duties of Excise (Goods of Special Importance) Act, 1957 and the Additional Duties of Excise (Textiles and Textile Articles) Act, 1978. As per scheme of the said Notification, exemption was granted by way of refund of Central Excise duty and Additional Duties of Excise paid in cash through PLA as per prescribed rates and refund was subject to condition that the manufacturer has to first utilize all Cenvat credit available to them on the last day of month under consideration for payment of duty on goods cleared during such month and pay only the balance amount in cash. The Appellant had opted for availing the facility of re-credit, in terms of Para 2C(a) of the said notification.

2.1 The Appellant had filed Re-credit applications during the period from October, 2004 to February, 2008 for re-credit of Central Excise Duty, Education Cess and Secondary and Higher Education Cess, in terms of notification *supra* on clearance of finished goods manufactured by them. The said re-credit applications were disposed off by the refund sanctioning authority on various dates.

2.2 It appeared that the Appellant was wrongly sanctioned refund/re-credit of Education Cess and S.H.E. Cess, which was not admissible to them under Notification No. 39/2001-CE dated 31.7.2001 and was required to be recovered from them along with interest. The Show Cause Notice No. 301/2009 dated 4.11.2009 was issued to the Appellant calling them to show cause as to why

refund of Education Cess and S.H.E. Cess amounting to Rs. 45,49,157/- granted erroneously should not be demanded / recovered from them under Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as 'Act') along with interest under Section 11AB ibid.

2.3 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed demand of Education Cess and S.H.E. Cess amounting to Rs. 45,49,157/-, along with interest, in terms of Notification No. 39/2001-CE dated 31.7.2001 read with under Section 11A(1) and Section 11AB/11AA of the Act.

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

(i) They had acted bonafide and there being direct decisions of the Supreme Court in favour of the assessee by two different Benches and one later decision from the Supreme Court which could not have been anticipated, the question of raising or confirming any demand beyond normal period of limitation does not arise at all. The impugned notice and order must therefore, be vacated as being unsustainable and unauthorized by law. The earlier decisions of the Supreme Court in SRD Nutrients and Bajaj Auto being in favour of the assessee and not having been set aside or overruled cannot be disregarded or refused to be followed by the respondent and even after noticing their pleas on this issue, the respondent has followed the view of the Supreme Court in Unicorn case to decide against the assessee ignoring divergence of judicial opinion which necessitates every demand beyond normal period of limitation of one year to be impermissible and the respondent ought to have dropped the demand. Instead he has chosen to confirm the demand with interest wholly unauthorized by law.

(ii) The adjudicating authority has further erred in paras 3.9 to 3.15 to justify the order being passed or demand being raised without any time limit. None of the decisions relied upon or the provisions indicated in these paras would override Section 11A and the proviso thereto and therefore, there cannot be a demand without bar of limitation indefinitely and such illegal action of the revenue cannot be sustained both on facts and in law.

(iii) It is settled law that there can be no adjudication beyond the points, grounds/pleas taken in the show cause notice by the revenue. In the present case, the show cause notice only sought to withdraw the amount of re-credit for the period covered by the notice dated 4.11.2009 and there was no basis for doing so indicated therein in the notice issued under Section 11A. Having issued notice under Section 11A the revenue cannot go back and take the plea of no notice being required to be issued and if that be so there would also be no adjudication in the absence of the notice to the assessee by the competent authority in accordance with law. The reliance by the revenue on cases of compounded levy under Section 3A of the Central Excise Act is wholly erroneous and misconceived and is nothing but an attempt to circumvent the due process of law which cannot be accepted and the impugned order be vacated.

(iv) The demand itself is unsustainable and unauthorized by law and therefore, interest thereon demanded by the respondent is also unsustainable as the provisions of the Central Excise Act in Section 11A/11B and 11AB dealing with interest have no application for cess levied under the Finance Act and therefore, the entire demand towards Cess as well as interest must be quashed.

4. Personal Hearing in the matter was scheduled in virtual mode through video conferencing on 25.3.2022. Shri R. Santhanam, Advocate, Shri K. C. Gupta, Head Indirect Tax, and Shri Baldev Dewan, A.R. appeared on behalf of Appellant. The Advocate stated that the SCN issued in the case is barred by limitation. He further re-iterated the submission in appeal memorandum and relied upon case laws submitted as part of additional submission. He also relied upon Board's Circular No. 3/2022-Customs dated 1.3.2022 to argue that in case the aggregate duty is nil, the amount of Surcharge / Cess would also be nil.

4.1 In additional written submission, the Appellant has furnished case laws of Topcem India - 2021 (376) E.L.T. 573 (Gau.) and M/s Unicorn Industries - 2019 (370) E.L.T. 3 (S.C.).

5. I have carefully gone through the facts of the case, impugned order and submissions made by the Appellant in appeal memorandum. The issue to be decided in the present appeal is whether the impugned order confirming demand for erroneously sanctioned refund of Education Cess and Secondary & Higher Education Cess under the provisions of the Notification No. 39/2001-CE

dated 31.07.2001, as amended, read with Section 11A of the Central Excise Act, 1944 is correct, legal and proper or not.

6. On perusal of the records, I find that the Appellant was availing the benefit of area based Exemption Notification No. 39/2001-CE dated 31.7.2001, as amended. The Appellant had filed re-credit applications for refund/re-credit of Central Excise Duty, Education Cess and S.H.E. Cess paid from PLA on clearance of finished goods manufactured by them during the period from October, 2004 to February, 2008, which was processed and sanctioned by the refund sanctioning authority vide various Re-credit orders issued at material time. Subsequently, Show Cause Notice was issued to the Appellant on the ground that exemption under the said notification was available only to Central Excise Duty and the said notification did not cover Education Cess and Secondary & Higher Education Cess and hence, the Education Cess and S.H.E Cess were erroneously sanctioned to them. The impugned order confirmed demand of Education Cess and S.H.E Cess along with interest.

6.1 The Appellant has contended that earlier decisions of the Hon'ble Supreme Court in SRD Nutrients and Bajaj Auto being in favour of the assessee and not having been set aside or overruled cannot be disregarded or refused to be followed by the respondent and even after noticing their pleas on this issue, the respondent has followed the view of the Supreme Court in Unicorn case to decide against the assessee ignoring divergence of judicial opinion which necessitates every demand beyond normal period of limitation of one year to be impermissible and the respondent ought to have dropped the demand. The Appellant further contended that there cannot be a demand without bar of limitation indefinitely and such illegal action of the Revenue cannot be sustained both on facts and in law.

7. I find that Show Cause Notice in the case was issued on 4.11.2009 by invoking the provisions of Section 11A(1) of the Act for demanding Education Cess and S.H.E. Cess sanctioned during the period from October, 2004 to February, 2008. Apparently, entire period involved in the SCN is beyond normal period of limitation of one year. However, the SCN has not alleged about existence of any of the ingredients required for invoking extended period of limitation i.e. fraud, collusion, wilful mis-statement, suppression of facts, contravention of any of the provisions of the Act or of the rules made thereunder. Thus, issuance of Show Cause Notice under Section 11A(1) of the Act for a period beyond normal period of limitation without demonstrating existence of ingredients mentioned in Section 11A ibid is not sustainable.

7.1 I observe that the adjudicating authority has given following findings in the impugned order on the bar of limitation:

> "3.11) The Notification, as amended, has been issued as a special measure of the administration and this is a stand-alone scheme and was not available to any other unit situated in the Country or even in Gujarat unless located in Kutch area. As the scheme is a separate, stand-alone scheme altogether, the noticee opting for the scheme was bound by the terms and conditions of the scheme.
>
> 3.12) Further, Clause (g) of paragraph 2C (Para 2A(g) until 27 3.2008) of the said Notification provides for demand and recovery of credit availed irregularly. The said clause reads as under.
>
> > "the amount of the credit availed irregularly or availed of in excess of the amount determined correctly refundable under clause (e) and not reversed by the manufacturer within the period specified in that clause shall be recoverable as if it is a recovery of duty of excise erroneously refunded In case such irregular or excess credit is utilized for payment of excise duty on clearances of excisable goods, the said goods should be considered to have been cleared without payment of duty to the extent of utilization of such irregular or excess credit"
>
> 3.13) The above clause gives an inherent power to demand and recover the Credit/Refund availed/taken irregularly. No time limit has been prescribed in the Notification for demanding and recovering amount of the credit availed irregularly. As the Notification is entirely independent and contains inherent power for recovery of duty, the general provisions of limitation and demand are not applicable."

8. It is pertinent to examine provisions of re-credit of Central Excise duty contained in said notification prevailing at material time, which are reproduced as under:

> 2A. Notwithstanding anything contained in paragraph 2, -
> (a) the manufacturer at his own option, may take credit of the amount of duty paid during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, in his account current, maintained in terms of Part V of the Excise Manual of Supplementary Instruction issued by the Central Board of Excise and Customs. Such amount credited in the account current may be utilised by the manufacture for payment of duty, in the manner specified under rule 8 of the Central Excise Rules, 2002, in subsequent months, and such payment should be deemed to be payment in cash;
>
> Provided that ...
>
> (b) the credit of duty paid during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, may be taken by the manufacturer in his account current, by the seventh day of the month following the month under consideration;
>
> (c) a manufacturer who intends to avail the option under clause (a), shall exercise his option in writing for availing such option before effecting the first clearance in any financial year and such option shall be effective from the date of exercise of the option and shall not be withdrawn during the remaining part of the financial year;
>
> Provided that ...

(d) the manufacturer shall submit a statement of the duty paid, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, along with the refund amount which he has taken credit and the calculation particulars of such credit taken, to the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, by the 7th day of the next month to the month under consideration;

(e) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, as the case may be, after such verification, as may be deemed necessary, shall determine the amount correctly refundable to the manufacturer and intimate the same to the manufacture by 15th day of the next month to the month under consideration. In case the credit taken by the manufacturer is in excess of the amount determined, the manufacturer shall, within five days from the receipt of the said intimation, reverse the said excess credit from the said account current maintained by him. In case, the credit taken by the manufacturer is less than the amount of refund determined, the manufacturer shall be eligible to take credit of the balance amount;

(f) in case the manufacturer fails to comply with the provisions of clause (a) to (e), he shall forfeit the option, to take credit of the amount of duty during the month under consideration, other than by way of utilisation of CENVAT credit under the CENVAT Credit Rules, 2002, in his account current on his own, as provided for in clauses (a) and (c);

(g) the amount of the credit availed irregularly or availed of in excess of the amount determined correctly refundable under clause (e) and not reversed by the manufacturer within the period specified in that clause, shall be recoverable as if it is a recovery of duty of excise erroneously refunded. In case such irregular or excess credit is utilised for payment of excise duty on clearances of excisable goods, the said goods should be considered to have been cleared without payment of duty to the extent of utilisation of such irregular or excess credit.

Explanation. - For the purposes of this notification, duty paid, by utilisation of the amount credited in the account current, shall be taken as payment of duty by way other than utilisation of CENVAT credit under the CENVAT Credit Rules, 2002. "

8.1 In the backdrop of above legal provisions, I observe that the Appellant had availed re-credit of duty paid in cash in their account current, which also included Education Cess and S.H.E. Cess, as per clause(b) above and filed Re-credit applications as per clause(d). The Assistant Commissioner determined correct re-credit amount vide various Re-credit orders as detailed at Para 1.8 of the impugned order, in terms of clause(e). It is not brought on record that said Re-credit orders were reviewed by the Department, and hence, the same attained finality. The clause (g) comes into picture for recovery of any amount of credit availed irregularly or availed in excess of the amount determined under clause (e) on verification of re-credit applications. The recovery proceedings envisaged in clause (g) is confined to Re-credit orders issued in terms of clause(e) and it cannot be invoked independently without any time limit. The findings of the adjudicating authority that the said notification contains inherent power for recovery of duty without any time limit is

erroneous and not correct interpretation of said notification. If it was found that the Appellant was not eligible for refund of Education Cess and S.H.E. Cess, then the JAC could have curtailed re-credit amount while passing Re-credit orders or the Department could have reviewed the said Re-credit Orders, which was not done. However, initiation of recovery proceedings under clause(g) after Re-credit orders have attained finality, is not legally sustainable.

8.2 I rely on the Order passed by the Hon'ble CESTAT, Kolkata in the case of M/s RNB Carbides & Ferro Alloys Pvt. Ltd. reported as 2021 (378) E.L.T. 474 (Tri. - Kolkata), wherein it has been held that,

> "21. Looking from a perspective altogether different from the case of valuation of excisable goods, the entire proceedings in the instant case mainly relate to the recovery of amount already refunded claiming the same to be a case of "erroneous refund" under Section 11A of the Act. The whole basis of the Revenue that freight amount is not includible in the assessable value, as has subsequently been held by the Supreme Court in Ispat Industries (supra), to state that the buyer's place can never be said to be place of removal. In our view, the refund already sanctioned by relying on the judicial legal precedents holding the field then as well as the clarifications issued by the Board, the same cannot be termed as "erroneous refund". In this regard, it would be worthwhile to take support from the recent decision of the Hon'ble Gauhati High Court in the case of Topcem India v. UOI - 2021 (376) E.L.T. 573. In that case also, refund was sanctioned of the cess amount along with the basic excise duty in terms of the exemption notifications issued in the north-eastern States. The said notifications provided for exemption by way of refund of the duty paid through account current (PLA). By a subsequent decision of the Supreme Court in Unicorn Industries, it was held that the previous decisions of the Supreme Court in S.R.D. Nutrients case which upheld exemption of the cess amount was held to be per incurium. As a result thereof, the Department proceeded to recover the cess amount refund of which was already sanctioned by terming the said refund to be "erroneous". The Gauhati High Court clarified the position that refund already sanctioned by taking the support of the legal precedents holding the field then cannot be termed as erroneous merely because of the change in legal position subsequently. The Court noted as below:-
>
> > "46. "Erroneous Refund"
> > The provisions of Section 11A in the context of the present proceedings have been invoked by the Department by treating the refunds granted earlier to the petitioners to have been granted "erroneously". A perusal of the provisions of Central Excise Act and the Rules framed thereunder reveals that the term erroneous has not been defined anywhere. In this context, it is relevant to refer to the judgment of this Court rendered in Rajendra Singh (supra) wherein by referring to the Black's Law Dictionary, it was held that "erroneous" means involving error; deviating from law. In the said judgment, it is held that an order cannot be termed as erroneous unless it is not in accordance with law. It is held that if an officer acting in accordance with law makes certain assessment and determines the turnover of dealer, the same cannot be branded as erroneous. In another matter, the Division Bench of this Court in Victor Cane Industries v. Commissioner of Taxes and Ors., reported in 2001 SCC Online Gau 216 : (2002) 2 GLR 69, held that simply because the law has changed or earlier law laid down has been

reversed, it would not entitle the revisional authority to reopen the earlier assessments.....

47. Another Division Bench judgment of this Court rendered similar findings in the case of Mahabir Coke Industries, reported in (2007) 4 GLR 515. It was held that even if subsequently the law is changed or reversed, the assessments already completed cannot be allowed to be opened as the law covering the field relating to exemption of tax to a new Industry at the time of passing of the order of assessment to be considered....."

In the present case also, the Department by relying on the subsequent decision of the Supreme Court in Ispat Industries has proceeded to take a view that freight amount can never be included in the assessable value. In our view, the refund already sanctioned cannot be termed as "erroneous refund" more so in view of the fact that refund has been duly sanctioned by the Department as per the laws prevailing then duly supported by the C.B.E. & C. clarifications at relevant point of time.

22. In view of the above discussion, the appeals filed by the assessee are allowed and the appeals filed by the Revenue are dismissed as withdrawn under the National Litigation Policy. Since the issue has been decided on merits, we are not examining the plea on limitation."

8.3 By respectfully following the above decision, I set aside confirmation of demand of Rs. 45,49,157/- under Section 11A(1) of the act and recovery of interest under Section 11AB /11 AA ibid.

9. In view of above, I set aside the impugned order and allow the appeal.

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

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

सत्यापित,

बिपुल शाह
अधीक्षक (अपील)

(AKHILESH KUMAR)
Commissioner (Appeals)

22nd April, 2022.

By R.P.A.D.

To, M/s. Jindal Saw Ltd (AC & CWC) Village Nanakapaya, Bhuj (Kutch).	सेवा में, मैसर्स जिंदल सॉ लिमिटेड ग्राम नानाकपाया, भुज (कच्छ)।

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, मुंद्रा मंडल को आवश्यक कार्यवाही हेतु।
4) गार्ड फाइल।