::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 – 2477952/2441142
Email: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा:-

DIN-20230164SX0000910587

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2 /7 /GDM/2022	05/AC/GRD/2021-22	22-12-2021

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

KCH-EXCUS-000-APP-052-2022

आदेश का दिनांक / Date of Order:	28.12.2022	जारी करने की तारीख / Date of issue:	11.01.2023

श्री शिव प्रताप सिंह, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Shiv Pratap Singh, 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 Kutch Chemical Industries Ltd., Survey No. 166/1 & 3, 141/1 & 172 Plot No. 165, Village Padana, Near Aquagel Chemicals Pvt Ltd.

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

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

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

(i) वित्त अधिनियम,1994 की धारा **86** की उप-धाराओं **(2)** एवं **(2A)** के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, **1994**, के नियम **9(2)** एवं **9(2A)** के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एंव उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अधवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अधवा 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 **35**एफ 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) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम **6** के अंतर्गत देय रकम

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

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

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

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

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

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

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

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

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ **2**),1998 की धारा **109** के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली,2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, **1944** की धारा **35-EE** के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 /- का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल 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 नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various umbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

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

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

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

:: ORDER-IN-APPEAL ::

M/s. Kutch Chemical Industries Ltd. Survey No. 166/1 & 3, 171/1 & 172, Plot No. 165, Village Padana, Near Aquagel Chemical Pvt. Ltd. Gandhidham, (Kutch) 370240 (*hereinafter referred to as* ***"the Appellant"***) has filed the present appeal against Order-in-Original No. 05/AC/GRD/2021-22 dated 22.12.2021 (*hereinafter referred to as* ***"the impugned order"***) passed by the Assistant Commissioner, CGST Rural Division, Gandhidham (*hereinafter referred to as* ***'Adjudicating Authority'***)

2. The brief facts of the case are that the Appellant are having Central Excise Registration No. AABCK8460AXM001 under rule 9 of the Central Excise Rules, 2002 and are engaged in the manufacture of excisable goods i.e., organic & In-organic Chemicals falling under Chapter No. 28 & 29 of the first schedule to the Central Excise Tariff Act, 1985. The Appellant was availing the benefit of CENVAT credit and area-based exemption under the notification No. 39/2001-CE dated 31.07.2001 and regularly filed various claims for refund/re-credit of duties (Basic Excise Duty, Education Cess and Secondary & Higher Education Cess) paid through PLA under the said notification.

3. A Show Cause Notice No. 64/2010 dated 23.08.2010 was issued proposing recovery of an amount of Rs. 40,82,700/-, pertaining to Edu. Cess and SHE Cess, which were alleged to have been erroneously refunded, in terms of Notification No. 39-2001-CE dated 31.07.2001 read with Section 11A, which was in-applicable to the Education Cess and Secondary & Higher Secondary Edu. Cess. Interest at appropriate rate under Section 11AB of the Central Excise Act was also proposed to be demanded. The adjudicating authority, vide the impugned order, confirmed the demand of Rs 40,82,700/-, said to be erroneously refunded in respect of Education Cess and Secondary & Higher Education Cess under the provision of Notification No. 39-2001-CE dated 31.07.2001 read with Section 11A along with interest at appropriate rate under Section 11AB of the Central Excise Act, 1944.

4. Being aggrieved, the Appellant has preferred the present appeal on various grounds, *inter alia*, as below:-

(i) That the adjudicating authority has grossly erred in not appreciating the facts of the present case inasmuch as the adjudicating authority has failed to consider the fact that the re-credit orders sanctioning the re-credit were not challenged by the department before the higher appellate authority and they had become final. The adjudicating authority has in the impugned order held that Section 11A is for the purpose of recovery of erroneous refund and there was no need for filing any appeal for recovery of an erroneous refund. The adjudicating authority has failed to consider the fact that the refund cannot be termed as erroneous until and unless the order sanctioning such refund has been challenged and set aside in the appellate proceedings. Since the department did not prefer an appeal before the Commissioner (Appeals) challenging such order, such refund cannot be termed as erroneous and a show cause notice cannot be issued for the purpose of recovering such refund and relied upon following case laws:

i. M/s Ever ready Industries India Ltd., 2016 (337) ELT 189, (Madras High Court).
ii. M/s Madurai Power Corporation, 2008 (229) ELT 521 (Madras High Court).
iii. M/s Honda Power Products, 2020 (372) ELT 30, (Allahabad High Court).
iv. M/s TFL Quinn India Pvt. Ltd., 2016 (339) ELT 129 (Hyderabad Tribunal).
v. M/s TVS Motor Company Ltd.,t 2017 (5) GSTN 85,(Bangalore Tribunal).
vi. M/s. Eicher Tractors, 2017 (358) ELT 375, (Delhi Tribunal).

(ii) That The adjudicating authority has completely erred while holding that the decision of the Hon'ble Gujarat High Court In the case of M/s. Shri Siddhivinyak Syntex (supra) would not be applicable to the facts of the present case. It is submitted that the adjudicating authority has clearly mentioned that Circular No.162/73/95-CX dated 14.12.1995 was relied upon for the purpose of transferring the matter to the call book. However, the adjudicating authority has failed to appreciate that this circular was termed as illegal by the Hon'ble Gujarat High Court in the case of M/s. Shri Siddhivinyak Syntex (supra) and the Hon'ble High Court has clearly stated that it was not permissible for

the department to keep the show cause notice pending for a period of one decade for the reason that the outcome of some similar cases is awaited. in the present case, it is an undisputed fact that the show cause notice was kept in the call book for the reason being that the Hon'ble Supreme Court had vide two decisions one in the case of M/s SRD Nutrients Pvt. Ltd. and other in the case of M/s. Bajaj Auto Ltd. held that the education Cess would also be exempt when the duly of central excise is exempt. Therefore, the impugned order has been passed without non application of mind inasmuch as it is not the case that the Hon'ble Supreme Court finally settled the issue in the case of M/s. Unicorn Industries Ltd. (supra), but in reality, the issue was settled much earlier in favor of the assessee in the case of M/s. SRD Nutrients Pvt. Ltd. and M/s. Baja] Auto Ltd. Therefore, the action of the adjudicating authority to hold that no prejudice is caused to the assessee and hence the decision of M/s Shri Siddhivinyak Syntex (supra) would not be applicable is a finding completely illegal and perverse. Therefore, the impugned order is liable to be set aside in the interest of justice.

The above judgment of the Hon'ble Gujarat High Court has been followed in several subsequent cases before the Gujarat High Court namely;

i. M/s. Aalidhara Textiles Engineers- 2018 (360) ELT 493,
ii. M/s Parimal Textiles-2018(8)GSTL 361,
iii. M/s Shivkrupa Processors, 2018 (362) ELT 773,
iv. M/s Adani Wilmar- SCA No. 9573/2018,
v. M/s. Apollo Tyres Ltd- SCA No. 16157/2018.

Applying the ratio of the judgment of the Hon'ble Gujarat High Court in case of M/s. Siddhivinyak Syntex and the other judgments as above, the adjudication proceedings were delayed for a period of a decade, without any cogent reasons and the entire case falls within the bracket of the ratio laid down by the Hon'ble Gujarat High Court in case of M/s. Siddhivinyak Syntex.

(iii) That Notification No.39/2001 -CE does not stipulate any procedure for the purpose of recovering erroneous refund or for issuance of a show cause notice, a show cause notice for recovering erroneous refund or central excise duty can only be issued under provisions of Section 11A and when the provisions of Section 11A are applicable,

the limitation period stipulated therein is also applicable. When the department itself has not alleged any fraud or misstatement on the part of the appellant, the show cause notice could not have been issued invoking the extended period of limitation, and therefore, the demand is time barred. The adjudicating authority has merely tried to overcome the weighty submissions made by the appellant and the case laws relied upon by the appellant, by giving erroneous and flimsy findings. Therefore, such findings being completely contrary to the settled legal position, are not sustainable in the eyes of law. Hence the impugned order being passed without application of mind and by non-consideration of material facts is liable to be set aside in the interest of justice.

(iv) That it is a settled legal position that when at a given point of time a decision was in favor of the assessee and such assessee does something in view of such decision, then it cannot be alleged that there was a suppression or mis-declaration on the part of the assessee which would mandate invocation of extended period of limitation. Therefore, the entire demand in the present case is fully time barred and such recovery is not permissible in law and relied upon following case laws:

(i) M/s. Magus Metals Ltd., 2017 (355) ELT 323, (Hon'ble SC).

(ii) M/s Shaikh Iqbal Mohammed, 2019 (25) GSTL 545, (Tri. Hyderabad).

(iii) M/s. Ajit India Pvt. Ltd., 2018 (19) GSTL 659, (Tri. Mumbai).

(iv) M/s. Banswara Syntex Ltd., 2007 (216) ELT 16, (HC, Rajasthan).

(v) That, the Hon'ble Supreme Court has on many occasions dealt with such situations and it has been categorically held that if there is a decision in favor of an assessee and such decision is reversed by the Appellate Court at a subsequent stage, then the extended period of limitation would not be available to the department and merely because the Appellate Court has taken a contrary view, would itself not be a ground for invocation of extended period of limitation and relied upon the following case laws.

(i) M/s. Essel Pre-pack Ltd. 2015(323) ELT 248, (Hon'ble SC).

(ii) M/s. Blue Star Ltd.; 2015 (322) ELT 820, (Hon'ble SC).

(iii) M/s. Kiran Ispat Udhyog, 2015 (321) ELT 182, (Hon'ble SC),

(iv) M/s. Sonnen Flex Abrasives Pvt. Ltd., 2016 (343) ELT 57, (HC, Mumbai).

(v) M/s. Reliance Industries Ltd., 2009 (244) ELT 254, (Ahmedabad Tri.)

(vi) Vijay Kumar Arora,2016 (335) ELT 754, (Delhi Tri.).

(vi) That, the law about invocation of extended period of limitation is well settled. Only in a case where the assessee knew that certain information was required to be disclosed and yet the assessee deliberately did not disclose such information, the case would be that of suppression of facts. When the Excise Officers called for certain information and the assessee did not disclose the same or deliberately disclosed wrong information that would be a case of willful mis-statement. Even in cases where certain information was not disclosed as the assessee was under a bonafide impression that it was not duty bound to disclose such information, it would not be a case of suppression of facts as held by the Hon'ble Supreme Court in the landmark cases of Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively. In fact, the present one is a case where all the facts discussed in the show cause notice were within the knowledge of the Department right from day one. Under these circumstances, the show cause notice is barred by limitation and there is no justification in the action of invoking extended period of limitation in the facts of the present case.

5. Personal hearing in the matter was held on 09.11.2022. Shri Vijay Thakkar, GM Commercial, authorised representative of the appellant, attended the personal hearing. He reiterated the submission made in the appeal. He also handed over a paper book containing his authorization for the hearing, further submitted and the case laws relied by them. He submitted that in the absence of any fraud or suppression on their part, extended period for issuing SCN cannot be invoked. As they have met all the conditions prescribed in the notification, they are eligible for the refund. In this regard they also rely on the case laws cited by them. Therefore, he requested to set aside the OIO and allow the appeal.

Discussion & Findings:

6. I have carefully gone through the facts of the case, impugned order and submissions made by the Appellant in appeal memorandum. The issue to be decided in the present appeal is whether the impugned order confirming demand for alleged 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.

7. On perusal of the records, I find that the Appellant was availing the benefit of area based Exemption Notification No. 39/2001-CE dated 31.7.2001, as amended. 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 April-2005 to February-2007, which were processed and sanctioned 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.

7.1 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.

8. I find that Show Cause Notice in the case was issued on 23.08.2010 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 April-2005 to February-2007. 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.

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

> *"26. ..... I find that the SCN for recovery of erroneous refund has been issued in terms of Notification No 39/2001-CE dated 31.07.2001. On perusal of the said Notification, it is clearly evident that the said Notification is self-contained Notification and the entire procedure for exemption, refund/re-credit procedure, conditions, eligibility, recovery, adjustment of excess or less refund etc. are prescribed in the Notification itself. Therefore, any recovery or erroneous refund is also governed by this Notification and it does not stipulate any time limit for recovery of such erroneous refund. The self-contained Notification are different from the normal exemption Notifications. Once the conditions are prescribed in the self-contained Notification, then they will prevail over the conditions laid down in general provisions."*

9. 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. "

9.1 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 9 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) are 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. The Adjudicating authority has missed the basic principle of jurisprudence that a notification issued in exercise of limited powers vested under the Act is subordinate to the Act and cannot override other general provisions under that Act. In case of conflict between the provisions under the Act and the notification, Act will prevail. If it was found that the Appellant was not eligible for refund of Education Cess and S.H.E. Cess, then the jurisdictional Asstt./Dy. Commr. 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.

9.2 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."

10. I also find that in similar issue involved in the case of appeal filed before this office by M/s Jindal Saw Ltd., the Appellate authority vide Order-in-Appeal No KCH-EXCUS-000-APP-001-2022 dated 27.04.2022 had set aside the demand raised on similar grounds. Hence, I find it prudent not to deviate from the stand taken by this appellate authority in its earlier order.

11. In view of the above, I set aside the impugned order for demand of Rs. 40,82,700/- under the provisions of Notification No 39/2001-CE dated 31.07.2001, as amended, read with Section 11A of the Act and recovery of interest under Section 11AB/11 AA ibid.

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

12. The appeal filed by the Appellant is disposed off accordingly.

सत्यापित / Attested

Superintendent
Central GST (Appeals)
Rajkot

(SHIV PRATAP SINGH)
Commissioner (Appeals)

F.No. V2/7/GDM/2022 Dated:

By R.P.A.D.

To, M/s. Kutch Chemical Industries Ltd. Survey No. 166/1 & 3, 171/1 & 172, Plot No. 165, Village Padana, Near Aquagel Chemical. Pvt. Ltd. Gandhidham, (Kutch) 370240	सेवा मे, मेसेर्स कच्छ केमिकल इंडस्ट्रीज लिमिटेड सर्वे नं. 166/1 और 3, 171/1 और 172, प्लॉट नं. 165, गांव पडना, एक्वागेल केमिकल प्रा। लिमिटेड, गांधीधाम, (कच्छ) 370240

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।

2) प्रधान 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 मण्डल गांधीधाम, (Rural) आवश्यक कार्यवाही हेतु।

4) गार्ड फ़ाइल।