

:: 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

Tele Fax No. 0281 - 2477952/2441142 Email: commrappl3-cexamd@nic.in



सत्यमेव जयते

रजिस्टर्ड डाक ए.डी. द्वारा :- DIN-20220464SX0000008E7D

क	अपील / फाइल नं./ Appeal / File No.	मूल आवेदन / OIONo.	दिनांक / Date
	V2/119/RAJ/2021	09/REF/2020-21	16-02-2021

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

RAJ-EXCUS-000-APP-008-2022

आदेश का दिनांक / Date of Order:	27.04.2022	जारी करने की तारीख / Date of issue:	28.04.2022
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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 Tirth Agro Technology Pvt Ltd, Shaktiman, Survey No.108/1, Plot no. B, NH-27 Nr. Bharudi Toll
Plaza Bhunava (Village), Taluka: Gondal, Rajkot-360311.**

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपर्युक्त 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
manner.

(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 मुद्दांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद 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 बहाल हुए अपीलों के अलावा शेष सभी अपीलों-सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण
(सिस्टम) की प्रांतीय क्षेत्रीय पीठिकां, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 380016 को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor,
Bhauimali 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) नियमबली, 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 सजाया 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
अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेबांकित बैंक ड्राफ्ट द्वारा किया जाना
चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयं आवेद (स्ट
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.5,000/- 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 नियमबली, 1994, के नियम 9(1) के सहित
निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ वित्त आदेश के विरुद्ध अपील की नहीं 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 सजाया 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 अपीलीय न्यायाधिकरण की शाखा के
सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेबांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान,
बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयं आवेद (स्ट 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 fee of Rs. 1,000/- where the amount of service tax & interest demanded & penalty levied
is upto five lakhs but not exceeding Rs. fifty Lakhs, Rs.10,000/- where the amount of service tax &
interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in
favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench
of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



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

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (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 जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस 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 गयी गलत राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं-2) अधिनियम 2014 के अंश से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थान नहीं एवं 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 :

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

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

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

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

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी केसीट 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 सारिख अथवा सेमावाचिधि पर जो बाहर से पाठित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आवेदन व अपील आवेदन की दो प्रतियां संलग्न की जानी चाहिए साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदावगी के साथ 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 अदावगी की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/- का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की सिखा पत्रों कार्य से बचने के लिए क्या स्थिति 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 Appellate 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 टिकट लगा होना चाहिए।
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित 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. Tirth Agro Technology Pvt Ltd, District: Rajkot (hereinafter referred to as "Appellant") has filed Appeal No. V2/119/RAJ/2021 against Order-in-Original No. 9/Ref/2020-21 dated 23.2.2021 (hereinafter referred to as 'impugned order') passed by the Deputy Commissioner, CGST Division, Rajkot-II (hereinafter referred to as 'refund sanctioning authority').

2. The facts of the case, in brief, are that the Appellant had filed refund claim of Rs. 4,97,964/- on 18.8.2015 on the ground that their service provider had charged service tax in respect of serving of food and beverages in their factory canteen, however, the said service was exempted from service tax in terms of Notification No. 14/2013-ST dated 22.10.2013. The Appellant was sanctioned refund vide Refund Order No. 1/ST/Ref/2016 dated 4.1.2016. The said refund order was reviewed by the Department and appeal was filed before the then Commissioner (Appeals), Central Excise, Rajkot who vide his Order-in-Appeal No. RJT-EXCUS-000-APP-202-2016-17 dated 21.3.2016 remanded the matter to the refund sanctioning authority to examine the principles of unjust enrichment.

2.1 In *de novo* proceedings, the refund sanctioning authority vide Order-in-Original No. 123/ST/REF/2017 dated 22.6.2017 sanctioned the refund by holding that canteen expense, including service tax amount, was charged to profit and loss account and the Appellant had not passed on the service tax burden to any other person and hence, the bar of unjust enrichment would not be applicable to the refund sanctioned to the Appellant.

2.2 The said Order was reviewed by the Department and appeal was filed before the then Commissioner (Appeals), Central Excise, Rajkot, who vide his Order-in-Appeal No. RJT-EXCUS-000-APP-160-2018-19 dated 7.9.2018 allowed the appeal by holding that when the service tax amount was shown as expenses in Profit and Loss account as certified by their C.A., then the burden of duty would be deemed to have been passed on to their buyers in absence of evidence regarding costing of goods manufactured by them.

2.3 Being aggrieved, the Appellant filed appeal before the Hon'ble CESTAT, Ahmedabad, who vide its Order No. A/10753/2020 dated 5.3.2020 remanded the matter to the refund sanctioning authority for *de novo* adjudication with a direction to the Appellant to establish that even though the amount of refund was shown as expenses but the same had not influenced the value or sale price



of the goods and thereby the incidence was not passed on to any other person.

2.4 In *de novo* adjudication, the refund sanctioning authority vide the impugned order rejected the service tax refund under Section 11B of the Central Excise Act, 1994 by holding that the Appellant failed to establish that incidence of service tax for which refund was sought was not passed on to any other person.

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

(i) Though issue is in its favour on merits inasmuch as incidence of tax was not passed on to anybody as per Chartered Accountant Certificate dated 11.05.2016 and in detailed examination by the Assistant Commissioner while passing O-I-O dated 22.06.2017 but looking to the long litigation in the matter, it does not wish to go into the merit of the case as issue is fully in its favour on limitation on the following grounds as the impugned show cause notice is liable to be dropped on the ground of limitation too.

(ii) That it is admitted fact in the show cause notice that refund was sanctioned vide Order-in-Original No. 001/ST/REF/2016 dated 04.01.2016. The amount was refunded by way of direct credit in their bank account on 7.1.2016. The Department had preferred an appeal against the said order dated 04.01.2016 before the Commissioner (Appeals) on 31.03.2016. The SCN if any for erroneous refund was required to be issued within the time limit specified under Section 73(1) of the Finance Act, 1994 as stood at the material time. However, the SCN was not issued within time limit of 18 months but issued on 25.10.2019 dispatched on 04.12.2019 and received by them on 5.12.2019, not only after preferring an appeal before the Commissioner (Appeals) on 23.10.2017 against 2nd OIO dated 22.06.2017 but Order-in-Appeal passed by the Commissioner (Appeals) on 7.9.2018 in second round of litigation. That the impugned Show cause notice issued to it is badly time barred as same is issued beyond the 18 months from the relevant date as provided under Section 73 of the Finance Act, 1994 as stood at the time of refund i.e. 07.01.2016.

(iii) That the said provision as stood on the date of sanction and payment of refund amount i.e. Order dated 04.01.2016 and paid on 07.01.2016 is relevant. It is settled position of law that law on the date of offence etc. is applicable. The said provisions was amended with effect



from 14.05.2016 and said "Eighteen Months" was replaced by "Thirty Months", though same is not applicable as per settled position of law however, if one may venture to apply that amended provisions may apply in the instant case then also demand is time barred as refund was paid on 07.01.2016 and as per the amended provisions Show Cause Notice for recovery of erroneous refund was required to be issued within 30 months from the relevant date i.e. 06.07.2018 whereas SCN was issued on 25.10.2019, which is badly time barred and relied upon CBIC Circular No. 423/56/98-CX dated 22.09.1998 and case laws of Golden Plast Rigid PVC Pipes - 2018 (13) GSTL 321 and Pricol Ltd - 2015 (39) STR 190.

(iv) In view of the above, the impugned order rejecting refund of service tax of Rs. 4,67,964/- deserves to be set aside and the demand show cause notice is also liable to be quashed. Therefore, it is prayed that not only OIO may be set aside but impugned Show Cause Notice may also please be quashed.

4. Personal Hearing in the matter was scheduled in virtual mode through video conference on 5.4.2022. Shri P.D. Rachchh, Advocate, appeared on behalf of the Appellant. He reiterated the submission made in appeal memorandum. He stated that the SCN issued in the matter is time barred.

5. I have carefully gone through the facts of the case, the impugned order, and grounds raised in appeal memoranda. The issue to be decided in the case is whether the impugned order, in the facts of this case, rejecting refund is correct, legal and proper or not.

6. I find that the impugned order was passed in pursuance of the remand direction of the Hon'ble CESTAT, Ahmedabad issued vide Order No A/10753/2020 dated 5.3.2020. It is, therefore, pertinent to examine relevant portion of the said Order, which is reproduced as under:

"4. Heard both sides and perused the record. I find that the amount of service tax for which refund has been sanctioned and received by the appellant was accounted for as expenses in their books of account. I agree with the submission of the learned Counsel that merely because the amount was shown as expenses in the books of accounts, unjust-enrichment will not apply. However, in such case, the appellant should have established that even though the amount is shown in the accounts as expense, the same has reduced the profit of the appellant and not included in the cost of product thereby the same was not passed on to any other person. Learned commissioner (Appeals) also observed the same that appellant could not establish by giving cost data, that



the expenses on account of service tax for which refund was sought has not influenced the value of the goods manufactured and cleared by them. Therefore, I am of the view that an opportunity can be given to the appellant to establish that even though the amount of refund was shown as expenses but the same has not influenced the value or sale price of the goods and accordingly, the incidence was not passed on to any other person.

The impugned order is set-aside and appeal is allowed by way of remand to the Adjudicating Authority.”

7. Pursuant to the above Order, the adjudicating authority has passed the impugned order rejecting the refund on the grounds of unjust enrichment, by concluding as under:

“17. The opportunity was available with the claimant to establish by giving cost data, that the expenses on account of service tax for which refund was sought has not influenced the value of the goods manufactured and cleared by them as per the direction of Hon’ble CESTAT, however, the claimant have failed to establish that the incidence of service tax for which refund has been sought for has not been passed on to any other person as discussed in para-supra.”

8. I find that the Hon’ble Tribunal had remanded the matter to the adjudicating authority to give an opportunity to the Appellant to establish that the amount of refund which was expensed out by them had not influenced the value or sale price of the goods and accordingly, the incidence was not passed on to any other person. So, the *de novo* proceedings were confined to examine evidences to be produced by the Appellant to establish the aspect of unjust enrichment. In *de novo* proceedings, the Appellant failed to establish that the incidence of service tax for which refund was sought for has not been passed on to any other person. Even before me, the Appellant has chosen not to contest the issue on merit. I, therefore, hold that there is no infirmity in the impugned order.

9. The Appellant has contended that the protective demand Show Cause Notice dated 25.10.2019 was barred by limitation. The refund was issued to them vide Refund Order dated 4.1.2016 but protective demand SCN was issued to them on 25.10.2019, which was issued beyond 18 months from the relevant date as provided under Section 73 of the Finance Act, 1994 as it stood at the time of refund. Hence, the impugned order rejecting refund of service tax of Rs.



4,67,964/- deserves to be set aside and the demand show cause notice is also liable to be quashed.

9.1 It is observed that the protective demand Show Cause Notice dated 25.10.2019 was issued to the Appellant after issuance of Order-in-Appeal dated 7.9.2018 passed by the then Commissioner (Appeals), Rajkot in favour of the Department. It is further observed that the *de novo* proceedings were confined to examine the aspect of unjust enrichment, in terms of directions contained in CESTAT's Order dated 5.3.2020, as discussed *supra*. However, the adjudicating authority has also taken up the protective demand SCN dated 25.10.2019 for adjudication in *de novo* proceedings vide the impugned order, as apparent from Para 9 and Para 16 of the impugned order but no conclusive findings have been recorded in the impugned order and consequently, the Show Cause Notice dated 25.10.2019 has remained undecided. Since the said SCN is not decided yet, it is pre-mature to examine whether SCN was time barred or not. Considering the facts of the case, I find it fit to remand the matter to the adjudicating authority for limited purpose of deciding protective demand SCN dated 25.10.2019 by issuing speaking order. Needless to mention that principles of natural justice be adhered to in *de novo* proceedings. It is made clear that impugned order rejecting refund order on merit is upheld. The remand direction is limited to carrying out adjudication of protective demand SCN dated 25.10.2019.

10. In view of above, I set aside the impugned order to the extent of non-adjudication of SCN dated 25.10.2019 and remand the matter as per directions contained in Para 9.1 above. The remaining portion of impugned order is upheld.

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

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

सत्यापित,

D/S

विपुल शाह
अधीक्षक (अपील)

Akhil Kumar
27th April, 2022
(AKHILESH KUMAR)
Commissioner (Appeals)

By RPAD

<p>To, M/s Tirth Agro Technology Pvt Ltd, 'Shaktiman', Survey No. 108/1, NH 27, Near Bharudi Toll Plaza, Village Bhunava, Taluka : Gondal, District : Rajkot.</p>	<p>सेवा में, मेसर्स तीर्थ एग्रो टेक्नोलॉजी प्राइवेट लिमिटेड, 'शक्तिमान', सर्वेक्षण संख्या 108/1, राष्ट्रीय राजमार्ग 27, भरुदी टोल प्लाजा के पास, ग्राम भुनाव, तालुका: गोंडल, जिला : राजकोट।</p>
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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, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
- 3) ऊप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट -II मण्डल, राजकोट को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।

