



: : 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 / 2<sup>nd</sup> Floor, GST Bhavan,  
रेस कोर्स रिंग रोड, / Race Course Ring Road,  
राजकोट / Rajkot - 360 001



सत्यमेव जयते

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रजिस्टर्ड डाक ए.डी. द्वारा :-

DIN- 20230264SX0000212112

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / OIO No.	दिनांक/ Date
	GAPPL/COM/STP/2211/2022	50/AC/NS/2022-23	06-06-2022

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

**RAJ-EXCUS-000-APP-054-2023**

आदेश का दिनांक / Date of Order:	<b>23.02.2023</b>	जारी करने की तारीख / Date of issue:	<b>27.02.2023</b>
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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 एवं सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /  
Arising out of above mentioned OIO issued by Additional/Joint/Députy/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, Dist- Rajkot- 360311.**

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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए।/  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> 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) नियमवाली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित 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 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 सकती है 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित 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 is more than five lakhs or less, Rs.5000/- 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 प्रतियों संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 of the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (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, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये 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 सी गई शलत 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 स्थान अर्जी 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 पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपूरतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के 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 an 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 क्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (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 संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।  
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।  
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त बंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पत्री कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the 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 बर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbcc.gov.in](http://www.cbcc.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.cbcc.gov.in](http://www.cbcc.gov.in)



**अपील आदेश /ORDER-IN-APPEAL**

M/s Tirth Agro Technology Pvt Ltd, Shaktiman, Survey No.108/1, Plot No.B, NH-27, Nr. Bharudi Toll Plaza, Bhunava (Village), Tal. Gondal, Dist. Rajkot-360 311 (hereinafter referred to as the appellant) has filed appeal No.GAPPL/COM/STP/2211/2022 against Order-in-Original No. 50/AC/NS/2022-23 dated 06.06.2022 (hereinafter referred to as 'impugned order') passed by the Assistant Commissioner, Central Excise & CGST, Division-II, Rajkot (hereinafter referred to as 'adjudicating authority').

2. Briefly stated the facts of the case are that a refund of Rs.4,67,964/- was sanctioned to the appellant vide Order-in-Original No.01/ST/REF/2016 dated 04.01.2016. Vide Order-in-Appeal No.RAJ-EXCUS-000-APP-202-16-17 dated 17.03.2017, the Commissioner (Appeals) allowed an appeal filed by the department and remanded back the case to the adjudicating authority for fresh decision. The adjudicating authority, vide order-in-original No.123/ST/REF/2017 dated 22.06.2017 again sanctioned the refund. Vide Order-in-Appeal No.RAJ-EXCUS-000-APP-160-18-19 dated 06.09.2018, the Commissioner (Appeals) set aside the Order-in-Original dated 22.06.2017 and allowed appeal filed by the department. A show cause notice dated 25.10.2019 was issued to the appellant for recovery of erroneously sanctioned refund. On filing appeal by the appellant against Order-in-Appeal dated 06.09.2018, Hon'ble Tribunal vide its Order No.A/10753/2020 dated 05.03.2020 set aside the same and remanded back the case to adjudicating authority. Thereafter, vide Order-in-Original No.09/REF/2020-21 dated 23.02.2021, the adjudicating authority has rejected the refund. The appellant filed appeal against the said order before Commissioner (Appeals), who allowed the appeal vide Order-in-Appeal No.RAJ-EXCUS-000-APP-008-2022 dated 27.04.2022 by way of remand to the adjudicating authority to decide the show cause notice issued to the appellant which was not done in the Order-in-Original dated 23.02.2021. The adjudicating authority, by the impugned order, ordered for recovery of erroneously sanctioned refund amount of Rs.4,67,964/- along with interest.

3.1 Being aggrieved, the appellant filed the appeal wherein they, *inter alia*, contended that the adjudicating authority failed to understand the clear provisions of Section 73 of the Finance Act, 1994 regarding time limit prescribed for issue of notice from the relevant date. He further decided unjust enrichment issue which was not before him in the show cause notice dated 25.10.2019.

3.2 The appellant submitted that the refund was sanctioned vide Order-in-Original dated 04.01.2016 and the amount was credited in the bank account on 07.01.2016. Even though refund order was passed on 22.06.2017 for the second



*[Handwritten signature]*

time, the amount was not refunded as the amount was already sanctioned and credited to the account of appellant on 07.01.2016. Hence, the appellant contended that, the show cause notice was not issued within time limit of 18 months but issued on 25.10.2019, dispatched on 04.12.2019 and received by the appellant on 05.12.2019 after Order-in-Appeal dated 07.09.2018 in second round of litigation and hence, badly time barred.

3.3 The appellant contended that the adjudicating authority has not given any findings as to why first refund sanctioned on 04.01.2016 and paid on 07.01.2016 cannot be considered as date of refund. The appellant submitted that the adjudicating authority failed to appreciate that 'service tax refunded' means payment made to the appellant and in 2<sup>nd</sup> order there was no refund of any service tax at all.

3.4 The appellant submitted that as per the provisions of Section 73(1) of the Finance Act, 1994 a show cause notice was required to be served within thirty months from the date of erroneous refund of service tax. As the refund was sanctioned vide order dated 04.01.2016 and paid on 07.01.2016, the appellant contended that, show cause notice was required to be served on or before 06.07.2018; however the same was issued on 25.10.2019 and served on 05.12.2019 and hence time barred.

3.5 The appellant, relying upon Circular No.423/56/98-CX dated 22.09.1998, case laws of *Golden Plast Rigid PVC Ouoos-2018 (13) GSTL.321 (Tri-Chenni)* and *Pricol Ltd-2015 (39) STR.190 (Mad)*, submitted that refund cannot be recovered without issue of show cause notice within time limit.

4. Advocate P.D. Rachch appeared for personal hearing held on 22.02.2023 and reiterated the submissions in the appeal. He submitted that under Section 73 of Finance Act, 1994, a demand for erroneous refund can be made within 18 months from the date of making of refund (i.e. the payment date). In the present case, the refund was sanctioned on 01.01.2016 and paid on 07.01.2016. However, the demand for erroneous refund is made on 05.12.2019, i.e. almost 4 years. The same is clearly time barred. He submitted a copy of Circular No.423/56/98-CX dated 22.09.1998 and a judgment of Madras High Court and a decision of CESTAT, Chennai. In view of above he requested to set aside the impugned order.

5. I have carefully gone through the facts of the case, the impugned order, grounds of appeal in the appeal memorandum. The moot question to be answered in the present appeal is whether the show cause issued to the appellant for recovery of erroneous refund was time barred under Section 73 of the Finance Act, 1994 or otherwise.

The chronology of events in the present appeal is as under:



Date	Events
04.01.2016	Refund sanctioned vide Order-in-Original No.01/ST/REF/2016 dated 04.01.2016
07.01.2016	Amount of Rs.4,67,964/- credited in the account of appellant
17.03.2017	First remand order by Commissioner (Appeals) vide Order-in-Appeal No.RAJ-EXCUS-000-APP-202-16-17 dated 17.03.2017
22.06.2017	Refund again sanctioned by adjudicating authority vide order-in-original No.123/ST/REF/2017 dated 22.06.2017
06.09.2018	Set aside the order dated 22.06.2017 vide Order-in-Appeal No.RAJ-EXCUS-000-APP-160-18-19 dated 06.09.2018
25.10.2019	Issued show cause notice dated 25.10.2019
04.12.2019	Posted show cause notice dated 25.10.2019
05.12.2019	Served show cause notice dated 25.10.2019 to the appellant.
05.03.2020	Set aside Order-in-Appeal dated 06.09.2018 by Tribunal vide its Order No.A/10753/2020 dated 05.03.2020
23.02.2021	Rejected refund
27.04.2022	Remanded the matter for deciding show cause notice dated 25.10.2019
06.06.2022	Confirmed the demand of erroneous refund

It can be seen from the chronology of events as mentioned in the above table, refund was sanctioned to the appellant on 04.01.2016 and paid on 07.01.2016.

7. Now, coming to the provisions relating to recovery of 'erroneous refund', the provisions of Section 73 as it stood at the relevant time reads as under:

***"SECTION 73. Recovery of service tax not levied or paid or short-levied or short-paid or erroneously refunded.—***

*(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, Central Excise Officer may, within thirty months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice :"*

As per the above provision of law, where any service tax has erroneously refunded, a notice is required to be served on the person to whom such tax refund has erroneously been made within thirty months from the 'relevant date'.

'Relevant date' as defined under sub-section 6 of Section 73 reads as under:

*"(6) For the purposes of this section, "relevant date" means,—*

*(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid—*

*(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;*

*(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;*

*(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made thereunder;*

*(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;*

*(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund."*

*Amr*



8. From the plain reading of the above, it can be seen that the 'relevant date' in case of erroneous refund is 'the date of such refund'. In the present case, the 'relevant date' is 07.01.2016 as it was on this date the amount was paid as refund to the account of the appellant. I find that the same has been clarified by the Board vide Circular No. 423/56/98-CX dated 22-9-1998 wherein it is clarified that in case of erroneous refund, demand has to be issued within normal period from the date of actual refund. The said circular reads as under:

*"Subject : Whether erroneous refund granted could be recovered by raising a demand under Section 11A or Section 35E provides an avenue to the Department for recovery - Clarification regarding.*

*Certain doubts have been raised regarding whether the erroneous refunds granted could be recovered by recourse to review under Section 35-E of the Central Excise Act or demands under Section 11A within the statutory time limit as laid down.*

*The S.C. in the case of CCE v. Re-rolling Mills (reported in 1997 (94) ELT 8 (SC) has inter alia held as following :*

*"The learned Counsel for the parties do not dispute that this appeal is covered by the decision of this Court in Union of India & Ors. v. Jain Shudh Vanaspati Ltd. & Anr. 1996 (86) E.L.T. 460 (S.C.) = (1996) 10 SCC 520. In that case the Court was dealing with Section 28 of the Customs Act which is in pari materia with Section 11 A of the Central Excise Act. The said decision is thus applicable to the present case also. For the reasons given in the said judgement, the appeal is dismissed."*

*In this context the point to be stressed is that the Order passed U/S 35E (2) does not automatically result in the recovery of the refund. This has to be followed by SCN U/S 11A which should be issued within 6 months from the date of actual refund. Since time limit for filing appeal U/S 35E(2) is longer than the time limit prescribed U/S 11A, the SCN should proceed the proceedings U/S 35E(2).*

*This view has been supported by the opinion of the law Ministry. The Law Ministry vide F.No. 387/78/98 - JC has opened thus, "In view of the judgement of the Apex Court in CCE v. Re-rolling Mills [1997 (94) E.L.T 8] dismissing the appeal preferred by the Department against the CEGAT order, the order passed by the Tribunal on 27-1-1998 in the present case of M/s. Fag Precision Bearing Ltd. reflects the correct legal position. We, therefore agree with the view of the referring Department that the demand for recovery of erroneous refund has to be made U/S 11A of the Central Excise Act, 1944 within the prescribed limitation period."*

*In view of above it is clarified that timely demands should invariably be raised (within six months normal period) under Section 11A of the Act."*

9. Section 73 of Finance Act, 1994 being *pari materia* to Section 11A of Central Excise Act, 1944, a show cause notice under Section 73 has to be issued within the normal period of limitation, which is thirty months in this case for recovery of erroneous refund. As the date of actual refund is 07.01.2016, a show cause notice for recovery of erroneous refund under Section 73 was required to be issued by the proper officer and served to the appellant latest by 06.07.2018. In the present case, no show cause notice was issued to the appellant for recovery of erroneous refund sanctioned when the department filed appeal against Order-in-Original No.01/ST/REF/2016 dated 04.01.2016 by which the refund was sanctioned and paid. Show cause notice was issued only on 25.10.2019 that too after one year from passing second Order-in-Appeal dated 06.09.2018. Thus, the demand notice issued on 25.10.2019 is hit by limitation under Section 73 *ibid*. In this regard, I find support in the case of *Bajaj Auto Limited-2003 (151) E.L.T. 23 (Bom.)* wherein it is held as under:



*[Handwritten signature]*

"23. While considering the scope of recovery of excise duty under Section 11A of the Excise Act, on account of retrospective amendment to Rules 9 and 49 of Central Excise Rules, 1944 by Finance Act, 1982, the Apex Court in the case of *J.K. Spinning and Weaving Mills Ltd. & Anr. v. Union of India & Ors.*, reported in 1987 (32) E.L.T. 234 (S.C.), held in Para Nos. 31 and 33 as follows :-

"31. Under Section 11A(1) the Excise authorities cannot recover duties not levied or not paid or short-levied or short-paid or erroneously refunded beyond the period of six months, the proviso to Section 11A not being applicable in the present case. Thus, although Section 51 of the Finance Act, 1982 has given retrospective effect to the amendments of Rules 9 and 49, yet it must be subject to the provision of Section 11A of the Act. We are unable to accept the contention of the learned Attorney General that as Section 51 has made the amendments retrospective in operation since February 28, 1944, it should be held that it overrides the provision of Section 11A. If the intention of the Legislature was to nullify the effect of Section 11A, in that case, the Legislature would have specifically provided for the same. Section 51 does not contain any non obstante clause, nor does it refer to the provision of Section 11A. In the circumstances, it is difficult to hold that Section 51 overrides the provision of Section 11A.

32. ....

33. There is no provision in the Act or in the Rules enabling the Excise authorities to make any demand beyond the periods mentioned in Section 11A of the Act on the ground of the accrual of cause of action. The question that is really involved is whether in view of Section 51 of the Finance Act, 1982, Section 11A should be ignored or not. In our view, Section 51 does not, in any manner, affect the provision of Section 11A of the Act. In the absence of any specific provision overriding Section 11A, it will be consistent with rules of harmonious construction to hold that Section 51 of the Finance Act, 1982 insofar as it gives retrospective effect to the amendments made to Rules 9 and 49 of the Rules, is subject to the provision of Section 11A."

Thus, the Apex Court held, that, even when the Revenue is entitled to recover excise duty on account of retrospective amendment to the Excise Rules, recovery will be subject to the limitation prescribed under Section 11A of the Excise Act. In other words, even the amendment, which empowered the Revenue to recover excise duty with retrospective effect, in the absence of non obstante clause in the amendment, recovery will be governed by the limitation prescribed under Section 11A of the Excise Act. Applying the ratio of the above decision to the facts of the present case, the impugned notice under Section 11A of the Act, dated 2-9-1992, though issued pursuant to the order of the appellate authority, it being issued beyond the period of six months from the relevant date, for recovery of the erroneous refund, is barred by limitation and hence is liable to be quashed and set aside.

24. In a subsequent judgment in the case of *J.K. Cotton Spinning & Weaving Mills Company Ltd. v. Collector of Central Excise*, reported in 1998 (99) E.L.T. 8 (S.C.), the Apex Court had occasion to consider the elasticity permissible under Section 11A for issuing notice for recovery of erroneous refund. In Para No. 6 of its judgment, the Apex Court held as under :-

"6. The period of six months envisaged in sub-section (1) thereof can thus be extended only under three eventualities. First is, if the impairment of the levy is attributable to any fraud, collusion or wilful misrepresentation or suppression of facts, the period of six months will stand stretched up to five years. The second eventuality is, if the original assessment was provisional, in which case the period would start running only from the date of final assessment. The third is, if the service of show cause notice on the person chargeable with duty is stayed by a court, in which case the entire period of stay shall be excluded from computing the aforesaid limitation time."

In the present case, none of the aforesaid eventualities are existing so as to extend the period of limitation for issuing notice under Section 11A of the Excise Act. Thus, the limitation of six months from the date of relevant date for recovery of the erroneous refund would have to be restricted to six months from the relevant date. Under the circumstances, the show cause notice impugned in the present case, issued under Section 11A of the Act, being time barred, is liable to be quashed and set aside.

25. Moreover, the Central Board of Excise and Customs, after obtaining opinion of the Law Ministry, vide Circular No. 423/56/98-CX., dated 22-9-1998, has clarified that erroneous refund cannot be recovered by mere filing an application under Section 35E(2) of the Excise Act, unless notice under Section 11A is issued within the stipulated time. The relevant portion of the above Circular, reads as under :-

".....In this context the point to be stressed is that the Order passed U/s 35E(2) does not automatically result in the recovery of the refund. This has to be followed by SCN U/S 11A which should be issued within 6 months from the date of actual refund. Since time-limit for filing appeal U/S 35E(2) is longer than the time-limit prescribed U/S 11A, the SCN should proceed (sic) the proceedings U/S 35E(2).



*[Handwritten signature]*

.....In view of above, it is clarified that timely demands should invariably be raised (within six months normal period) under Section 11A of the Act."

From the aforesaid Circular of the Government, which is in consonance with our view, it is accepted by the Government that issuance of notice under Section 11A of the Excise Act within 6 months from the relevant date is mandatory even if the time-limit for filing appeal under Section 35E(2) is longer than the time-limit prescribed under Section 11A. In other words, if an appeal under Section 35E(2) is filed in time and notice under Section 11A is not issued within 6 months from the relevant date, and if the notice is issued belatedly after the order under Section 35E, then, in spite of the order in appeal under Section 35E(2), the Revenue will not be entitled to recover the erroneous refund, it being time-barred. It is a well established principle in law that C.B.E.C. Circulars are binding on the Revenue. The above Circular being issued in the light of the decision of the Apex Court in the case of Re-Rolling Mills (supra) and in the light of the opinion of Law Ministry, is binding on the Revenue and contrary agreements cannot be advanced by the Revenue. In this view of the matter, in the present case, the relevant date of refund being 23-5-1988, the notice under Section 11A, issued on 2-9-1992, is obviously beyond 6 months from the relevant date and hence, it is barred by limitation."

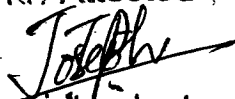
10. From the above settled provisions of law and in view of clarification issued by Board, it is as clear as day light that the show cause notice was issued beyond normal period of limitation, albeit the matter was remanded back to the adjudicating authority and a second order was passed by him. It is a fact that refund amount was paid to the appellant on 07.01.2016 and in the second order dated 22.06.2017, no amount was paid. Therefore, I hold that as show cause notice dated 25.10.2019 is time barred under Section 73 of the Finance Act, 1994, the impugned order confirming the demand is not sustainable on the ground of limitation.

11. In view of the above discussions and findings, I set aside the impugned order and allow the appeal.

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

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

सत्यापित / Attested

  
Superintendent  
Central GST (Appeals)  
Rajkot

  
(शिव प्रताप सिंह/ SHIV PRATAP SINGH)  
आयुक्त (अपील)/Commissioner (Appeals)

By R.P.A.D.

सेवा में, मेस्सेर्स तीर्थ अगरो टेक्नालजी प्राइवेट लिमिटेड शक्तिमान, सर्वे नंबर 108/1, प्लॉट बी, एन।एच-27, भरुदी टोल प्लाज़ा के पास विल्लेज भुनवा, तालुका गोंडल, जिल्ला राजकोट-360 311.	To M/s Tirth Agro Technology Pvt Ltd, Shaktiman, Survey No.108/1, Plot No.B, NH-27, Nr. Bharudi Toll Plaza, Bhunava (Village), Tal. Gondal, Dist. Rajkot-360 311
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प्रतिलिपि:-

- 1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद।
- 2) प्रधान आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट।
- 3) ऊप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, रमंडल-II, राजकोट।
- 4) गार्ड फ़ाइल।

