
 सत्यमेव जयते	केंद्रीय कर आयुक्त (अपील) O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, वस्तु एवं सेवा कर भवन, सातवीं मंजिल, पोलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	 GST Building, 7 th Floor, Near Polytechnic, Ambavadi, Ahmedabad- 380015
☎ : 079-26305065		टैलेफैक्स : 079 - 26305136

क फाइल संख्या : File No : **V2(69)7/RA/GNR/2017-18/815**

ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-0188-17-18**
 दिनांक Date : **29.01.2018** जारी करने की तारीख Date of Issue: **08/02/18**
श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker** Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश :
AHM-CEX-003-DC-006-2017 दिनांक : **26.05.2017** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-DC-006-2017**, Date: **26.05.2017** Issued
 by: Assistant Commissioner, Central Excise, Div: Gandhinagar, Ahmedabad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Interkiln Cermamics Ltd

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

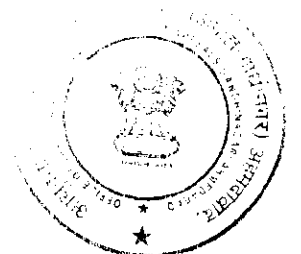
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur 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.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.



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

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2021 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- एबी/35-इ के अंतर्गत:-

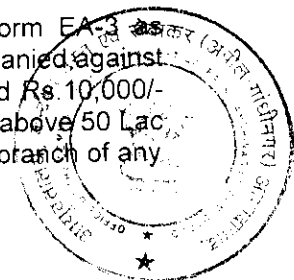
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेटल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2021 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरण की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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/- and Rs.10,000/- where amount of duty / penalty / demand / refund s upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any



nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे 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 adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 35फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1998 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

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

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

→ आगे बशर्त यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

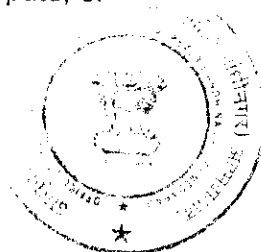
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

(6)(i) इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, 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."



ORDER-IN-APPEAL

This appeal has been filed by the Assistant Commissioner of Central GST, Kalol Division, Gandhinagar [for short-the department] against the Order-in-Original No.AHM-CEX-003-DC-006-2017 dated 26.05.2017 [impugned order] passed by the jurisdictional Deputy/Assistant Commissioner of Central Excise, Ahmedabad-III [adjudicating authority] in respect of M/s Interklin Ceramics Ltd, 226, Vadavswami, Taluka Kalol, Dist. Gandhinagar [for short-respondent], in view of Review Order No.11/2017-18 dated 26.05.2017 of Commissioner of Central GST, & CEx, Gandhinagar.

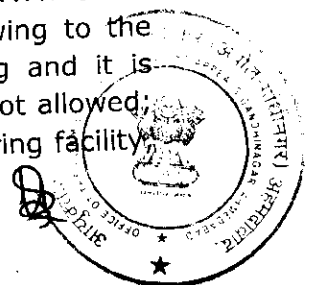
2. The facts of the case is that the respondent has filed a refund claim of Rs.17,43,000/- before the adjudicating authority. The background for filing the said refund claim is that based on Audit Objection, show cause notice dated 13.08.2007 was issued to the respondent, alleging that they had availed CENVAT credit of Rs.31,49,444/- in respect of capital goods on the basis Xerox copies of Bills of Entry, which is in contravention of the provisions of Rule 7,9 of CENVAT credit Rules, 2004 (CCR). The said notice was confirmed by the jurisdictional Additional Commissioner vide his order dated 29.02.2008. After a prolonged litigations through Commissioner (Appeals) and CESTAT again and again, the respondent succeeded on the objection raised by the Audit officer; that an amount of Rs.24,61,434/- was allowed by the Commissioner (Appeals) vide his OIA No.115/2011 dated 07.07.2011 and remaining amount of Rs.6,88,010/- was allowed by the Additional Commissioner of Central Excise, Ahmedabad-III vide his order No.AHM-CEX-003-ADC-AJS-016-16-17 dated 09.09.2016 on the basis of Hon'ble Tribunal's order No.A/10281/2015 dated 26.03.2015.

2.1 Since all the allegation raised against the respondent, vide show cause notice dated 13.08.2007 was finally decided in their favour, they filed refund claim of Rs.17,43,000/- which was paid by them on two occasions viz., [i] an amount of Rs.17,28,000/- reversed in their CENVAT account on 17.02.2007 on the basis of Audit Objection and [ii] Rs.15,000/- paid in cash as a pre-deposit based Commissioner (Appeals) order dated 18.11.2008.

2.2 The adjudicating authority has sanctioned the refund amount in question, mainly in view of decision in case of UOI Vs M/s Slovak India Trading Co. Pvt Ltd of Hon'ble High Court of Karnataka [2006 (201) ELT 559] which was maintained by the Hon'ble Apex Court.

3. Being aggrieved with the sanction of rebate claim in cash, the department has filed the instant appeal on the grounds that:

- That the adjudicating authority has sanctioned the refund of CENVAT credit that was reversed by the respondent at the relevant period owing to the Audit objection; that the respondent's unit is closed since long and it is settled law that refund of CENVAT credit upon closure of unit is not allowed; that when the unit is closed and have wound up their manufacturing facility;



the question of granting refund of the accumulated credit except for it being under Rule 5 does not arise.

- The adjudicating authority has not considered the facts mentioned in the Hon'ble Tribunal, Larger Bench decision in case of M/s Gauri Plasticulture P Ltd [2006 (202) ELT 199-Mum], wherein it has been held that no cash refund should have been allowed to the assessee for the reversal/payment made by them through CENVAT account at the time of closing of unit and there is no provisions to sanction cash refund of unutilized CENVAT credit.
- The decision of Hon'ble High Court of Karnataka relied on by the adjudicating authority is not applicable to the present case as the said decision was with reference to erstwhile Rule 5 of CCR 2002.
- The credit reversed by the respondent was intentionally at the time of closure of factory so as to encash the said credit in future, if the result of the litigation goes in their favour.
- The respondent has not proved the aspect of unjust enrichment to the satisfaction of adjudicating authority, yet he concluded the matter of unjust enrichment.

4. A personal hearing in the matter was held on 24.01.2018. Shri M.K.Kothari, Consultant appeared on behalf of the respondent and reiterated the grounds of appeal. He submitted additional written submissions.

5. The respondent in their cross-objection filed against the appeal filed by the department and in their additional written submission filed during the course of personal hearing, inter-alia, stated that:

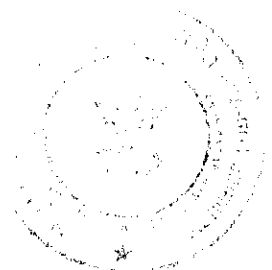
- The appeal filed against the Hon'ble Tribunal Larger Bench decision relied on by the department is admitted by the Hon'ble High Court of Mumbai; that the Hon'ble High Court of Karnataka decision relied on by the adjudicating authority has been affirmed by the Hon'ble Apex Court. Hence the Larger Bench decision cannot be considered as good law.
- The respondent has no malafide intention as stated by the department in their appeal; the reversal was made on the insistence of the audit officer.
- The adjudicating authority has correctly examined the issue relating to unjust enrichment; the provisions of unjust enrichment would not be applicable if the refund relates to CENVAT credit; that in the notice, no issue regarding unjust enrichment was raised.

6. I have carefully gone through the facts of the case, submission made by the department in the appeal and the submissions made by the respondent in their cross-objection as well as at the time of personal hearing.

7. At the outset, I observe that the issue involved in the instant appeal is relating to the eligibility of refund claim sanctioned by the adjudicating authority in cash though it was reversed in CENVAT account at the time of closure of unit.

8. In the instant case, I observe that the refund claim in question was filed by the respondent on account of finality of allegation raised against them in the year 2007; that during the time of allegation raised by the Audit Officer, they had reversed an amount of Rs.17,28,000/- in their CENVAT account and paid Rs.15,000/- in cash against pre-deposit amount ordered by the Commissioner (Appeals) dated 18.11.2008. The department contention is that the respondent's

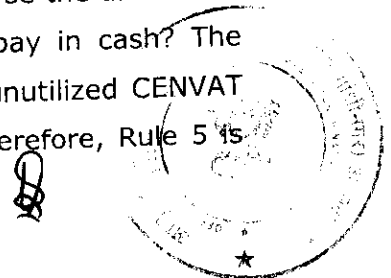




unit is closed since long and it is a settled law that refund of CENVAT credit upon closure of unit is not allowed; that when the unit is closed and have wound up their manufacturing facility, the question of granting refund of the accumulated credit except for it being under Rule 5 does not arise.

9. In the instant case, from the records, I observe that the respondent's unit was closed since long and before closing the unit, they had reversed the amount of Rs.17,28,000/- in their CENVAT account owing to the audit objection and Rs.15,000/- paid as pre-deposit amount in cash in view of Commissioner (Appeals) order dated 18.11.2008. I observe that the department has heavily relied on Hon'ble Tribunals Larger Bench decision in case of M/s Gauri Plasticulture Ltd *supra*; that the Hon'ble Tribunal has held that there is no bar in allowing the refund of such credit in cash provided the assessee is able to establish that on account of the use of such credit for payment of disputed duty and now refunded amount, they were compelled to pay the duty out of the PLA during the period. On other hand, the adjudicating authority has relied on Hon'ble High Court of Karnataka decision in case of M/s Slovak India Trading *supra* which was affirmed by the Hon'ble Apex Court. The Hon'ble High Court of Karnataka has held that "there is no express prohibition in terms of Rule 5. Even otherwise, it refers to a manufacturer as we see from Rule 5 itself. Admittedly, in the case on hand, there is no manufacture in the light of closure of the Company. Therefore, Rule 5 is not available for the purpose of rejection as rightly ruled by the Tribunal. The Tribunal has noticed that various case laws in which similar claims were allowed. The Tribunal, in our view, is fully justified in ordering refund particularly in the light of the closure of the factory and in the light of the assessee coming out of the Modvat Scheme. In these circumstances, we answer all the three questions as framed in para 17 against the Revenue and in favour of the assessee."

10. In the instant case, I observe that there was no clarity as to whether any situation as held by the Larger Bench of Hon'ble Tribunal *supra* had been faced by the respondent or otherwise. It is an undisputed fact that the unit was closed since long and refund claim was arisen due to payment made by the appellant due to an Audit objection which went on a long litigation and settled in their favour. In a situation like where the appellant had paid duty amount on the basis of audit objection and closed down their unit during the course of litigation, there may be a situation viz [i] when the amount of duty in question was not reversed by the appellant at the relevant time and the appellant succeeds the litigation; and [ii] the amount of duty in question was not reversed and the appellant fails to succeed the litigation. As regards [i] above, as per department contention, it is obvious that whatever balance available with the appellant in their CENVAT account at the time of closure of their unit will automatically lapse. As regards [ii] above what will be the situation. Would the department allow the respondent to reverse the amount in dispute from their CENVAT balance or would they demand to pay in cash? The refund in the instant case was not with regard to accumulated unutilized CENVAT credit. Admittedly, in the case on hand, the unit was closed. Therefore, Rule 5 is



not available for the purpose of rejection. I observe that various Tribunals has followed the decision of M/s Slovak India Trading *supra* by allowing refund in cash on closure of unit though it was paid through CENVAT. I further I observe that the Hon'ble Tribunal Larger Bench decision *supra* has been distinguished/over ruled by Hon'ble High Court of Rajasthan in case of M/s Lav Kush Textiles Vs CCE Jaipur [2017 (353) ELT 417 -Raj]. It has been held that:

"15. The order of the Karnataka High Court has further been confirmed by the Hon'ble Supreme Court in the SLP mentioned in the above paragraph. Taking into consideration, the Rule 5 of the Cenvat Credit Rules, 2002, we are of the view that the Tribunal was not correct while relying upon the judgment of the Larger Bench in Gauri Plasticulture (P) Ltd. as Rule 5 in no way prohibits the payment of the refund amount in cash and more particularly when after a proper adjudication of matter an amount of Rs. 63,001/- is said to have been sanctioned in favour of assessee (appellant) and the factum of their manufacturing unit having been closed, we are of the considered opinion that the present appeal deserves acceptance, the same is, therefore, allowed. The refund amount due to the appellant is required to be paid in cash by the Revenue....."

11. In view of above discussion, I do not find any infirmity in the order passed by the adjudicating authority under which the refund of the appellant was sanctioned in cash as discussed in above paras. Therefore, I uphold the same and reject the appeal filed by the department.

12. The appeal filed by the department is disposed of in above terms.

उमा शंकर

(उमा शंकर)
आयुक्त (अपील्स)

Date: /01/2018

Attested

Mohan V.V.
(Mohan V.V)
Superintendent (Appeals)
CGST & Central Excise, Ahmedabad
By R.P.A.D

To
M/s Interklin Ceramics Ltd,
226, Vadavswami, Taluka Kalol,
Dist. Gandhinagar

The Assistant Commissioner
CGST, Gandhinagar Division.

Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Commissioner, CGST, Gandhinagar.
3. The Deputy/Assistant Commissioner, CGST, Kalol Division
- ✓ 4. The Assistant Commissioner, System-CGST Gandhinagar
5. Guard File.
6. P.A. File.

