रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील -I) का कार्यालय, केन्द्रीय उत्पाद शुल्क, :
: सैन्टल एक्साइज भवन, सातवीं मंजिल, पौलिटैक्नीक के पास, :
: आंबावाडी, अहमदाबाद– 380015. :

क फाइल संख्या : File No : **V2(39)69 /Ahd-III/2015-16/Appeal-I** 1944 to 1948

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-117-16-17**

दिनाँक Date : **22.09.2016** जारी करने की तारीख Date of Issue 26/9/16.

श्री अभय कुमार श्रीवास्तव आयुक्त (अपील-I) द्वारा पारित

Passed by **Shri Abhai Kumar Srivastav** Commissioner(Appeals-I)Ahmedabad

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-I आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनाँक : _____ से सृजित

Arising out of Order-in-Original: **35/CE/Ref/DC/2015** Date: **26.10.2015**
Issued by: Deputy Commissioner, Central Excise, Din: Kalol, A'bad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Viral Industries Pvt. 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 :

(i) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूवोक्त 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 प्रकिया 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 मामलें 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.

केन्द्रीय उत्पाद शुल्क आयुक्तालय (अपील-I) OFFICE OF THE COMMISSIONER (APPEALS-I) CENTRAL EXCISE AHMEDABAD अहमदाबाद

ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट 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, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35– ण्0बी/35–इ के अंतर्गतः–

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

(क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

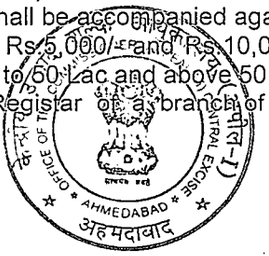
(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

(ख) 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 मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016.

(b) 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, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर 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 ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखाकिंत 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 is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar 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 ओदश 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 हैं।

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 not withstanding 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 रू.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 beer a court fee stamp of Rs.6.50 paisa 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 in 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, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते 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 बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

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 संदर्भ में, 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."

केन्द्रीय उत्पाद शुल्क आयुक्तालय, (अपील-I) OFFICE OF THE COMMISSIONER (APPEALS-I) CENTRAL EXCISE AHMEDABAD अहमदाबाद

ORDER-IN-APPEAL

This appeal has been filed by M/s. Viral Industries Private Limited, Plot No. 3447 to 3450 and 3459 to 3462, GIDC, Phase-IV, Chattral, Tal. Kalol, Gandhinagar, Gujarat-382 729 [appellant-for sake of brevity] against OIO No. 35/CE/Ref/DC/2015 dated 26.10.2015 issued by Deputy Commissioner, Central Excise, Kalol Division, Ahmedabad-III Commissionerate.

2. The facts briefly are that during the course of audit of the appellant, by officers of Audit-I Commissionerate, Ahmedabad, an objection was raised vide revenue para no. 3 of final audit report no. 43/2015(Excise) dated 11.8.2015, that they had wrongly availed CENVAT credit of Rs. 1,39,146 on Customs Education Cess and Secondary and Higher Education Cess. The appellant paid the amount of credit wrongly availed along with interest of Rs. 43,916/- and penalty of Rs. 29,277/- vide challans, dated 6.5.2015 and 9.5.2015.

3. Thereafter, on 8.7.2015, the appellant filed a refund claim of Rs. 2,12,339/- under Section 11B of the Central Excise Act, 1944, on the grounds that the payments may be considered to have been made under protest; that they were not supposed to reverse the credit availed since the availment was proper and in compliance to the CENVAT Credit Rules, 2004.

4. The adjudicating authority vide his aforementioned OIO dated 26.10.2015, rejected the refund claims, on the ground that:

- as per the final audit report, the appellant had agreed with the objection, which was approved in the MCM; that during the time of payment, the objection was not contested; that the dues were willingly paid along with interest and penalty;
- the contention that they had contested the objection before receipt of audit report has not been proved by producing documentary evidence;
- that the credit should not have been availed in the first place since the appellant knew that vide Notification no. 13/2012-Cus and 14/2012-Cus, both dated 17.3.2012, Education Cess and Secondary and Higher Education Cess on CVD were exempt;
- that Board has clarified that if an amount is paid as excise duty on exempted goods, the same cannot be availed as CENVAT Credit.

5. The appellant, feeling aggrieved, has filed this appeal against the above OIO, wherein he has raised the following contentions:

- that before the first adjudicating authority it was clarified that the credit availed in respect of Education Cess and Secondary and Higher Education Cess was on aggregate of customs duty and not on CVD as alleged in the show cause notice; that since averment is not addressed, the impugned order is not a speaking order;
- appellant refers to Rule 3(1)(via) of the CENVAT Credit Rules, 2004, which enables availment of CENVAT Credit;
- no show cause notice was issued to the appellant demanding appropriation of the amounts deposited by them in pursuance of the audit objection;
- there is no dispute that amounts of CENVAT credit availed by the appellant were in consonance with the amount of such duty paid under such invoices; that even assuming that the duty was incorrectly paid, the availment of CENVAT credit cannot be now disputed by the department;
- that they wish to rely on the case of M/s. Nuland Laboratories [2015(317) ELT 705].

6. Personal hearing in the case was held on 10.8.2016 wherein Shri Paresh Dave and Ms. Shilpa Dave, both advocates, appeared on behalf of the appellant and reiterated the submissions advanced in the grounds of appeal. They also provided a compilation of case laws.

7. I have gone through the facts of the case, the submissions made in the appeal and the oral averments, raised during the course of personal hearing.

केन्द्रीय उत्पाद शुल्क (अपील-I) आयुक्त का कार्यालय, OFFICE OF THE COMMISSIONER (APPEALS-I) CENTRAL EXCISE, AHMEDABAD, अहमदाबाद

8. The issue to be decided in this case is whether the adjudicating authority was correct in rejecting the refund filed by the appellant.

9. The adjudicating authority has held that no documentary evidence was produced as a proof by the appellant to substantiate his claim that they had contested the objection before receipt of audit report.

9.1 I find that the appellant has not produced any documentary evidence before me either, to disprove the findings of the lower adjudicating authority. Central Excise and Service Tax Audit Manual-2015, provides a draft of letter to be submitted by the assessee in case he wants a waiver of show cause notice under section 11A(2) of the Central Excise Act, 1944. Ideally, such letter [Annexure –CE-X] should have been obtained by the audit, before closing the proceedings. There is no finding in this regard as to whether such a letter was submitted by the appellant, in this case.

9.2 The facts that are not disputed are that
(i) credit held by audit to have been wrongly availed as CENVAT Credit, was reversed /paid by the appellant before the issuance of the Final Audit Report and after completion of the audit;
(ii) the amount wrongly availed as CENVAT credit was paid back, along with interest and penalty.

10. CENVAT credit is the primary issue in this appeal, and refund only a corollary. It is contended by the appellant that:

[a] the CENVAT Credit availment in respect of Capital goods received from an 100% EOU was in respect of Education Cess [**EC**] and Secondary and Higher Education Cess [**SHEC**] on aggregate of customs duty and not on CVD; and
[b] that the CENVAT credit availment was as per Rule 3(1)(via).

11. The adjudicating authority while rejecting the refund, has held that the availment of CENVAT Credit of EC and SHEC on CVD was incorrect, owing to the exemption granted vide notification Nos. 13/2012-Cus and 14/2012-Cus both dated 17.3.2012. Notification No. 13/2012-Cus, granted exemption from whole of EC, leviable under Section 3(1) of Customs Tariff Act, 1975 read with sections 91, 93 and 94 of the Finance Act, 2004 while notification No. 14/2012-Cus, dated 17.3.2012, granted exemption from whole of SHEC which is leviable under Section 3(1) of the Customs Tariff Act, 1975 read with Section 136, 138 and 139 of Finance Act , 2007.

12. The appellant has enclosed 17 [seventeen] invoices, with the appeal papers, on which credit is availed. The invoices, clearly depict that the supplier was a 100% EOU, who was discharging duty after availing benefit under Sr. No. 2 of notification No. 23/2003-CE dated 31.3.2003. Further, on going through the seventeen invoices submitted by the appellant it appears that the supplier of the appellant was discharging duties on clearances to DTA as follows:

[a] Basic Customs duty on Assessable value;
[b] CVD on Assessable value (+) Basic Customs Duty;
[c] EC and SHEC on duties of Customs i.e. BCD (+) CVD;
[d] EC and SHEC on aggregate of Customs duties under proviso to Section 3 of the Central Excise Act, 1944.

13. Rule 3(7) of the CENVAT Credit Rules, 2004 deals with the situation wherein CENVAT credit is availed in respect of goods received from an *hundred percent export oriented unit* or by an unit in an *Electronic Hardware Technology Park* or *Software Technology Park.* The relevant extracts are quoted here-in-below for ease of reference:

(7) Notwithstanding anything contained in sub-rule (1) and sub-rule (4), -

(a) CENVAT credit in respect of inputs or capital goods produced or manufactured, by a hundred per cent. export-oriented undertaking or by a unit in an Electronic Hardware Technology Park or in a Software Technology Park other than a unit which pays excise duty levied under section 3 of the Excise Act read with serial numbers 3, 5, 6 and 7 of Notification No. 23/2003-Central Excise, dated the 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003] and used in the manufacture of the final products or in providing an output service, in any other place in India, in case the unit pays excise duty under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003-Central Excise, dated the 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003], shall be admissible equivalent to the amount calculated in the following manner, namely :-

Fifty per cent. of [X multiplied by {(1+BCD/100) multiplied by (CVD/100)}], where BCD and CVD denote ad valorem rates, in per cent. of basic customs duty and additional duty of customs leviable on the inputs or the capital goods respectively and X denotes the assessable value :

*[**Provided** that the CENVAT credit in respect of inputs and capital goods cleared on or after 1st March, 2006 ..... shall be equal to [X multiplied by [(1+BCD/200) multiplied by (CVD/100)]] :*

*[**Provided** further that the CENVAT credit in respect of inputs and capital goods cleared on or after the 7th September, 2009 from an export-oriented undertaking or by a unit in Electronic Hardware Technology Park or in a Software Technology Park, as the case may be, on which such undertaking or unit has paid*

-

(A) excise duty leviable under section 3 of the Excise Act read with serial number 2 of the Notification No. 23/2003-Central Excise, dated 31st March, 2003 [G.S.R. 266(E), dated the 31st March, 2003]; and
(B) the Education Cess leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 and the Secondary and Higher Education Cess leviable under section 136 read with section 138 of the Finance Act, 2007, on the excise duty referred to in (A),

shall be the aggregate of –

(I) that portion of excise duty referred to in (A), as is equivalent to -
  (i) the additional duty leviable under sub-section (1) of section 3 of the Customs Tariff Act, which is equal to the duty of excise under clause (a) of sub-section (1) of section 3 of the Excise Act;
  (ii) the additional duty leviable under sub-section (5) of section 3 of the Customs Tariff Act; and
(II) the Education Cess and the Secondary and Higher Education Cess referred to in (B).]

13.1 On going through the aforementioned rule, it is clear that CENVAT credit admissible to the appellant is only in respect of EC leviable under Section 91 read with Section 93 of Finance (No. 2) Act, 2004 and SHEC leviable under section 136 read with section 138 of Finance Act, 2007 i.e. EC and SHEC paid on CVD.

As per Finance (No. 2) Act, 2004, Section 91 deals with levy of EC and Section 93 of the Act supra, deals with EC on goods specified under first schedule of Central Excise Tariff Act, 1985, manufactured or produced. Similarly, in Finance Act, 2007, section 136 deals with levy of SHEC and Section 138 deals with levy of cess on goods specified under first schedule of Central Excise Tariff Act, 1985. The Finance (No. 2) Act, 2004 and Finance Act, 2007 imposes EC and SHEC on imported goods under sections 94 and 139.

13.2 The appellant claims that he has availed CENVAT credit on [d] as mentioned in para 12, supra. <u>*The payment of EC and SHEC on the aggregate of Customs duties*</u>, however, has been set aside by the Hon'ble Tribunal in the case of M/s. Sarla Performance Fibers Ltd [2010(235) ELT 203 (Tri-Abad)], which has been upheld by the Hon'ble High Court of Gujarat [2014(307) ELT 470(Guj)]. The departmental appeal against the said order of the High Court has also been dismissed on the grounds of delay [2014(307) ELT A79 (SC)]. Hence, the CENVAT availment is questionable since no EC or SHEC was leviable on account of this judgement in the first place.

15. The appellant has stated that the credit taken in respect of EC and SHEC on aggregate of Customs duty was availed under Rule 3(1)(via) of the CENVAT Credit Rules, 2004. The relevant extracts of Rule 3 of the CENVAT Credit Rules, 2004, is reproduced below, for ease of understanding:

> ***RULE 3. CENVAT credit. —***
> *(1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -*
>
> *(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act :*
> *[Provided .....;]*
> *(ii) to(v).....;*
> *(vi) the Education Cess on excisable goods leviable under section 91 read with section 93 of the Finance (No. 2) Act, 2004 (23 of 2004);*
> *[(via) the Secondary and Higher Education Cess on excisable goods leviable under section 136 read with section 138 of the Finance Act, 2007 (22 of 2007);]*
> *(vii) the additional duty leviable under section 3 of the Customs Tariff Act, equivalent to the duty of excise specified under clauses (i), (ii), (iii), (iv), (v) [, (vi) and (via)]:*

This rule *supra*, nowhere permits availment of CENVAT credit in respect of EC or SHEC, paid on aggregate of customs duty.

16. For forming an opinion, it is imperative that there is clarity in facts. There is, however, ambiguity in respect of primary facts. The departmental allegations vis-à-vis, claims made by the appellant, in respect of facts, are enumerated below:

Sr. No.	**Departmental claim/allegation**	**Contention of the appellant.**
1	The show cause notice dated 28.8.2015 states that the appellant had availed credit on Customs EC and SHEC though EC and SHEC on additional customs duty i.e. CVD was abolished vide notification No. 13/2012-Cus and 14/2012-Cus both dated 17.3.2012	The CENVAT Credit availed of EC and SHEC was in respect of *aggregate of customs duty* and not on *CVD*, as alleged in the notice.
2	The notice further states that the appellant by taking credit on EC and SHEC pertaining to CVD had contravened CCR '04.	-As above.
3	The notice states that in respect of the wrongly availed CENVAT credit the details were compared with the CENVAT credit register vis-a-vis the respective bills of entry.	The appellant has enclosed 17 invoices which reflects that the CENVAT Credit was availed based on invoices in respect of goods received from EOU.

Further, the appellant had brought these facts to the notice of the adjudicating authority, but no finding has been recorded in the original order dated 26.10.2015. The Hon'ble Tribunal in the case of Kesarwani Zarda Bhandar [2009(236) ELT 735], has held that when submissions are not dealt with by a quasi judicial authority in an order, it cannot be considered as a speaking order. It is therefore felt, that the original order, rejecting the refund is not a speaking order and suffers from non adherence to the principles of natural justice.

18. In view of the foregoing, the original order dated 26.10.2015 rejecting the refund filed by the appellant is set aside and the matter is remanded to the adjudicating authority with a direction to verify the facts as mentioned in paras *supra*, and address all the issues raised by the appellant while deciding the issue. While remanding the matter, I rely on the case of M/s. Honda Seil Power Products Ltd [2013(287) ELT 353].

केन्द्रीय उत्पाद शुल्क आयुक्त (अपील-I) CENTRAL EXCISE OFFICE OF THE COMMISSIONER (APPEALS-I) AHMEDABAD अहमदाबाद

19. The appeal is disposed of accordingly.

Date: 22.09.2016

(Abhai Kumar Srivastav)
Commissioner (Appeals-I)
Central Excise, Ahmedabad

Attested

(Vinod Lukose)
Superintendent (Appeal-I)
Central Excise, Ahmedabad.

BY R.P.A.D

M/s. Viral Industries Private Limited,
Plot No. 3447 to 3450 and 3459 to 3462,
GIDC, Phase-IV,
Chattral, Tal. Kalol,
Gandhinagar, Gujarat-382 729

Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-III
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-III
4. The Dy. / Asstt. Commissioner, Central Excise, Division- Kalol, Ahmedabad-III
5. Guard file.
6. P.A