रजिस्टर्ड डाक ए.डी. द्वारा

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

क फाइल संख्या : File No : **V2(33)46 /Ahd-III/2015-16/Appeal-I**

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-013-16-17**

दिनाँक Date : **11.05.2016** ज़ारी करने की तारीख Date of Issue 12/5/16

श्री उमाशंकर आयुक्त (अपील-I) द्वारा पारित

Passed by **Shri Uma Shanker** 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: **41/REF/CE/AC/2015** Date: **15.06.2015**
Issued by: Assistant Commissioner, Central Excise, Din: Mehsana, A'bad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Hi-Choice International (100% EOU)

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 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) 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."

ORDER IN APPEAL

This appeal has been filed by **M/s Hi-Choice International (100% EOU), Muktupur, Tal-Unjha, Dist-Mehsana** (hereinafter referred to as"the appellant") against Order-in-Original No.41/Ref/CE/AC/2015 dated 15.06.2015 (hereinafter referred to as" the impugned order") passed by the Assistant Commissioner of Central Excise, Mehsana Division (hereinafter referred to as ("the adjudicating authority).

2. Facts of the case is that a refund claim of Rs.8,15,074/- was filed by the appellant on 12.03.2015 in terms of Rule 5 of Cenvat Credit Rules, 2004 (CER), before the adjudicating authority in respect of unutilized Cenvat credit lying in RG 23 A Part-II register at the time of closure of their unit. A show cause notice dated 30.04.2015 was issued to the appellant for denying the refund claim on the grounds that they have not fulfilled substantial compliance with regard to various conditions of the said Rule and Notification No.05/2006-CE (NT) dated 14.03.2006; that since the unit has closed down for more than 5 years, the refund filed hit by limitation as prescribed under Section 11B of Central Excise Act, 1944 (CEA). The said show cause notice was adjudicated by the adjudicating authority vide impugned order by rejecting the said refund claim on the grounds mentioned in the show cause notice.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that Rule 5 does not prohibit refund of unutilized credit when there is no manufacturing activities in light of closure of factory; the they had no opportunity to utilize the Cenvat credit as all the goods manufactured were exported and the refund claim in dispute is for the unutilized credit due to closure of the unit, the details specified under Rule 5 read with the notification No5/2006 is not required. The appellant cited decision in the case of M/s Solvak India Tradint Co. Ltd, reported at 2006 (205) ELT 956 (Tri.Ban) and 2006 (201)ELT 559 (Kar) and in the case of M/s Anal Synthetic Pvt Ltd decided by Commissioner (appeal), Ahmedabad vide OIA dated 25.11.2008.

4. A personal hearing in the matter was held on 03.05.2016 and Shri M.H.Raval, Consultant appeared for the same. He reiterated the grounds of appeal.

4.1 I have carefully gone through the facts of the case, submissions made by the appellant in the appeal memorandum and at the time of personal hearing. The core issue to be decided in the instant case is whether the appellant is eligible for refund of unutilized Cenvat credit lying in balance at the time of closure of unit, under the provisions of Rule 5 of CCR read with Notification No.05/2006.

4.2 Rule 5 of CCR stipulates that when any input are used in the final products which are cleared for export , the Cenvat credit of input or input service so used shall be allowed to be utilized by the manufacture towards payment of duty of excise of any final product cleared for home consumption or for export of payment of duty and for any reason the such credit is not possible to utilize , the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations, as may be specified, by the Central Government, by notification. Further, I find that the Notification No.05/2006 ibid allows submitting the claim for such refund once for any quarter in a calendar year and in case of a 100% EOU the claim for such refund be submitted for each calendar month with relevant documents. I also find that such refund is required to be filed with the jurisdictional officer before the expiry of the period specified in section 11B of the CEA.

4.3 In the instant case, I find that the appellant has filed the said refund claim as they were not in position to utilize the credit due to closure of their unit. The contention of the adjudicating authority is that the said notification prescribes certain conditions and limitation for availing refund under Rule 5; that the basis of determining the refund amount is the export clearance of the final products as mentioned in the appendix of the notification and it provides for submission of documents relating to exports which was not followed by the appellant. It is an undisputed fact that Rule 5 read with Notification No.05/2006 prescribes for grant of refund of Cenvat credit on inputs used in the manufacture of final products which are cleared for export and for availing such refund, conditions viz. submission of relevant documents and time limits for filing such refund etc are prescribed. The basis of determining the refund amount is the export clearances of the final products as mentioned in the appendix to the said Notification. Rule 5 clearly states that refund shall be allowed subject to such conditions as may be specified. The Notification provides for submission of documents such as shipping bills etc. The reference to conditions and limitations in Rule 5 is to no effect and such conditions specified in Rule 5 read with Notification 5/2006 are necessary, if the contention of the appellant that where for any reason such adjustments are not possible refund may be allowed under the said rule. In the instant case, I find that the appellant is not able to submit the refund claim of unutilized Cenvat credit month wise or which period it pertains, as prescribed in the notification ibid along with the required documents as prescribed. Further, I find that the notification No.05/2006 clearly prescribed the time limit for filing the refund claim i.e within one year from the relevant specified in Section 11 B of CEA. As per finding of the adjudicating authority, the appellant has filed the refund claim in question after the expiry of one year from the relevant date. Therefore, refund in such cases of closure of factory is not provided under Rule 5 read with the

notification ibid.

4.4 The appellant has relied on the decision of M/s Solvak India Tradint Co. Ltd, reported at 2006 (205) ELT 956 (Tri.Ban) and 2006 (201) E.L.T. 559 (Kar) The said decision has been distinguished in the decision of M/s Phonix Industries Pvt Ltd reported at 2015 (330) ELT (Tri. Mumbai). By considering the said decision of M/s Solvak India Tradint Co. Ltd, the Hon'ble Tribunal in the case of M/s Phonix Industries Pvt held that :-

> ***7.1*** *The ld. Counsel states that Rule 5 enumerates 3 categories under which refund of unutilized Cenvat credit may be allowed i.e. (a) where the final product is exported, (b) where the final product is cleared for home consumption, (c) where for any reason such adjustments are not possible refund may also be allowed. Their case would be covered under (c) according to learned counsel.*
>
> *We do not agree with this reading of Rule 5. Rule 5 categorically states that where any inputs are used in the final products which are cleared for export under bond or letter of undertaking, then the credit shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Govt. by notification. The words "such adjustment" have to be read in context of the whole sentence. The words "where for any reason such adjustment is not possible" can only imply that refund in cash may be granted only when the Cenvat credit cannot be adjusted against duty on final products cleared for home consumption or for export on payment of duty. Any other interpretation would be against the scheme of Cenvat credit which is to prevent cascading in taxation. If the appellants' contention that refund may be granted on closure of factory is held to be valid, then there may be cases when the inputs are not even used in manufacture of the final product. Grant of refund in such cases would lead to an illogical result - that is, the duty paid on inputs is being refunded without their use in the manufacture of final products. This will amount to refund of Central Excise duty paid which has no basis in law.*
>
> ***7.2*** *The appellants have argued that there is no express provision in terms of Rule 5 which bars refund on closure of factory. We find that Rule 5 expressly allows refund only when "adjustment" is not possible to utilize Cenvat credit for clearing goods for home consumption or for export on payment of duty. There cannot be any other reasonable interpretation in the manner of reading this Rule. The Rule starts with the phrase "where any inputs are used in the final products which are cleared for export.." Thus the first condition is that the final products must be exported. The general principle of construction in canons of law is that a legislative instrument has to be read as a whole. The phrases in a sentence have to be read in their cognate sense. That is, Rule 5 has to be read as a whole and not in parts. The whole conveys only one sense i.e. refund of unutilized credit is only permissible in case of export of goods and not for any other reason."*

4.5 The above said decision in the case of M/s Phonix Industries Pvt Ltd is squarely applicable to the present case. Further, I find that the adjudicating authority, in para 22 of the impugned order, has relied on decision of Hon'ble High Court of Madras in the case of M/s GTN Enginering (I) Ltd reported at 2012 (281) ELT (Mad) which states that the time limit of one year under Section 11 B of CEA is mandatory and applicable to Rule 5 of CCR read with notification ibid. The Hon'ble Madras High Court's order has also been followed by the jurisdictional bench of CESTAT in the case of M/s Spectramix Plastics reported in 2014(307)ELT 353 (T). These cases are also squarely applicable to the instant case looking into the facts of the case as discussed above.

4.5 In view of above discussion and applying ratio of the decisions cited in above para, I find that the adjudicating authority has correctly rejected the refund claim filed by the appellant. Therefore, I uphold the impugned order and rejected appeal filed by the appellant. The appeal is disposed off in above terms.

(UMA SHANKER)
COMMISSIONER (APPEALS-I)
CENTRAL EXCISE,
AHMEDABAD

Attested

(Mohanan V.V)
Superintendent (Appeals-I)
Central Excise, Ahmedabad
By R.P.A.D.

To
M/s Hi-Choice International (100% EOU),
Muktupur, Tal-Unjha,
Dist-Mehsana

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- Mehsana, Ahmedabad-III
5. Guard file.
6. P.A (Commissioner-Appeals-I) file.