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(30)110/Ahd-III/2015-16/Appeal-I** 401 to 405

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-238-16-17**

दिनाँक Date **22.02.2017** जारी करने की तारीख Date of Issue 28.3.17

श्री उमाशंकर आयुक्त (अपील-I) द्वारा पारित

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

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश स **AHM-CEX-003-ADC-MSC-024-15-16** दिनाँक : **03.12.2015**, सृजित

Arising out of Order-in-Original:**AHM-CEX-003-ADC-MSC-024-15-16** Date: **03.12.2015** Issued by: Additional Commissioner, Central Excise, Div: Kalol, A'bad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Bio Tech Opthalmics 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 :

(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.

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 s.dwR me.,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

M/s. Biotech Opthalmics Private Limited, 555-557, Near Shubham Tex-o-Pack, Opposite New Arvind Mills, Khatraj Kalol Road, Tal. Kalol, District Gandhinagar [*for short - 'appellant*] has filed this appeal against OIO No. AHM-CEX-003-ADC-MSC-024-15-16 dated 31.12.2015, passed by the Additional Commissioner, Central Excise, Ahmedabad-III Commissionerate[for short - '*adjudicating authority*'].

2. Briefly stated, a show cause notice dated 9.9.2014, was issued to the appellant in respect of the period when he was availing the benefit of SSI notification No. 8/2003-CE dated 1.3.2003. The notice, *inter alia* proposed [a] recovery of CENVAT credit of Rs. 5,30,300/- carried forwarded in FY 2010-2011; [b] recovery of CENVAT Credit of Rs. 5,74,902/- + Rs. 31,308/- wrongly availed during the year 2010-11; [c] recovery of Central Excise duty of Rs. 3,72,712/- paid by the appellant from the wrongly availed CENVAT credit. The notice further demanded interest on the said CENVAT credit and proposed penalty on the appellant.

3. This notice was adjudicated vide the impugned OIO dated 31.12.2015, wherein the adjudicating authority confirmed the charges proposed in the notice along with interest and further imposed penalty on the appellant.

4. Feeling aggrieved, the appellant, has filed this appeal against the impugned OIO, wherein he has raised the following averment:

- that for the year 2010-2011, the appellant did not maintain separate records for manufacture of dutiable goods and exempted goods; that in the case of Bonfiglioli Transmissions Private Limited [2015(317) ELT 214], the Tribunal had held that Rule 6(3) of the CENVAT Credit Rules, 2004 [CCR '04] was a non obstante clause and once the assessee had opted for the said rule, applicability of Rule 6(1) of CCR '04 does not arise;
- that since the appellant has merely followed the mechanism provided under rule 6(3) of CCR, the contention that the appellant has availed CENVAT credit and violated the condition of the notification, is frivolous and untenable;
- that they would like to rely on the case of Asha Rubber (P) Limited [2009(233) ELT 120];
- in respect of the finding that the goods cleared under the notification, ibid, are not exempted goods, the adjudicating authority has travelled beyond the scope of show cause notice by making fresh allegation, which was never stated or implied in the notice;
- the appellant is further entitled to claim refund/re-credit in respect of 0.15%, excessively paid;
- that on a harmonious reading of Rule 11(2) with Rule 6(3) of CCR '04, it can be concluded that if the appellant has made reversal of an amount envisaged in Rule 6(3), then it shall amount to reversal of non eligible CENVAT credit including the one envisaged under Rule 11(2) of CCR'04;
- regarding demand of CENVAT credit amounting to Rs. 4,0,4200/-, the same cannot be demanded twice – i.e. again on its utilization; that they would like to rely on the case of Hindustan Construction Company Limited [2014-TIOL-1820-CESTAT-MUM] and Rolls Print Packaging Limited [1992(62) ELT 312];
- that the allegation of violation of Rule 9(5) of CCR '04 is not tenable;
- that the notice is barred by limitation;
- that demand of interest on reversal portion is incorrect and unjustified as the appellant has not availed any wrong CENVAT credit;

- that since the appellant has correctly availed and utilized CENVAT credit, the question of levying penalty is futile.

5. Personal hearing in respect of this appeal was held on 24.1.2017, wherein Shri Niraj Bagri and Vaibhav Jajoo, both Consultants, appeared on behalf of the appellant and reiterated the submissions advanced in the grounds of appeal. The appellant vide their letter dated 25.1.2017, submitted additional submissions highlighting that limitation was not applicable in this case; that they wished to rely on the case of Lathia Industrial Supplies Company Private Limited [2013(292) ELT 421].

6. I have gone through the facts of the case, the appellant's grounds of appeal, additional submissions and the oral submissions made during the course of personal hearing. The questions to be decided in the present appeal are manifold, viz.:

[a] is the appellant required to reverse the CENVAT credit, lying in balance, at the time of opting for SSI benefit [notification No. 8/2003-CE dated 1.3.2003] in terms of Rule 11(2) of CCR '04;
[b]can the appellant working under notification ibid, avail CENVAT credit, more so, when he has paid an amount under rule 6(3) of CCR '04 in respect of clearances made under the notification?; and
[c]is the department correct in demanding duty paid by utilizing the wrongly availed CENVAT Credit.

7. The facts to the present dispute are that the appellant was availing the benefit of notification No. 8/2003-CE dated 1.3.2003. This exemption is granted to units whose turnover in the previous year is less than Rs. 400 lakhs. As per the notification the clearances in the current year upto Rs. 150 lakhs, are fully exempt. Clearances after Rs. 150 lakhs, are on payment of normal duty. The exemption granted vide the notification, ibid, is subject to certain conditions, [refer para 2 of notification] of which one of the condition is that the manufacturer shall not avail the credit of duty on inputs under rule 3 or rule 11 of CENVAT credit rules, paid on inputs used in the manufacture of specified goods cleared for home consumption, the aggregate value of the first clearances of which does not exceed Rs. 150 lakhs. Proviso to para 2(iii) inserted *wef* 11.2.2009, states that this condition will not apply to inputs used in specified goods, bearing brand name or trade name of another person, which are ineligible for grant of SSI exemption.

8. Now coming to the first question i.e. whether the appellant is required to reverse the CENVAT credit, lying in balance, while opting for SSI benefit under Notification No. 8/2003-CE dated 1.3.2003, I find that as per the scheme of things, on the date of transition to the scheme, there may be final products in stock in which inputs are used on which CENVAT credit has been availed, but the finished goods are not

cleared on date of opting for this scheme. In such cases, an amount is payable equivalent to the CENVAT credit on inputs lying in stock or in process or contained in final products on which CENVAT credit has been availed. The balance CENVAT credit. if any will lapse. Rule 11(2) of the CENVAT Credit Rules, 2004, which is applicable in such situation, states as follows:

Rule 11. Transitional provision.-

(1) Any amount of credit earned by a manufacturer under the CENVAT Credit Rules, 2002, as they existed prior to the 10th day of September, 2004 or by a provider of output service under the Service Tax Credit Rules, 2002, as they existed prior to the 10th day of September, 2004, and remaining unutilized on that day shall be allowed as CENVAT credit to such manufacturer or provider of output service under these rules, and be allowed to be utilized in accordance with these rules.

(2) A manufacturer who opts for exemption from the whole of the duty of excise leviable on goods manufactured by him under a notification based on the value or quantity of clearances in a financial year, and who has been taking CENVAT credit on inputs or input services before such option is exercised, shall be required to pay an amount equivalent to the CENVAT credit, if any, allowed to him in respect of inputs lying in stock or in process or contained in final products lying in stock on the date when such option is exercised and after deducting the said amount from the balance, if any, lying in his credit, the balance, if any, still remaining shall lapse and shall not be allowed to be utilized for payment of duty on any excisable goods, whether cleared for home consumption or for export.

Since the SSI exemption is based on the value of clearances, Rule 11(2) of CCR '04 would come into play. However, I find that the appellant has vehemently argued that since they have complied with Rule 6(3) of CCR '04, it shall amount to reversal of non eligible CENVAT credit including one envisaged under Rule 11(2) of the CCR '04. The appellant, I find has **conceded** that reversal under Rule 11(2) is a must for availing the benefit of the notification, ibid. However, the rest of the argument put forth is not plausible. Rule 6 of CCR '04 casts an obligation on a manufacturer of final products not to avail CENVAT credit, on such quantity of input as is used in or in relation to the manufacture of exempted goods. Rule 6(3), gives an option to manufacturers who have failed to keep separate records as per Rule 6(2), in respect of dutiable and exempted final products and have availed CENVAT credit in respect of inputs used in the manufacture of exempted goods to pay an amount in respect of exempted clearances. How this is applicable to reversal of CENVAT credit lying in the balance as on 31st March of the previous financial year, for a manufacturer intending to opt for SSI benefit, is difficult to comprehend. It is an undisputed fact that the appellant was availing the benefit of SSI notification in respect of his own goods. Since there was no dutiable clearance as far his own goods were concerned, the question of applicability of Rule 6(3) does not arise. I therefore, reject the contention, being fallacious. The second argument in this regard by the appellant is that Rule 11(2) being a transitional provision, would not be applicable. The appellant further goes on to state that since he was discharging duty on certain portion of finished goods and claimed benefit of the exemption on the balance portion, the appellant has not claimed exemption under the notification for all the clearances during the year. In this argument, the appellant misses the proviso to condition 2(iii) of the notification, ibid, which clearly states that

CENVAT credit can be availed in respect of the goods bearing brand name or trade name of another person, simultaneously while availing the benefit of the notification in respect of their own goods, which are cleared to the domestic market. So the reversal of CENVAT credit balance sought is in respect of his own goods not the CENVAT credit lying in balance on account of his being a manufacturer, of others brand name. This is more so because his manufacturing in respect of others brand name is not covered under this notification. Further, Rule 11(2), as reproduced supra, shows that the appellants argument about the rule being transitional, is not a tenable argument, since it specifically talks about exemption under value based /quantity based exemption. I find that Rule 11(2), supra, is clearly applicable in this case in respect of goods manufactured on his own account. Hence, as far as the first question is concerned, I am of the view that the appellant is required to reverse the CENVAT credit, lying in balance, at the time of opting for SSI benefit under Notification No. 8/2003-CE dated 1.3.2003, in respect of the goods manufactured on his own account.

8.1 I find that the issue stands settled. The Hon'ble Tribnal in the case of Pack Plast Industries [2016(338) ELT 319] has held as follows:

> *6.Heard both sides and perused the records. The condition precedent of the notification No. 8/2003-C.E., dated 1-3-2003 read with transitional provision under the Cenvat Credit Rules, 2004 for opting for the notification at the beginning of the financial year, is that the Cenvat credit attributable to the inputs, WIP as well as finished products as on 31st March of the previous year will have to be expunged and the balance Cenvat credit available should be allowed to lapse. The duty demands have arisen since the appellant have not done so. Having paid the appropriate amounts on this scores subsequently, we have no hesitation to conclude that the appellant will be eligible for the benefit of notification during the disputed period. Consequently, the proposal for denying the benefit of notification and consequent demands will need to be set aside. In the result, the appeal succeeds.*
>
> [emphasis supplied]

As is evident, the Tribunal has explicitly stated that reversal of the balance CENVAT credit is integral to the availment of the benefit of the notification. The appeal in the above case was allowed only because the reversal was done, though subsequently.

9. As far as the second question is concerned, as to whether the appellant can avail CENVAT credit during the period while he is availing SSI benefit, more so since he has reversed an amount under Rule 6(3) of CCR'04, in respect of clearances made under the notification, I find that the law is very clear. Para 2(iii) which imposes the condition on the appellant clearly states as follows:

(iii)the manufacturer shall not avail the credit of duty on inputs under rule 3 or rule 11 of the CENVAT Credit Rules, 2002 (hereinafter referred to as the said rules), paid on inputs used in the manufacture of the specified goods cleared for home consumption, the aggregate value of the first clearances of which, as calculated in the manner specified in the said table does not exceed one hundred and fifty lakh rupees;

The primary condition is that no CENVAT credit can be taken, while availing the SSI exemption notification. The appellant's contention is that since they had paid an amount under Rule 6(3) of CCR '04, it was akin to them not having availed the CENVAT credit, as they had not maintained separate accounts. Reversal under rule 6 of CCR '04, comes to play only when a manufacturer, manufactures both exempted and dutiable goods. In the case at hand, the appellant is manufacturing goods [a] on his own account, availing the benefit of the notification and [b] as a job worker for others brand. The benefit of the notification is available, only in respect of his own goods. It is not available in respect of goods manufactured on behalf of others, as a job worker. Therefore, the argument that he is manufacturing both dutiable and exempted is not true. The goods manufactured as a job worker on behalf of others, is not covered under the SSI notification, ibid, and therefore, the argument put forth stands rejected. As has been held by the Hon'ble Supreme Court of India in the case of Himalayan Cooperative Milk Product Union Limited [2000(122) ELT 327(SC)], purpose and policy decision behind the notification should not be defeated by giving it some meaning other than what is clearly and plainly flowing from it. The appellant cannot circumvent the conditions of the SSI notification by [a] availing CENVAT credit, when it is strictly prohibited and [b] thereafter paying an amount @6% under Rule 6(3) and then claiming that it is akin to CENVAT credit not having been availed.

9.1 The appellant has relied upon two case laws:

[a]Bongiglioli Transmissions (P) Limited [2015(317) ELT 214]. The Tribunal in this case was considering availment of CENVAT credit in respect of exemption under some separate notification. The facts are totally different and is in no way connected to the present dispute. Therefore, the citation relied upon stands distinguished.

[b] Asha Rubber Private Limited [2009 (233) ELT 120]. Though the Tribunal accepted that subsequent payment of 8% of value of exempted goods has the effect as if no credit was availed and that benefit of Notification No. 16/97-C.E. was granted, the notification granting the SSI benefit has changed and new set of CENVAT Credit Rules, 2004 has come into place. Hence, the circumstances being different, the case law is not applicable. Even otherwise, an appeal was preferred against this order by the department before the Hon'ble High Court of Gujarat [TA No. 467/2008] wherein the Court vide its order dated 16.9.2016, based on an office note dated 15.9.2016 and CBEC circular dated 17.12.2015, finding the tax effect involved being below the minimum threshold limit, disposed off the departmental appeal. Even otherwise, recently, the Hon'ble Tribunal vide its order dated 27.4.2016, in the case of M/s. Synthetic Industries [2016(344) ELT 1044], accepted the argument of the Commissioner(Appeals) and held that since there was a clear violation of condition (iii) of Para 2 of Notification No. 8/2003-C.E., as appellant had simultaneously availed benefit of CENVAT credit scheme as well as exemption under impugned notification, there was no infirmity in orders of lower authorities denying exemption. The Tribunal also held that the said condition of not availing CENVAT credit was a prime condition for availment of the benefit of the said notification.

10. The appellant has further stated that he is entitled to claim of refund/re-credit in respect of 0.15% excessively paid and that the adjudicating authority has refrained from commenting anything in this regard. I find that the argument raised is not a tenable

argument since refund/re-credit is governed by separate provisions and procedures. Since it is not a part of the present proceedings, which is restricted to availment of CENVAT credit, the question of commenting on an issue, does not arise. I do not find any merit in the contention and it is therefore, rejected.

11. Now coming to the final question as to whether the department is correct in demanding duty paid by utilizing the wrongly availed CENVAT Credit, wherein the amount confirmed is Rs. 3,72,712/-. The appellant's contention is that once SCN has proposed to disallow the CENVAT credit availed, the same cannot be demanded again on its utilization; that the notice has proposed a two-fold demand on the same aspect which is legally untenable. The appellant has relied on a couple of case laws to substantiate his claim. I would like to discuss one case law viz.:

(i)Hindustan Construction Company limited [2014-TIOL-1820 –CESTAT-MUM]. The Hon'ble Tribunal in respect to a similar question as mentioned in para above, has held as follows:

> *8. Similarly, the demand of Rs. 90.78 crores being the credit actually utilized is also clearly not sustainable in law inasmuch as the said amount is already included in the cenvat credit disallowed. There cannot be any double demand towards cenvat credit, once by disallowing the entire amount of credit taken and second by a demand of credit utilized. Thus we find that there are a lot of inconsistencies/mistakes committed in the impugned order by the adjudicating authority. Therefore, the matter needs to go back to the adjudicating authority for fresh consideration. Accordingly we remand the matter back to the adjudicating authority. The appellant is directed to submit copies of all the contracts, the details of the cenvat credit availed and the details of cenvat credit reversed by them so that the adjudicating authority can satisfy as to the correctness of the availment or the reversal. We also make it clear that if the appellant has reversed the cenvat credit taken, the benefit of Notification 1/2006-ST providing for abatement in the taxable value of service rendered cannot be denied to the appellant.*

In view of the foregoing, I find merit in this argument raised by the appellant. This is akin to demanding an amount twice. Hence, the demand in this respect is not sustainable.

12. Now moving on to the last contention raised by the appellant, that the notice is hit by limitation. I find that the notice has invoked extended period of five years . The adjudicating authority in his findings has clearly stated that the appellant was aware of the restrictions of [a] not carrying forward the credit and [b] non availment of CENVAT credit. Yet for the reasons best known to the appellant, they tried to circumvent the restriction for availment by paying an amount under Rule 6 of the CCR '04. I agree with the finding of the adjudicating authority that this modus was adopted to primarily gain from the difference between the availment of CENVAT credit and the amount to be paid under Rule 6(3) of the CCR '04. I find that the appellant has contravened the provisions of the Rules and the Act with an intent to evade payment of duty, in clear violation of the conditions, specified in the SSI notification.

12.1 I find that the appellant has questioned the invocation of extended period on various grounds :

[a] No extended period can be invoked, when the notice is issued based on audit objection. The appellant has relying on three case laws argued that since there was no further investigations, extended period could not have been invoked. It is not known how the appellant has concluded that no investigation was done. Before issue of notice, it is incumbent that proper investigations are done to verify the objection. Further, in an SSI unit audit are not done every year. The SSI units selected based on risk parameters are at the most audited once in five years/couple of years. If on a audit objection no extended period could be invoked, than such audit would be rendered futile. I do not agree with the contention since the present case has the elements prescribed under Section 11A,for invocation of extended period.

[b]No extended period can be invoked when the matter involves interpretation of law. I have already held that the notification is plain and simple leaving no scope for any interpretational disputes. Hence, I do not find any force in the argument of the appellant. The case laws relied therefore, stands distinguished.

[c] The appellant has further stated that because there was a exorbitant delay, as the details were disclosed in the returns; that since there was no intention to evade duty, extended period could not be invoked. Since I have already held that there was an intention to evade payment of duty by wrongly availing the CENVAT credit, I find that the extended period has been correctly invoked. Further the argument that there was a exorbitant delay is not correct since the notice has been issued within the time limits specified in Section 11A of the Central Excise Act, 1944. The argument that details were disclosed in returns is also not correct since it was never informed that they had carried forwarded the credit and were availing CENVAT credit in respect of goods manufactured on their own, on which SSI benefit was being availed. The return being common, for both their own production and the production as job worker, and since they were eligible to carry forward the credit and avail CENVAT credit in respect of goods manufactured on behalf of others brand name, it was very difficult for the department to come to a conclusion based only on a return that the appellant had not carried forwarded the credit and was availing the CENVAT credit only in respect of goods manufactured for others brand name.

13. As far as demand of interest is concerned, the appellant has stated that there was neither short payment of duty nor was there wrong availment of CENVAT credit taken or utilized. The appellant is not correct on basic facts and therefore, the argument is rejected being not tenable. Even otherwise, Rule 14 of the CCR '04, clearly states that where CENVAT credit is taken **or** utilized wrongly the same along with interest shall be recovered.

14. The appellant has further questioned imposition of penalty. I do not agree with the contention raised since the argument made is on a wrong premise that they had neither wrongly availed the CENVAT credit not had they utilized the CENVAT credit. The contention lacks merits and is therefore, rejected.

15. In view of the foregoing, I uphold the impugned OIO dated 31.12.2015, except for the confirmation of the demand, along with interest of Rs. 3,72,712/-, and imposition of penalty of Rs. 1,86,356/-. [refer paras 38(v), (vi) and (vii)].

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

16. The appeal filed by the appellant stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स - I)

Date : 22.02.2017

Attested

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

BY R.P.A.D.

To,

M/s. Biotech Opthalmics Private Limited,
555-557, Near Shubham Tex-o-Pack,
Opposite New Arvind Mills,
Khatraj Kalol Road, Tal. Kalol,
District Gandhinagar

Copy to:-

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