रजिस्टर्ड डाक ए.डी. द्वारा

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

क फाइल संख्या : File No : **V2(15)67 /Ahd-III/2015-16/Appeal-I** 1808 to 1812

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-003-APP-093-16-17**

दिनाँक Date : **08.09.2016** जारी करने की तारीख Date of Issue 15/9/16

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: **AHM-CEX-003-ADC-MLM-014 to 015-15-16** Date: **23.10.2015**
Issued by: Additional Commissioner, Central Excise, Din: Kadi, A'bad-III.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

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

M/s. Adani Wilmar 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.

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 आयुक्त (अपील-I) OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE AHMEDABAD अहमदाबाद

ORDER-IN-APPEAL

M/s. Adani Wilmar Limited, Plot No. 343 & 343, Near GEB Power Station, Meda Adraj, Tal. Kadi, Dist. Mehsana (hereinafter referred to as the *appellant*) has filed this appeal against OIO No. AHM-CEX-003-ADC-MLM-14 to 15-15-16 dated 23.10.2015, passed by the Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as *adjudicating authority*).

2. Briefly stated, the facts are that the appellant had during the period from June 2013 to October 2014, discharged duty under protest by classifying their product as *spent earth* under tariff item 15220090 of Central Excise Tariff Act, 1985[CETA]. On enquiry, the appellant informed that *spent earth* was not a manufactured good as per the judgement of Hon'ble Supreme Court of India in the case of Markfed Vanaspati & Allied Industries [2003(153) ELT 491(SC)]; that even otherwise *spent fuller's earth* was exempt vide notification No. 17/2011-CE dated 1.3.2011.

3. Two notices dated 3.7.2014 and 27.3.2015, were issued, *interalia*, denying the benefit of notification No. 17/2011-CE dated 1.3.2011; proposing appropriation of the duty already paid under protest in addition to proposing imposition of penalty under Section 11AC read with Rule 25 of the Central Excise Rules, 2002.

4. The adjudicating authority, vide the aforementioned order dated 23.10.2015, held that the product *spent earth* is classifiable under 15220090; that the amount already paid under protest is appropriated against the duty liability; that the benefit of notification No. 17/2011-CE dated 1.3.2011 stands denied and the protest lodged stands vacated. The proposal for imposition of penalty was, however, set aside.

5. Feeling aggrieved, the appellant, has filed this appeal raising the following averments:

- the issue is covered by the decision of the Tribunal in the case of M/s. Maheshwari Solvent Extraction Ltd [2013 (7) TMI 51-CESTAT Mumbai];
- the High Court in the case of M/s. Balrampur Chini Mills [2013(6) TMI 116] has quashed CBEC Circular no. 904/24/2009-CX dated 28.10.2009;
- the two vital aspects in such cases are [a] there must be an activity of manufacture and [b] such activity should give rise to an excisable good; *the aspect that the goods should be manufactured is lost sight of*;
- the decision of the larger bench of the Tribunal in the case of M/s. Markfed Vanaspati and Allied Industries [2000(116) ELT 204] still holds the field and is applicable;
- as per notification No. 17/2011-CE dated 1.3.2011, "Spent Fuller's Earth" is exempted;
- that notification No. 89/95-CE dated 18.5.1995, exempts waste, parings and scrap arising in the course of manufacture of exempted goods from the whole of duty; that this notification will apply in the facts of the present case;
- that even if it were held to be *spent earth* and not *spent fuller's earth* – it is not liable to excise duty on account of the judgement of the Supreme Court in the case of Markfield Vanaspati [[2003(153) ELT 491]];

- the mere fact that the product is covered under tariff heading *per se* cannot make it liable to excise duty; that classification alone is not sufficient to attract excise duty; the requirement of goods being manufactured continues;
- as per various dictionary meaning, the fuller earth is natural clay and after use of the material/chemicals with oil for bleaching what is left is spent earth or spent fuller earth;
- that in para 19 of the OIO it is mentioned that samples were drawn on 7.10.2013 – which is after both the show cause notices were issued and therefore the results of the samples cannot be relied upon for deciding the present proceedings.

6. Personal hearing in the matter was held on 8.8.2016. Shri S. J. Vyas, advocate along with Shri Gopal Chosla, Assistant General Manager and Shri Anand Chauhan, Sr. Manager of the appellant appeared. Shri Vyas, reiterated the arguments made in the grounds of appeal and also brought on record a judgement of the Hon'ble CESTAT reported at [2016-TIOL-1579-CESTAT-HYD], which is relevant to the issue under consideration.

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

8. The issues to be decided are: (i) whether the goods cleared by the appellant is eligible for benefit of Not. No. 17/2011-CE dated 1.3.2011; (ii) whether the goods are classifiable under 15220090 as *spent earth*?; and (iii) whether spent earth is liable to be charged to central excise duty?

9. Revenue's arguments for classifying the product under 15220090 as *spent earth* and for denying the benefit of the notification No. 17/2011-CE dated 1.3.2011, are that:

- CBEC vide its circular dated 28.10.2009, subsequent to addition of an explanation in Section 2(d) of the Central Excise Act, 1944, has clarified that waste, residue or refuse which arise during the course of manufacture and are capable of being sold for consideration would be excisable goods and chargeable to payment of excise duty;
- that all the three conditions i.e. distinct name, character and use stand satisfied; a distinct product emerges, thus satisfying the two conditions of excisability i.e. manufacture and marketability;
- the appellant uses activated bleaching earth classified under chapter 38 as an input for the purpose of refining, de-colouring, bleaching of oils; the residue that emerges after the completion of bleaching process is classifiable under the chapter head 1522;
- the bleaching earth loses its capacity for absorption and gets converted to spent earth; that the fatty oils present in spent earth can be extracted; that spent earth is also used by soap processors and brick manufacturers ; that it is not correct to claim that spent earth is a waste product or that it has no use; that it has its own commercial use and value;
- that the exemption granted in the notification no. 17/2011 dated 1.3.2011 is for 'spent fullers earth' and not for "spent earth"; that both are different products ;

- that notification no. 89/95-CE dated 18.5.1995 is not applicable since spent earth cannot be called as 'waste, parings and scrap'; that the assessee is paying duty on fatty acids which are intermediate products;
- the samples drawn were tested and report obtained from Chemical Examiner.

10. The genesis of the dispute is that with the issue of Not. No. 17/2011-CE dated 1.3.2011, the appellant was under the impression that Central Excise duty was exempt on *spent earth*; that the word "Fullers" used with *spent earth* in the notification does not make any change in the characteristics. My predecessors have decided the issue in favour of Revenue [OIA No. AHM-EXCUS-003-APP-131-132-14-15 dated 26.12.2014 and OIA No. 46/2013(Ahd-III0SKS/Com(A)/Ahd dated 15.3.2013] holding that the goods are *spent earth* classifiable under chapter sub-heading 15220090 of CETA '85 relying on HSN notes, Board's Circular No. 904/24/09-CX dated 28.10.2009 and Circular No. 941/2/2011-CX dated 14.2.2011. The claim of the appellant that they are eligible for exemption of the exemption notification *supra*, has been distinguished on the grounds that it was "**spent fuller's earth**" which was exempted and not "**spent earth**" per se. Against the impugned order, no new averments have been made in respect of availability of benefit of notification No. 17/2011-CE dated 1.3.2011 or the classification of the goods under 15220090. However, the appellant has cited various judgements, referred to supra, questioning the exigibility of *spent earth*.

11.1 Duty of excise known as CENVAT is leviable under section 3 of the Central Excise Act, 1944 on all excisable goods produced or manufactured in India at the rates set forth in the First Schedule of Central Excise Tariff Act, 1985. The two words that are of primary importance are: [a] excisable goods; and [b] manufacture. Both the words are defined under the Central Excise Act, 1944 – as follows :

Section 2(d) of the Central Excise Act, 1944, defines excisable goods

*(d) "**excisable goods**" means goods specified in [[the First Schedule and the Second Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986)] as being subject to a duty of excise and includes salt;*

*[**Explanation.** — For the purposes of this clause, "goods" includes any article, material or substance which is **capable of being bought and sold** for a consideration and such goods shall be **deemed to be marketable.**]*

Section 2(f) of the Central Excise Act, 1944, defines manufacture as

*[(f) "**manufacture**" includes any process, -*

(i) incidental or ancillary to the completion of a manufactured product;

(ii)which is specified in relation to any goods in the Section or Chapter notes of [the First Schedule] to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to [manufacture; or]

[(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,]

and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;]

(emphasis supplied)

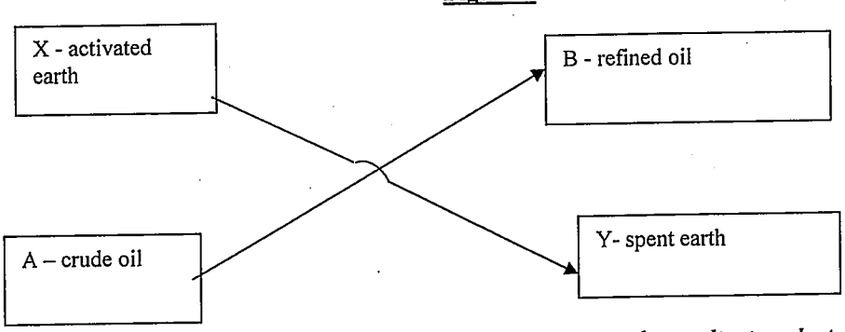
11.2 Thus, for levy of the Central Excise duty on any articles, the two basic conditions that need to be satisfied are [a] it should be excisable goods; and [b] it should have come into existence, as a result of manufacture. If either of the two conditions is not satisfied, central excise duty cannot be levied. The conditions contemplated under Sections 2(d) and 2(f) of the Act, *ibid*, have to be satisfied conjunctively in order to entertain the imposition of duty under Section 3, *ibid*, as per the Hon'ble Supreme Court [*refer Hindustan Zinc [2005(181) ELT 170(SC)] and Grasim Industries Ltd [2011(273)ELT 10(SC)*]

Test of Manufacture

12.1 Though manufacture stands defined – to include any process incidental or ancillary to the completion of a manufactured product, the test commonly used for ascertaining whether goods have undergone the process of *'manufacture'* for the purpose of attracting Central Excise levy was evolved by the Hon'ble Supreme Court of India in DCM case, which was reiterated in the case of Parle Products [1994(74) ELT 492(SC)] and in the case of Ujagar Prints [1988(38)ELT 535(SC)]. The Apex Court held that for an activity or process to amount as manufacture must lead to emergence of a new commercial product, different from the one with which the process started. In other words, it should be an article with a *different name, character and use*.

12.2 What needs to be examined is whether during the course of refining crude oil, the by product which emerges i.e. spent earth, along with refined oil, can be termed as having undergone the process of manufacture. It is the Revenue's claim that this is a result of manufacture. The manufacturing process through which the goods have undergone, is explained by way of a diagram, for ease of understanding.

Figure-1



[activated earth and crude oil are the inputs and after the process the resultant products are refined oil and spent earth – a by-product]

12.3 As is evident, *activated earth*, consequent to the manufacturing process turns into *spent earth*, which loses its original force or strength. Thus it satisfies the test of *different character*. This spent earth, as is mentioned by the original adjudicating authority, is used by soap processors and brick manufacturers - thereby satisfying the test of use. This product has a

different name to the one which had entered the process of manufacture – *activated earth* now consequent to the process of manufacture has become '*spent earth*'. Thus, as can be seen all the three different parameters, set forth by the Hon'ble Supreme Court, to hold that the product has undergone a process amounting to manufacture, stands satisfied.

12.4 The appellant has relied on the case law of Balrampur Chini Mills Ltd [2013(6) TMI 116-High Court of Allahabad]. The ratio of the decision was that rules denying benefit of Modvat/Cenvat credit can only be operated in respect of **final products** and since the *bagasse was not final product,* **but waste,** the benefit of the credit cannot be denied. The Hon'ble Court further quashed the Circular dated 28.10.2009 and held that the assessee was neither liable for penalty nor interest either by payment or by reversal in respect of bagasse.

12.4 The appellant has also relied upon following case laws:

[i] Hindalco Industries Ltd [2015(315)ELT 10(Bom)] Hon'ble Bombay High Court while deciding whether Dross and skimming of aluminium, zinc or other non-ferrous metal emerging as by-product during manufacture of aluminum/non-ferrous sheets/foils, held that it is not liable to central excise duty on the grounds that the twin tests mandated for the product to be exigible to duty, were not satisfied.

[ii] M/s. DSCL Sugar Ltd [2015-TIOL-240-SC-CX] . The dispute before the Hon'ble Apex Court in this judgement was whether Bagasse which emerges as residue/waste of sugarcane, is subject to duties of excise. The Apex Court held as follows:

> *10. In the present case it could not be pointed out as to whether any process in respect of Bagasse has been specified either in the Section or in the Chapter notice. In the absence thereof this deeming provision cannot be attracted. Otherwise, it is not in dispute that Bagasse is only an agricultural waste and residue, **which itself is not the result of any process.** Therefore, it cannot be treated as falling within the definition of Section 2(f) of the Act and the absence of manufacture, there cannot be any excise duty.*

12.5 The decision of the Hon'ble Bombay High Court and the Hon'ble Supreme Court of India are in respect of [a] dross and skimming of aluminium zinc or other non ferrous metal, emerging as a by-product and [b] in case of sugarcane - bagasse which emerges as residue/waste of sugarcane.

The process, which sugarcane has undergone, results in the products – sugar, molasses and bagasse, as explained by way of a small diagram, for ease of understanding:

Figure -2

[***Sugarcane undergoes a set of process that transforms itsinto sugar and bagasse]***

12.6 As is evident, on comparing *figure 1* to *figure 2*, a distinction is apparent in case of bagasse, there is only one input(sugarcane) and three resultant products (bagasse, molasses and

sugar). In order to term a process as amounting to manufacture, the process needs to be clearly undertaken on an input and the resultant output should be having distinct name , character and use. In the case of bagasse such a process is not clearly visible. However, in the case under consideration. there are two separate inputs and two separate outputs corresponding to each input. In view of clear distinction between the instant case and the cases mentioned above (bagasse and dross) the averment of the appellant in making the judgements applicable to their case, fails.

Test of excisable goods

13.1 The Central Excise Act, 1944, does not define *goods* as such. However, by an explanation to Section 2(d), inserted by Finance Act, 2008, goods have been defined as including any article, material or substance, **capable of being bought and sold** for a consideration and such goods shall be deemed to be marketable.

13.2 The appellant has relied upon CBEC's circular No. 1027/15/2016-CX dated 25.4.2016, wherein the Board withdrew circular nos. 902/24/2009-CX dated 28.10.2009, 941/02/2011-CX dated 14.2.2011, and instruction no. 17/02/2009-CX (Pt.) dated 12.11.2014, which were issued consequent to the aforementioned amendment in section 2(d) of the Finance Act, 2008. However, I observe that the explanation to Section 2(d), *ibid*, has not been struck down. It is not disputed that, (i) spent earth is not waste; and (ii) it is being sold for a consideration because it has downstream usage in soap, brick and other industry.

13.3 Thus, by virtue of "spent earth" being : (i) specified in the First Schedule to the Central Excise Tariff Act, 1985; and (ii) being capable of bought and sold for a consideration, passes the test for being classified as "excisable goods", in accordance with the definition mentioned in Section 2(d), *ibid.*

13.4 The Hon'ble Supreme Court in the case of M/s. DSCL Sugar Ltd, *supra*, examined the amendments, made in the year 2008 in Section 2(d) and Section 2(f) of the Central Excise Act '44. After examining the explanation added to Section 2(d), the court said that it introduced a deeming fiction by which certain kind of goods are treated as marketable and thus excisable, but further stated that the process should fall within the definition of manufacture, as contained in Section 2(f) of the Central Excise Act, 1944, for the product to be exigible.

13.5 As far as *spent earth* is concerned, the product has cleared the twin tests, namely (i) the product has resulted from a process amounting to 'manufacture'; and (ii) it is excisable goods. Therefore, it is liable to payment of excise duty. In so far as applicability of exemption notification and classification is concerned, I find that these issues have been dealt at length in earlier appellate orders, mentioned supra and in the impugned OIO. Hence, no interference, is called for.

14.1 The appellant has, however, further relied on two case laws and a circular dated 25.4.2016, elaborated hereinafter.

[a] Markfed Vanaspati and Allied Industries [2003(153) ELT 491(SC)]. The Apex court in this case was seized with whether spent earth is leviable to duty, held that 'spent earth' was 'earth' on which duty had been paid; that it remains earth even after the processing; that levying duty again would amount to double duty on the same product; that it is not possible to accept the contention that merely because an item falls in a tariff entry it must be deemed that there is manufacture.

[b] M/s. Gemini Edibles and Fats India P Ltd [2016-TIOL-1579-CESTAT-HYD], wherein the dispute was whether the by-product '*spent earth*' emerging as residue in the process of refining crude palm oil - is an excisable product falling under 15220090. The Tribunal relying on the minutes of the Tariff Conference held on 28/29th October 2015, and the withdrawal of circulars and instructions, held that *spent earth* was non excisable.

[c] Circular No. 1027/15/2016-CX dated 25.4.2016, wherein the Board withdrew circular nos. 902/24/2009-CX dated 28.10.2009, 941/02/2011-CX dated 14.2.2011, and instruction no. 17/02/2009-CX (Pt.) dated 12.11.2014. The Board further clarified that the Hon'ble Apex Court in the order of M/s. DSCL Sugar [2015-TIOL-240-SC-CX], had examined the issue and re-affirmed that bagasse is not a manufactured product; that the judgement applies to both period before and after the insertion of explanation 2(d) of the CEA '44; that the circular and instructions withdrawn, supra, had become non-est.

14.2 The two judgements and Board's circular dated 25.4.2016, strike at the core of the issue. In the case of Markfed judgement, the Apex Court noted that "*Even now it has not been shown that there is manufacture.....The law still remains that the burden to prove that there is manufacture and that what is manufactured is on the revenue..*" This suggests that had the department represented the facts to discharge our onus of justifying as to why the process should be held as amounting to manufacture, possibly the ratio might have been different. Having said that, it is also to be noted that where there is a decision of a Court/Tribunal, judicial discipline entails that such orders be followed, provided facts are similar. As is evident, the facts are similar to Markfed Vanaspati and Allied Industries case. The Apex Court in the case of Kamlakshi Finance Corporation Ltd [1991(55)ELT 433(SC)] held that "*the principles of judicial discipline require that the orders of the higher appellate authorities should be followed unreservedly by the subordinate authorities. The mere fact that the order of the appellate authority is not "acceptable" to the department - in itself an objectionable phrase - and is the subject-matter of an appeal can furnish no ground for not following it unless its operation has been suspended by a competent Court. If this healthy rule is not followed, the result will only be undue harassment to assessees and chaos in administration of tax laws.*" Article 141 of the Constitution of India clearly states that the law declared by the Supreme Court shall be binding on all the courts within the territory of India. Therefore, in view of the discussion, supra, the impugned OIO being against the law declared by the Hon'ble Supreme Court of India and the Hon'ble Tribunal, is set aside.

15. The Apex Court in the case of Ratan Melting and Wire Industries [2008(231) ELT 22(SC)], has held that circulars and instructions issued by the Board are no doubt binding in law on the authorities under the respective statutes. Para 4.2 of CBEC's circular dated 25.4.2016

states that, "*Consequently, Bagasse, Dross and Skimmings of non-ferrous metals of* ***any such by product*** *or waste, which are non excisable goods and are cleared for a consideration from the factory need to be treated like exempted goods for the purpose of reversal of credit of input services, in terms of rule 6 of CENVAT Credit Rules, 2004.*" It would appear that by virtue of construction of the circular, *spent earth* would also be treated as non excisable goods, and thus even if the process of conversion of activated earth to spent earth is treated as amounting to manufacture, the second test for exigibility fails. On that account also, the OIO needs to be set aside. However, it needs to be examined whether there is any liability on the appellant in terms of para 4.2 of Circular No. 1027/15/2016-CX dated 25.4.2016.

16. In view of the foregoing, the OIO is set aside and the appeals are allowed, with a direction that the adjudicating authority will examine the matter in terms of para 4.2 of the Circular dated 25.4.2016, and work out the liability in terms of CENVAT Credit Rules, 2004, if any. The appeal is disposed of accordingly.

Date: 08.09.2016

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

Attested

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

BY R.P.A.D.

To,

M/s. Adani Wilmar Limited,
Plot No. 342 and 343,
Near GEB Power Station,
Meda Adraj,
Tal. Kadi,
Dist. Mehsana, Gujarat

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

Copy To:-

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