

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(28)76,77,78/Ahd-III/2016-17/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-026 to 028-17-18

दिनांक Date : 26.05.2017 जारी करने की तारीख Date of Issue 26/5/17

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 सं दिनांक : से सृजित

Arising out of Order-in-Original: AHM-CEX-003-ADC-DSN-015-16-17 Date: 31.08.2016
Issued by: Additional Commissioner, Central Excise, Din: Kadi, A'bad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. AS PER ORDER.

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

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

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

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

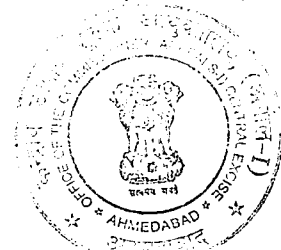
(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

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

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.



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

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

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

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- ञ0बी/35-इ के अंतर्गत:-

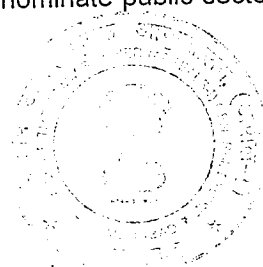
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेटल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016.

(a) 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.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund 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. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated



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

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner 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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34 के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 24) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 43 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 अर्जी एवं अपील को लागू नहीं होंगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores, Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

→ Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

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

(6)(i) In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

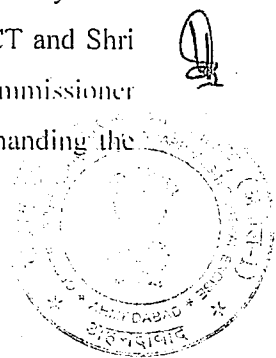


ORDER-IN-APPEAL

Following three appeals have been filed by the appellant shown at column No.(3) of the table below against Order-in-Original No.AHM-CEX-003-ADC-DSN-015-16-17 dated 31.08.2016 [impugned order] passed by the Additional Commissioner of Central Excise, Ahmedabad-III [adjudicating authority].

S No	Appeal No.	Name of the appellant	Duty invclved	Penalty involved
1	2	3	4	5
1	77/Ahd-III/16-17	M/s Ganesh Chem Tech Pvt Ltd	Rs.45,21,486/-	Rs.45,21,486/-
2	78/Ahd-III/16-17	Shri Nareshbhai Fatehchandbhai Shah	-	Rs.30.00.000/-
3	76/Ahd-III/16-17	Shri Jayesh Prabhudas Bhimani	-	Rs.20,00,000/-

2. Briefly stated, the facts of the cases are that M/s Ganesh Chem Tech Pvt Ltd [M/s GCT] was engaged in the manufacture of Dye Intermediates and Allied Chemicals and availed Cenvat credit on inputs and capital goods. On the basis of intelligence that M/s GCT were indulging in evasion of duty by adopting a novel modus operandi of availing Cenvat Credit of duty on input viz Linear Alkyl Bensene (LAB) and diverting the same in the market without actually consuming in the manufacture of their final products, investigation was initiated against them. Scrutiny of records and investigation revealed that M/s GCT have received Cenvatable invoices for [i] 4851.6 kgs of Gamma Acid and availed unauthorized Cenvat credit of Rs.1.63.014/- ; [ii] 14.685 MT of Fomaldehyde and availed unauthorized Cenvat credit of Rs.20,022/-; and [iii] received/procured only invoices for 519.511 MT of Linear Alkyl Benzene from M/s Bhimani Chemicals, M/s Parshwa Chemicals and availed unauthorized Cenvat credit of Rs.43,38,450/-. After completion of investigation, a show cause notice dated 04.05.2005 for the period covering 1999-2000 to 2003-04 was issued to M/s GCT for recovery of wrongly availed Cenvat Credit totally amounting to Rs.45,21,486/- with interest under Central Excise, Act. 1944 and imposition of penalty under erstwhile Central Excise Rule, 1944 and Cenvat Credit Rules, 2001 and 2002 read with Section 11 AC of the Central Excise Act. Since the appellant mentioned at 2 and 3 of above table i.e Shri Nareshbhai F Shah, Director of M/s GCT and Shri Jayesh P Bhimani, Authorized signatory of dealers namely M/s Bhimani Chemicals and M/s Parshwa Chemicals were actively involved in availing of fraudulent Cenvat credit by M/s GCT, penalty under rule 209A of erstwhile Central Excise Rule 1944 and Central Excise Rule 2001 and 2002 was also proposed to them in the said show cause notice dated 04.04.2005. Vide Order in Original dated 28.02.2006, the Additional Commissioner of Central Excise, Ahmedabad-III has confirmed the demand of Cenvat Credit along with interest and imposed penalty of Rs.45.21 lacs on M/s GCT; Rs.40 lacs on Shri Nareshbhai F Shah and Rs.20 lacs on Shri Jayesh P Bhimani. By the Order-in-Appeal dated 29.12.2006, the appeal filed by M/s GCT and Shri Nareshbhai F Shah was remanded to the adjudicating authority by the Commissioner (Appeals) and the appeal filed Shri Jayesh P Bhimani was set aside. While remanding the



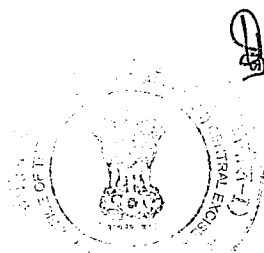
cases, the Commissioner (Appeals) has hold to prove with documentary evidences about diversion of LAB. The appeal filed by the department before CESTAT against order of Commissioner (Appeals) in respect of Shri Jayesh P Bhimani was also remanded to the original adjudicating authority for considering the case with M/s GCT. vide CESTAT order dated 12.01.2015. Accordingly, vide the impugned order, the adjudicating authority has decided all the three cases, by confirming the demand and imposition of penalty as mentioned at above table.

3. Being aggrieved, M/s GCT and Shri Nareshbhai Fatchchandbhai Shah has filed the instant appeals mentioned at 1 and 2 of above table mainly on the grounds that:

- The present appeal is on account of non-compliance of the conditional order of remand proceedings dated 29.12.2006; that action, enquiry or compliance with the condition of remand proceedings is undertaken by the department; that the re-adjudication under remand proceedings is intentionally delayed by the department nearly for 10 years which attributes to the department's action/inaction; that the department has allowed to create a situation whereby the condition of remand cannot be fulfilled; that the delay has also resulted into denial of sufficient opportunity for the appellant to defend their case.
- The facts on record to the contrary, positively show that the department's case is erroneous and that the inputs have actually been received; that the entire case is simply revolves around statements without any positive corroborative evidences which is not sufficient to sustain the department case in absence of such corroborative evidences and proof by independent evidence;
- From 2007-14 it was possible to draw the samples as they were preserved the samples. However, due to flood and water logging on 31.07.2014, the preserved samples were destroyed; that it is not the case of non-cooperation on their part but the delay was on the part of the department. Therefore, the only course open no is to set aside the impugned order.
- They had shown receipt of LAB. its issuance for production and its credit taken; thus it is outrageous to suggest that they have never received and used such chemicals. Further, the invoices were raised by Bhimani Chemicals and other suppliers and payments have been made by cheques which have been recorded in the books of accounts.

Shri Jayesh Prabhudas Bhimani has filed the instant appeal mentioned at 3 of above table on the following grounds:

- The adjudicating authority has decided the case on the basis of Appellate Tribunal's order dated 12.01.2015; that while remanding the matter, the authority had specifically directed to take consideration the observation of Commissioner (Appeals) order dated 29.12.2006; that the conclusion drawn by the adjudicating authority is not on the basis of the findings of Commissioner (Appeals).
- The delivery challans submitted by them before the appellate authority was recorded in his order dated 29.12.2006 which clearly evidenced the signature of the recipient of the goods and thereby established delivery goods; that the entire conclusion arrived by the adjudicating authority in this regard in the impugned order is totally incorrect.
- The appellate authority in his order dated 29.12.2006 specifically held that the burden to prove the transaction was not discharged by the department and such burden could not be shifted on to the appellant and in the circumstances the appellate authority has set aside the penalty imposed on them.



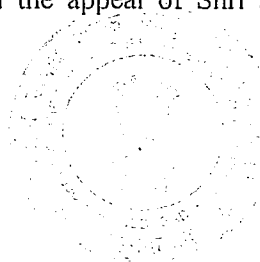
4. Personal hearing in respect of Shri Jayesh P Bhimani was held on 19.04.2017 and Shri Paritosh R Gupta, Advocate appeared for the same. He reiterated the grounds of appeal and submitted various citations in support of their submissions. Personal hearing in the matter of M/s GCT and Shri Nareshbhai Fatehchandbhai Shah was held on 20.04.2017 and Shri S.J.Vyas, Advocate appeared for the same. He reiterated the grounds of appeal and further submitted that since the Commissioner (Appeals) order dated 29.12.2016 was not appealed before CESTAT and his direction was also not carried out by the adjudicating authority, the demand is not sustainable and required to be set aside.

5. I have carefully gone through the facts of the cases on records and the submissions made in the appeal memorandums as well as at the time of personal hearing by all the appellants mentioned in the above table. Since all the said three appeals are arisen from a common order and the issues involved are also related, I took all the three appeals for a common decision.

6. At the outset, I observe that the as regards the appeal filed by M/s GCT, the issue to be decided in the matter is relating [i] Cenvat credit of Rs.43,38,450/- taken on 519.511 MT of raw material Linear Alkyl Benzene (LAB) without receipt in the factory premises; [ii] Cenvat Credit of Rs.20,022/-taken wrongly on raw material Formaldehyde without receipt in the factory; [iii] shortage found on physical stock of Gama Acid, a raw material weighing 4851.6 kgs, involving duty credit of Rs.1,63,014/-and imposition of penalty amounting to Rs.45,21,486/-. As regards appeal filed by Shri Nareshbhai Fatehchandbhai Shah and Shri Jayesh Prabhudas Bhimani, the issue to be decided is relating to imposition of penalty.

7. As regards [i] above, the adjudicating authority has contended that M/s GCT had - by purchased Cenvatable invoices in respect of raw material namely LAB and had taken Cenvat Credit wrongly amounting to Rs.43,38,450/- without receiving the said raw materials in their factory and without utilizing in the manufacturing of their final products. As regards [ii] above, the Adjudicating authority has contended that M/s GCT had purchased Cenvatable invoices of Formaldehyde without receiving in their factory premises and taken Cenvat credit of Rs.20,022/-and in respect of [iii] above, the adjudicating has contended that during physical stock conducted by the departmental officers, shortage of 4815.6 Kgs raw materials viz Gamma acid and the entire Cenvat credit of Rs.1,63,014/- involved on the said quantity is required to be recovered. I further observe that the adjudicating authority has imposed penalty on M/s GCT, in view of fraudulent availment of Cenvat Credit and also imposed penalty on Shri Nareshbhai Fatehchandbhai Shah and Shri Jayesh Prabhudas Bhimani as they were connived with the said act.

8. I observe that this issue was earlier decided by the Commissioner (Appeals) vide his OIA dated 29.12.2006 against OIO No.17/Addl.Commr/(DRS)/2006 dated 28.02.2006. Vide the said OIA, the appeal filed by M/s GCT and Shri Nareshbhai Fatehchandbhai Shah were remanded by the appellate authority for a decision afresh and the appeal of Shri Jayesh

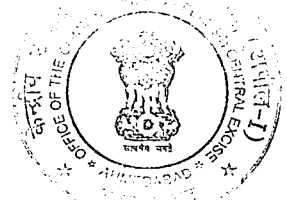


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Prabhudas Bhiman was allowed by set aside the penalty imposed. While remanding the case of M/s GCT and Naresbhai F Shah, the Commissioner (Appeals) hold that:

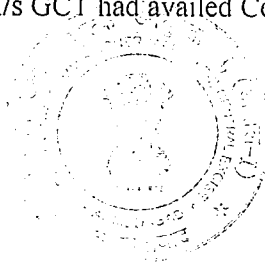
"I find that though the Central Excise Officers had prior intelligence that the appellants have not utilized LAB in manufacture of their final product still they had only recorded statement of Shri Vijay A Vora, Excise Clerk of M/s Ganesh Chem Tech admitting non use of LAB in their final products and had not drawn any representative samples of their final products for chemical test to corroborate the statement of Shri Vijay A Vora, Excise Clerk of M/s Ganesh Chem Tech that it did not contain LAB. I further find that the adjudicating authority has heavily relied on post facto opinion of Dr. Y. K. Agarwal, Director of School of Science, Gujarat University which based on technical literature of the final products manufactured by the appellants stating that LAB is not essential raw material/ingredient in the manufacture of their final products. I find that such opinion was obtained in some another case of the Commissionerate and not in the case of appellants & the copy of the opinion of Dr. Y. K. Agarwal, Director of School of Science, Gujarat University was also not given to the appellants in the interest of principle of natural justice. The question for consideration in this case is if the initial confessional statements of the clerk and director of the appellants are sufficient evidence to prove serious charges of irregular availment of cenvat credit if there is no evidence otherwise whereas I find that the dealer Shri Jayesh M Bhimani of M/s Parshwa Chemicals & M/s Bhimani Chemicals in his statement has confirmed the dispatch & its receipt & payment of LAB by M/s Ganesh Chemicals to them: the entry of sale of LAB in their records & RG23D register and also that drivers of the transporter at Vadodara used to deliver the LAB as per their instructions to the places where they were asked to deliver; that Ravindra M Shah of Shah Bulk Carrier, Vadodara had also confirmed that on reaching the tankers destined for M/s Bhimani Chemicals Pvt Ltd., Ahmedabad the drivers of the tankers were being instructed to contact the representative of their firm outside Octroi limit of city at Piplej or Astali. The representative of the said firms were directing the drivers and assigning the destination where the said LAB was to be unloaded/delivered and they were concerned with the receipt/acknowledgement of the said trading firms only and accordingly they were getting the receipt/acknowledgement on the body of LRs. He was having no records showing where the said tankers of LAB were unloaded practically. It is universal fact that the onus to prove irregular availment of cenvat credit is on the part of Department. In view of the statement of dealer Shri Jayesh M Bhimani & transporter Shri Ravindra M Shah it cannot be disputed that LAB was not delivered by dealer Jayesh M Bhimani to the appellants at Sr.No.1 of the Table above, The initial statement of Naresbhai F Shah that he used to make payment by cheque & get back 98% by cash is also not reliable as there is no evidence to support this statement as investigation even did not confirm that there have been cash withdrawal by Shri Jayesh M Bhimani from any his accounts. I therefore hold that the Department has to prove with documentary evidences about diversion of 519.511 MTs of LAB during the year 2001-02 to 2003-04 by the appellants or dealer after taking cenvat credit thereon. The case of non use of LAB by the appellants is remanded back to the original adjudicating authority with direction to make further investigation & to draw representative samples of their final products for chemical test and supply them copy of opinion of Dr. Y. K. Agarwal, Director of School of Science, Gujarat University. As regards duty demand of Rs.1,63,014/- & Rs.22,022 on account of wrong availment of cenvat credit without receipt of Gamma Acid & Formaldehyde respectively I find that although it was alleged in the SCN that these credit were taken by the appellants on the basis of documents without receipt of goods but adjudicating authority has not given any finding in discussion and order portion of the OIO. This was necessary as the supplier of these inputs M/s Riddhi Corporation & M/s Aavkar Chemical Industries, Ahmedabad have confirmed dispatch of Gamma Acid & Formaldehyde to the appellants I therefore set aside the duty demand of Rs.43,38,450/- on account of wrong availment of cenvat credit on LAB, Rs.22,022/- on account of wrong availment of cenvat credit on Formaldehyde and Rs.1,6,014/- on account of wrong availment of cenvat credit on Gamma Acid and remand the case to adjudicating authority for decision a fresh for the reasons indicated above. Obviously the penalty of Rs.45,21,486 under Section 11AC, interest under Section 11AB and personal penalty of Rs.40,00,000/- on Shri Naresbhai F Shah, appellants at Sr.No.2 of above Table becomes null and void which will be decided afresh in denovo proceeding.

9. It is the contention of M/s GCT and Naresbhai F Shah that the department has not compliance with the directions of the Commissioner (Appeals) order dated 29.12.2006: that action relating to drawing of samples or further enquiry so as to prove the diversion of raw



materials after taking Cenvat Credit. Thus, the impugned order is not sustainable at this stage. I observe that in this regard, the adjudicating authority, at par 40 of the impugned order has held that *"the Commissioner (Appeals) had ordered to make further investigation and to draw representative samples of the final products for chemical test to arrive at a conclusion regarding use of LAB in the manufacture of final products. However, since the case was in second appeal and the assessee has discontinued the manufacture of those final products, this option is no longer available. However, this cannot be a ground for setting aside the demand. I may also mention here that with the passage of time, the trail of the illicit actions gets blurred and getting additional evidences become difficult"*. I further observe that the adjudicating authority has heavily contended on the basis of M/s GCT's Director Shri Naresh F Shah's declaration dated 27.12.2004 that the said raw materials namely LAB is not required for manufacture of any final products.

10. With all respect to the order of Commissioner (Appeals) dated 29.12.2006, looking into the above facts narrated by the adjudicating authority, I find merit consideration in the said contention. In this case, I observe that the undisputed facts revealed that M/s GCT has availed Cenvat Credit of Rs.43,38,450/- towards raw material namely LAB said to be received in their factory during the relevant period. Therefore, for coming to conclusion whether they were received the said raw material in their factory or not, the question of drawing remnant samples, as questioned by the Commissioner (Appeals) in his order dated 29.12.2006, arises only in case there were no evidence in support of the investigation pertains to such fraudulent availment of Cenvat credit. In this case, I observe that a truthful declarations dated 27.12.2004 filed by Shri Naresh F Shah, the Director of GCT clearly revealed that for manufacture any of their final products, the said raw materials viz LAB is not required. The details of said declaration in respect of raw materials used in the manufacture of their final products have been narrated in the impugned order at para 46, page Nos. 16 to 34. This declaration was never retracted. The Commissioner (Appeals) in his order dated 29.12.2006 and M/s GCT in their appeal has contended that the onus to prove irregular availment of Cenvat credit is on the part of department and in view of statements recorded, it cannot be disputed that the said raw materials viz. LAB was not received/delivered to M/s GCT. I observe that the above stated factual position clearly indicated that the said raw materials LAB is not required for manufacture of the final products manufactured by M/s GCT. In the circumstances, obviously, receipt of Cenvatable invoices of raw materials viz., LAB and availment of Cenvat credit thereof clearly indicated that M/s GCT has availed Cenvat Credit wrongly/fraudulently on such raw material which are not at all required for manufacturing purpose. In view of above, I am of the opinion that drawing of samples at later stage for ascertaining as to whether the raw material LAB is actually used in their final products is unwarranted and the declaration made by Shri Narendrabhai F Shah as a Director of M/s GCT and deposition made by him and the excise clerk of M/s GCT in their statements are sufficient to prove that M/s GCT had availed Cenvat Credit on LAB fraudulently without receiving in the factory.

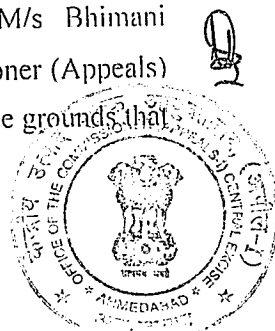


11. I observe that the statement of Shri Narendrabhai F Shah, Director of M/s GCT and Shri Vijaybhai Amaratlal Vora, Excise Clerk are inculpatory and are specific. They clearly admitted that the said raw material viz LAB is not required for the manufacture of the final products. This fact is further clearly strengthened from the declaration of raw materials required for manufacture of final products filed by the Director. The Director has clearly admitted the truth of the charts dealing with the manufacturing process of their finished goods which are not covered by the said raw material namely LAB. In view of the foregoing, I observe that the Commissioner (Appeals) in his order dated 29.12.2006 has erred in taking the view that there is not enough evidence to support their statement with respect non-receipt of raw material namely LAB in the factory.

12. The Commissioner (appeals) further hold that the department has to prove with documentary evidences about diversion of the said raw material viz LAB during the relevant period by M/s GCT or the dealer after taking Cenvat Credit. In view of above discussed facts at para 10 and 11. I find no reason to disallow this piece of evidence. The evidence of fraudulent availment of Cenvat credit has been brought on record only as a result of investigation undertaken by the department. The evidences unearthed by the department are not statutory documents and would have gone undetected but for the investigation. Therefore this is a clear case of suppression of facts from the department and certainly the extended period of limitation is invocable in this case. Therefore, the amount of Cenvat credit of Rs.43,48,450/- taken wrongly is correctly ordered for recovery by the adjudicating authority with interest.

13. As regards wrongly availment of Cenvat Credit amounting to Rs.20,022/- in respect of purchase of Cenvatable invoices of Formaldehyde without receiving in their factory premises and shortage of 4815.6 Kgs of raw materials viz Gamma acid involving Cenvat credit of Rs.1,63,014/- mentioned at [ii] and [iii] above, the Commissioner (Appeals), vide his order dated 29.12.2006 hold that the adjudicating authority has not given any findings in discussions. In the impugned order, the adjudicating authority has held that there is an admission that the materials was not received in the factory even though credit was taken on the invoices an amount of Rs.1,63,014/- was reversed by M/s GCT which sufficient to conclude that the credit on raw materials wrongly taken. I observe that no further supporting evidences was discussed by the adjudicating authority and therefore, demand of the said amount does not have any merit and accordingly, I set aside the same.

14. As regards imposition of penalty on M/s GCT and Shri Narendra F Shah, Director of M/s GCT. I observe that looking into the apt of the case, the adjudicating authority has correctly imposed the penalty and I do not find any merit to interfere. As regards the penalty imposed on Shri Jayesh Prabhudas Bhimani, Authorized Signatory of M/s Bhimani Chemicals and M/s Parshwa Chemicals Pvt Ltd, I observe that the Commissioner (Appeals) vide his OIA dated 29.12.2006 has set aside the penalty imposed on him on the grounds that



the dealers are not physically dealt with goods and the said goods are not liable for confiscation as they were duty paid. The Hon'ble CESTAT vide their order dated 12.01.2015 has remanded the appeal filed by the department with a view that the penal provisions on him would be considered after examining all the facts and circumstances of the case in totality of the main notice i.e M/s GCT. The adjudicating authority has imposed penalty of Rs.20,00,000/- on Shri Jayesh P Bhimani as it was observed that he has transported the goods and assisted in the diversion of raw materials by acting in collusion with M/s GCT. From the foregoing discussion, it is evident that M/s GCT has not received any raw materials vide Cenvatable invoices issued by Shri Jayesh Prabhudas Bhimani, Authorized Signatory of M/s Bhimani Chemicals and M/s Parshwa Chemicals Pvt Ltd. In the circumstances, it is evident that Shri Jayesh P Bhimani was directly or indirectly involved in such fraudulently availment of Cenvat Credit amounting to Rs.43,48,450/-. Therefore, he is liable for penal action. However, looking into the facts and circumstances of the case, I ^{reduce} ~~reduce~~ the penalty from Rs.20,00,000/- to 10,00,000/-.

15. The case laws relied upon by the above referred three appellants is dealing with cases wherein demands have been dropped on various grounds. But every case of suppression of facts has to be evaluated on its own. In this case, demand is on the basis of fraudulently availment of huge amount of Cenvat Credit without receipt of raw materials and which have been admitted by the Director of the company himself and other authorized persons involved. hence not applicable.

17. In view of above discussion, all the three appeals mentioned in the table at para 1 above are disposed of in above terms.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 26/05/2017

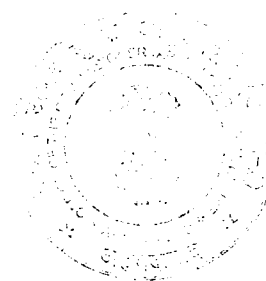
Attested

Mohan V.V.
(Mohan V.V.)
Superintendent (Appeal-I)
Central Excise, Ahmedabad
BY R.P.A.D.

To,
M/s Ganesh Chem Tech Pvt Ltd
Survey No.153, Karannagar, Tal. Kadi
Dist .Mehsana, Gujarat.

Shri Naresh F Shah,
Director, M/s Gaanesh Chem Tech Pvt Ltd
Survey No.153, Karannagar, Tal. Kadi
Dist Mehsana, Gujarat.

Shri Jayesh Prabhudas Bhilmani
R/o. D-1/2, Kailash Tower, Stadium
Navrangpura, Ahmedabad, Gujarat.



Copy to:

1. The Chief Commissioner of Central Excise Zone, Ahmedabad.
2. The Commissioner of Central Excise. Ahmedabad-III.
3. The Additional Commissioner(Systems) Central Excise, Ahmedabad - III
4. The Additional Commissioner, Central Excise, Ahmedabad-III
5. The AC/DC, Central Excise, Kadi Division
6. Guard file
7. P. A

