

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(72)63/Ahd-III/2016-17/Appeal-I / 3058 to 3062

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-033-17-18

दिनांक Date : 20.06.2017 जारी करने की तारीख Date of Issue: 12-07-17

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-MLM-073-15-16 Date: 31.03.2016
Issued by: Additional Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Mahendra Ispat(India) 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 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।

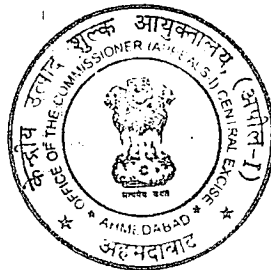
(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(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- णबी/35-इ के अंतर्गत:-

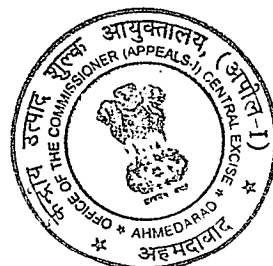
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

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, मेघानी नगर, अहमदाबाद-380016.

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 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 रुपए 5 लाख या उससे कम है वहाँ रुपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 5 लाख या 50 लाख तक हो तो रुपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रुपए 50 लाख या उससे ज्यादा है वहाँ रुपए 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 notwithstanding 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 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 paise 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, 1988 की धारा 35फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्त कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल हैं

- (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 बशर्त 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।

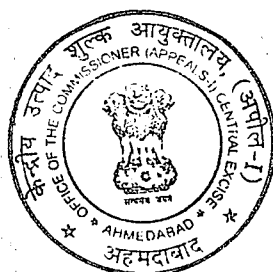
For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 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

M/s Mahendra Ispat (India) Pvt. Ltd., Block No.338, Plot No.6, village: Zak, Pardhol, Gandhinagar- 382 305 (hereinafter referred to as 'the appellant') is holding Central Excise Registration No. AAGCM0136QXM001 for manufacture S.S. Round, S.S. Flats, S.S. Ingots etc. falling under Chapter heading No. 72221119, 72189990 and 72181000 of the First Schedule to the Central Excise Tariff Act, 1944 (hereinafter referred to as 'CETA, 1985') and is availing CENVAT credit under Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004'). During the course of Central Excise audit of the records of the appellant for the period June-2010 to October-2013, it was observed the appellant had cleared S.S. Flat manufactured by it to M/s Mahendra Alloys Pvt. Ltd., their sister concern where Shri Champalal Purohit who was one of the Directors the appellant company was holding 50% partnership and that the goods cleared to M/s Mahendra Alloys by the appellant was at a lower rate when compared to its sale to the other buyers. It appeared that the appellant and M/s Mahendra Alloys were related persons as defined in Section 4(3)(b) of Central Excise Act, 1944 (hereinafter referred to as 'CEA, 1944') and value of goods cleared by the appellant to M/s Mahendra Alloys had to be determined at 110% of the cost of production for the levy of Central Excise duty. Considering such invoices where the value shown was less than 110% of the cost of production, a Show Cause Notice F.No.V.72/15-76/DEM/OA/15-16 dated 02/11/2015 (hereinafter referred to as 'the SCN') was issued to the appellant demanding Central Excise duty of Rs.7,02,360/- under Section 11(A) of CEA, 1944, invoking extended period of limitation; demanding interest under Section 11AA of CEA, 1944 and proposing to impose penalty on the appellant under Rule 25 of the Central Excise Rules, 2002 (hereinafter 'CER, 2002') read with Section 11AC of CEA, 1944. The SCN has been adjudicated vide Order-in-original No. AHM-CEX-003-ADC-MLM-073-15-16 dated 31/05/2016 (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as 'the adjudicating authority'), where the demand and interest as proposed in the SCN are confirmed under Section 11(A) of CEA, 1944 and Section 11AA /11AB of CEA, 1944 and penalty is imposed on the appellant under Section 11AC of CEA, 1944, read with Rule 25 of CER, 2002 as proposed in the SCN.

2. The appellant has preferred an appeal against the impugned order, mainly on the following grounds:

- 1) The demand of duty has been wrongly made under the provisions of Rule 11 of the Valuation rules. In the case of M/s Gajra Gears Pvt. Ltd., vs CCE & ST, Indore – 2015 (327) ELT 827 (Tri.-Del.) it has been held that for rejecting the transaction value, the conditions prescribed in Rule 10 of the Central Excise Valuation Rules have to be satisfied which are that all the sales of excisable goods are to be through the interconnected undertaking and the assessee or its buyer are the holding company or subsidiary or that they are related in terms of



clause (ii), (iii) or (iv) of Section 4(3)(b). In the present case the appellant is a private limited company where as M/s Mahendra Alloys is a partnership firm and therefore, not a holding company or a subsidiary company of the appellant. The transaction between the appellant and M/s Mahendra Alloys are on principle to principle basis and the price charged by the appellant is the sole consideration for sale and therefore there exists no mutuality of interest in the business of each other.

2) Rule 8 will apply only in two situations, (a) where the goods are consumed by him in the same factory (captive consumption) or (b) where such goods are transferred to another factory for consumption in the manufacture of other articles of the assessee. In the present case it is not the case of Revenue that goods were transferred to other units, for manufacture and there was no captive consumption and hence the provisions of Rule 11 read with Rule 8 cannot be made applicable. The appellant relies on M/s Handy Wires Pvt. Ltd. vs CCCE, Nagpur – 2015 (329) ELT 169 (Tri.-Mumbai). The appellant had always cleared goods to M/s Mahendra Alloys by adding their profit margin of around 4% to 5%. The goods were cleared to M/s Mahendra Alloys by the appellant after adding profit margin of around 4% to 5%. The goods were never sold at prices below the cost of production. Department's action to load 10% of the cost of production is totally arbitrary and without any basis. THE CAS-4 certificate was provided as called for by department. The appellant had made clearances to many other customers but no efforts were made by department to actually verify at what rate the said clearances were made to different buyers. Ideally the rates at which SS Flats were sold by the appellants to M/s Mahendra Alloys vis-à-vis sales made to other buyers during the relevant period as provided under Rule 4 of Valuation Rules, 2000 was required to be compared instead of straight away applying the CAS-4 value as done under Rule 8. The invoices show that the rates sold to M/s Mahendra Alloys was similar to rates at which SS Flats were sold to other clients. The average rate at which SS Flats were sold by the appellant to M/s Mahendra Alloys was always above 110% of the CAS-4 value. The comparative study of rates for F.Y.2010-11; F.Y. 2011-12; F.Y. 2012-13; F.Y.2013-14 shows that the average rate at which SS Flats were sold by appellant to M/s Mahendra Alloys was higher than 110% of CAS value showing that the goods were cleared to M/s Mahendra Alloys at market rate and no extra consideration was meted out to them owing to the fact that both the units were interconnected. Further, the comparative chart clearly shows that the appellant had cleared goods at an average rate which was more than 110% of CAS-4 value and hence it is not clear as to how the demand for differential duty has been worked out and confirmed.

3) The impugned order is not speaking as the decisions and facts cited by the appellant have not been discussed. Further, there was no suppression of facts on part of the appellant and it was not liable to penalty under Section 11AC as

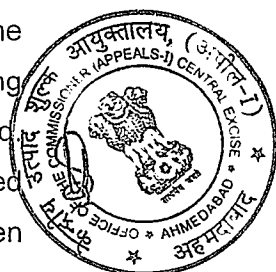


the returns were furnished regularly and there was no such objection in FAR 81/2010-11 dated 17/09/2010 for the period April-2009 to May-2010 conducted by the department showing that the department was aware of the position. The extended period of limitation could not be invoked as held in Supreme industries-2009 (235) ELT A85 (Bom.). In the absence of *mens rea*, no penalty under Section 11AC of CEA, 1944 could be imposed.

3. Personal hearing in the appeal was held on 19/04/2017. Shri M.K. Kothari, Consultant and Shri B.R. Pathan appeared on behalf of the appellant. The learned Consultant reiterated the grounds of appeal and submitted that overall 100% has been charged for consolidated clearances.

4. I have carefully gone through the show cause notice, the impugned order as well as the grounds of appeal. The undisputed fact in the instant case is that the appellant and M/s Mahendra Alloys were related in terms of Section 4(3)(b) of Central Excise Act, 1944.


5. The appellant has claimed in the appeal that the goods were cleared to M/s Mahendra Alloys after adding profit margin of around 4% to 5%; the goods were never sold at prices below the cost of production; the average rate at which SS Flats were sold by the appellant to M/s Mahindra Alloys was always above 110% of the Cost Accounting Standard 4 [CAS-4] value and hence it was not clear as to how the differential duty demand had been worked out. However, it has been clearly brought out in paragraph 13 of the impugned order that each of the clearances made to the related person during the period from June, 2010 to March, 2015 where the value shown was less than 110% of cost of production were considered to quantify the short payment of duty. This was done by way of best judgment assessment in terms of Rule 11 of Central Excise Valuation (Determination of Price of Excisable goods) Rules, 2000. Once it is undisputed that the clearances to M/s Mahendra Alloys by the appellant were clearances to related person, the loading of value in only such related person clearances were less than 110% of CAS-4 value was considered by the appellant for payment of duty, is proper and sustainable. The appellant has cited certain instances where the value of goods cleared to the related person was more than 110% of CAS-4 value, which is not relevant because such clearances are not considered while working out the demand for differential duty. Thus I find that the confirmation of demand for duty and interest in the impugned order is correct and legally sustainable. The fact that certain clearances to the related person was valued at less than 110% of the cost of production remained suppressed from the department and was detected only during the course of audit. The appellant has argued that as the same was not pointed out during audits conducted earlier, the allegation of suppression of facts was not justified. However, there is no claim on part of the appellant that the CAS-4 value was declared before the earlier audit parties. On the other hand even in the present case, it has been clearly brought out in Revenue Para 01 of DAP No.71/2014-15 (Excise) that even after



several reminders the appellant had not produced CAS-4 value and the audit party could not determine undervaluation or duty liability. It was only on the basis of inquiry by the officers of the department subsequent to being pointed out by audit that the undervaluation came to light and the short-payment was determined. Therefore, the allegation of suppression of facts with intent to evade duty is substantiated and the invoking of extended period and the imposition of penalty under Rule 25 of CER, 2002 read with Section 11AC of CEA, 1944 for the contraventions is justified in the present case. The appeal filed by the appellant is rejected.

6. अपीलकर्ता द्वारा दर्ज अपील का निपटारा उपरोक्त तरीके से किया जाता है।

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




(उमा शंकर)

आयुक्त (अपील्स-१)

Date: 27/06/2017

Attested


(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.

To
M/s Mahendra Ispat (India) Pvt. Ltd.,
Block No. 338, Plot no.6,
Village: Zak, Pardhol,
Gandhinagar – 382 305.

Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III
3. The Additional Commissioner, Central Excise (System), Ahmedabad-III.
4. The A.C. / D.C., Central Excise Division, Gandhinagar.
- ✓ 5. Guard File
6. P.A.



