



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

वस्तु एवं सेवा

GST Building, 7th Floor,,
Near Polytechnic,
Ambavadi, Ahmedabad-
380015

सतर्वा मंजिल, पोलिटेक्निक के पास,
आम्बावाडी, अहमदाबाद-380015

☎ : 079-26305065

टेलीफैक्स : 079 - 26305136



क फाइल संख्या : File No : V2(86)92/AHD-III/2016-17/Appeal

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-073-17-18

दिनांक Date : 27.07.2007 जारी करने की तारीख Date of Issue:

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश
AHM-CEX-003-ADC-DS दिनांक : 28.10.2016 से सृजित

Arising out of Order-in-Original: AHM-CEX-003-ADC-DSN-036-16-17, Date: 28.10.2016
Issued by: Additional Commissioner, Central Excise, Div:Kadi, Ahmedabad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Ratnamani Metals and Tubes Limited

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।

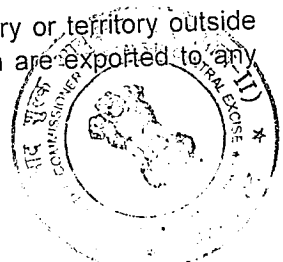
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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

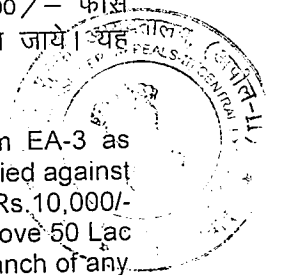
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

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 मेटल हास्पिटल कम्पाउण्ड, मेघाणी 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 इए-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 रूप 5 लाख या उससे कम है वहां रूप 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 5 लाख या 50 लाख तक हो तो रूप 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूप 50 लाख या उससे ज्यादा है वहां रूप 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 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 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 (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1984 की धारा 34फ 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 रुपये 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 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)(ii) 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."



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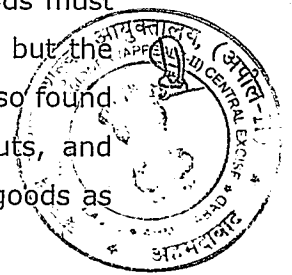
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ORDER IN APPEAL

M/s. Ratnamani Metal and Tubes Ltd., Village- Indrrad, Tal. Kadi, Dist. Mehsana (*hereinafter referred to as 'appellants'*) holding Service Tax Registration No. AABCR1742E XM002 is manufacturing Seamless Stainless Steel Tubes/Pipes falling under Chapters 72, 73 and 82 of the schedule to Central Excise Tariff Act, 1985. They are availing the facility of Cenvat Credit under CENVAT Credit Rules, 2004.

2. The facts of the case, in brief, are that during the scrutiny of the ER1/documents, it appeared that the goods i.e. "Used 5000 MT Extrusion Press Line", procured vide Bill of Entry No. 7052936 dated 13.10.2014 and No. 7417562 dated 18.11.2014, were brought to the factory by the appellant as Capital goods. The appellant also procured "Used Containers" falling under sub-heading No. 86090000 vide above Bill of Entry. The appellant had availed cenvat credit amounting to Rs.91,27,550/-, and Rs.7,40,657/-, respectively, in the Cenvat credit Register on 09.05.2015. On scrutiny, it was noticed that the goods "Used Containers" (*herein after referred as "the said goods"*) neither fell within the definition of Capital goods as per Rule 2(a) of the Cenvat Credit Rules, 2004, nor it can be considered as an input as per Rule 2 (k) as the same has no relationship whatsoever with the manufacture of final products. The credit taken by the appellant to the tune of Rs.7,40,657/-, appeared to be taken in respect of ineligible goods and as such inadmissible, and therefore the appellant appeared to have contravened the provisions of Rule 4 of the Cenvat Credit Rules, 2004. Therefore a S.C.N. dtd.3.05.2016, was issued to the appellant, asking as to why the Cenvat credit of Rs.7,40,657/-, should not be disallowed and recovered from them along with interest and penalty, as applicable, should not imposed under Rule 15(2) of the Cenvat Credit Rules, 2004, read with Section 11AC of the Central Excise Act, 1944.

3. The appellant in their defence stated that the said goods were used for the safe transportation of the capital goods i.e. Used MT Extrusion Press Line and that it is considered as a packing material to the capital goods; that since the said capital goods were transported through own containers, they were chargeable to import duty; that since the said goods which also carried various critical spares of the machinery to be installed, it was required for storage of critical spares of the machinery; that the said goods were also to be considered as accessories to the capital goods as the said goods were required for storage of critical spares even after installation of the said capital goods. The Adjudicating authority found that in order to qualify as capital goods and be eligible for Cenvat credit, the goods must satisfy the definition given in Rule 2(a) of the Cenvat Credit Rules, 2004, but the said goods did not qualify as capital goods entitled for Cenvat Credit. He also found that the said goods are 'Capital assets' and they cannot qualify as inputs, and therefore held that the Cenvat credit availed by the appellant on the said goods as

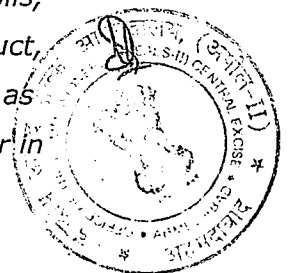


input is also inadmissible. Accordingly, the adjudicating authority vide OIO dtd.28.10.16, ordered to recover the Cenvat credit of Rs.7,40,657/-, alongwith interest, and imposed penalty of Rs.3,70,329/-.

4. Aggrieved by the said OIO, the appellant has filed this appeal, contending that as the installation date of the imported capital goods was not certain, they had to buy the said goods along with the capital goods to ensure complete safety and subsequent storage of the capital goods at the manufacturing location as well; the said goods qualified as capital goods based on the case of Kalyani Forge Ltd. [2008(231) ELT 373 (Commr. Appl.)], wherein the CESTAT held that Cenvat credit paid on Containers, which were used to bring capital goods, is available as the value of such containers was included in the assessable value of the capital goods and duty was paid on it on the ground that the capital goods cannot be imported without packing material; the said goods qualified as inputs and thus Cenvat credit on the same is available; the adjudicating authority has erred in holding that since the appellant had taken a position that the said goods qualifies as capital goods, the same cannot be construed as 'inputs' to be eligible for credit of tax paid thereof; penalty cannot be imposed on the appellant under the Cenvat Credit Rules, 2004, as they had not contravened any provisions of the law. The appellant cited various case laws in support of their contention.

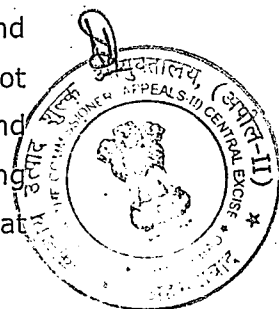
5. I have carefully gone through the facts of the case on records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellants at the time of personal hearing. The question to be decided is as to whether (i) the said goods on which cenvat credit is availed by the appellant is either a Capital goods or a input as defined in the Cenvat Credit Rules, 2004, (ii) Cenvat credit is admissible to the appellant on the said goods and (iii) penalty is imposable on the appellant in this matter. The said capital goods i.e. "Used 5000 MT Extrusion Press Line" was to be installed in the appellant's factory and hence qualified as Capital Goods for the benefit of Cenvat credit. The said goods i.e. Used Containers used for transporting the said Capital Goods, falling under Chapter sub-heading No. 86090000, cannot be considered as capital goods, as the same does not fall in the chapters mentioned in Rule 2(a)(A)(i) of the Cenvat Credit Rules, 2004, or as accessories of the goods specified at Rule 2(a)(A)(i) or as storage tank as mentioned in Rule 2(a)(A)(vii)(1). As regards the said goods qualifying as inputs, the definition of input as defined in Rule 2 (k) is indicated below :

"Input means (i) all goods, except light diesel oil, high speed diesel oil and motor spirit, commonly known as petrol, used in or in relation to the manufacture of final products whether directly or indirectly and whether contained in the final product or not and includes lubricating oils, greases, cutting oils, coolants, accessories of the final products cleared along with the final product, goods used as paint, or as packing material, or as fuel, or for generation of electricity or steam used in or in



relation to manufacture of final products or for any other purpose, within the factory of production;

(ii) all goods, except light diesel oil and motor spirit, commonly known as petrol and motor vehicles, used for providing any output services". The basic requirement for a product to be considered as input as per the above definition, is that it should be goods which are used in or in relation to manufacture of final products. The said goods cannot be used in or in relation to the manufacture of the appellant's final product. As per the appellant's contention, if the said goods are considered as packing material, the same cannot be considered as either primary or secondary packing material. Containers are customarily used for transportation of import and export cargo. Such Containers used for import-export cargo are normally not purchased and used as packing material for any goods, including heavy machinery. As per the judgement in Essel Propack v/s. Commissioner of Central Excise, Thane [2016(331) E.L.T. 158(Tri. Mumbai)] - "If any special secondary packing is provided by the assessee at the instance of a wholesale buyer, which is not generally provided as a normal feature of the wholesale trade, the cost of such packing shall be deducted from the wholesale cash price". As such, the Cenvat credit of such packing material which is not generally provided as a normal feature of the trade, does not appear to be admissible as cenvat credit on input. In another case of India Cements Ltd. v/s. Asstt. Collector of C. Excise, Thirunelveli [1995(75) ELT 493 (Mad.)], the Hon'ble High Court opined that "In order to determine whether a packaging material is used in or in relation to the manufacture, what is to be seen is as to how the goods are generally sold". In the appellant's case the said goods i.e. Used Containers used as packing material for their Used 5000 MT Extrusion Press Line, are not generally used as packing materials for huge machineries. The said goods are generally used by every industry for transportation of goods, including machinery, but it cannot be considered as a packing material and is generally not sold for that purpose. Generally the practice is that the said goods are rented out by Companies owning them to whomsoever requires them for transporting their goods, including machineries. The appellant, however has purchased the said goods with some other motive which is beyond comprehension. As the purchase of the said goods i.e. Used Containers for packing any goods is not a normal practice, the Cenvat credit on the said goods is inadmissible. In the case of Kothari Pouches v/s. Commissioner of Central Excise, Meerut, [2001(135) elt 725 (Tri. Del.)] the Hon'ble Tribunal stated that "In the instant case, the product pan masala is being sold in laminated pouches or small tins, as observed above, and the cost of those pouches and small tin containers can only be said to be not excludible while computing the value of the goods, but no credit on the jars and plastic containers can be claimed by the appellants being not a primary packing material". Thus, all the above decisions, lead me to the conclusion that Cenvat credit on the said goods cannot be allowed.



6. I, therefore, conclude that the said goods i.e. "Used Containers" on which the appellant has availed credit of Rs.7,40,657/-, is inadmissible under the Cenvat Credit Rules, 2004. As regards the penalty on the appellant imposed by the Adjudicating Authority amounting to Rs.3,70,329/-, under proviso to clause (c) of sub-section (1) of Section 11AC of the Central Excise Act, 1944, read with Rule 15(2) of the Cenvat Credit Rules, 2004, is considerate and does not need to be reduced any further.

7. In view of above, I dismiss the appellants appeal.


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

8. The appeals filed by the appellant, stand disposed off in above terms.

उमा शंकर
(उमा शंकर)

आयुक्त (अपील्स)

ATTESTED


(R.R. NATHAN)

SUPERINTENDENT,
CENTRAL TAX APPEALS, AHMEDABAD.

To,

M/s. Ratnamani Metal and Tubes Ltd.,
Village-Indrad, Tal. Kadi,
Dist. Mehsana.



Copy to:

- 1) The Chief Commissioner, Central Tax, GST, Ahmedabad Zone.
- 2) The Commissioner, Central Tax, Gandhinagar.
- 3) The Dy./Asst. Commissioner, Div-Kadi, Central Tax, GST, Gandhinagar.
- 4) The Asst. Commissioner(System), Central Tax, Hqrs., Gandhinagar.
- 5) Guard File.
- 6) P.A. File.

