

क फाइल संख्या :File No : V2/73/GNR/2018-19

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ख अपील आदेश संख्या :Order-In-Appeal No.: <u>AHM-EXCUS-003-APP-78-18-19</u> दिनाँक Date :<u>23.08.2018</u> जारी करने की तारीख Date of Issue:

<u>श्री उमाशंकर</u> आयुक्त (अपील) द्वारा पारित

C.Ju

Passed by Shri Uma Shanker Commissioner (Appeals) Ahmedabad

ग अपर आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-॥। आयुक्तालय द्वारा जारी मूल आदेश : 15-16/JC/AJS/2009 दिनाँक : 11-11-2009 से सृजित

Arising out of Order-in-Original: **15-16/JC/AJS/2009**, Date: **11-11-2009** Issued by: Joint Commissioner, CGST, Div:RRA, HQ, Gandhinagar Commissionerate, Ahmedabad.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. Somany Ceramics Ltd

कोई व्यक्ति इस अपील आदेश से असतीष 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, 4<sup>th</sup> 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 गबा माल हो।
- (C) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।
- (d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.
- (1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए—8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल—आदेश एवं अपील आदेश की दो—दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35—इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर—6 चालान की प्रति भी होनी चाहिए।

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

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

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35— ण्वी / 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, 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 इ.ए—3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सिहत 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 रिजस्टार के नाम से रेखांकिंत 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 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 हैं।
- (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

This order arises out of an appeal filed by M/s. Somany Ceramics Ltd., 14, GIDC Industrial Estate, Taluka; Kadi, Distt. Mehsana (in short 'appellant') against Order-in-Original No.15 to 16/JC(AJS)/2009 dtd. 11.11.2009 (in short 'impugned order') passed by the then Joint Commissioner, Central Excise, Ahmedabad-III (in short 'adjudicating authority').

- 2. Briefly stated that adjudicating authority vide impugned order confirmed demand of Rs.2,13,673/- alongwith inetrest under first proviso to Section 73 and 75 of the Finance Act, 1994 respectively read with Rule 14 of the Cenvat Credit Rules, 2004, being wrongly availed Cenvat credit of service tax paid on Outward Freight services for goods sold directly from the factory gate i.e. beyond the 'place of removal' during the period January-2008 to September-2008 in terms of Rule 2(I) ibid and also imposed penalty of Rs.2,13,673/- under Section 78 ibid read with Rule 15(1) ibid.
- 3. Aggrieved with the impugned order, the appellant filed the present appeal wherein, inter alia, stated that:
  - > The impugned order is passed arbitrary and on extraneous consideration ignoring the facts and settled legal position.
  - ➤ Demand is confirmed invoking incorrect provisions of law and beyond the scope of legislative competence, inconsistent with the law on availing of Cenvat credit.
  - The adjudicating authority has ignored the Board's Circular No.97/8/2007-ST dtd.23.08.2007 produced during the course of personal hearing.
  - ▶ In similar and identical issue, the Punjab & Haryana High Court has settled the issue in case of Ambuja Cement Ltd.- 2009(236) ELT-431 (P&H) and also rely on ratio of judgment by Hon'ble Tribunal in their own case vide Order No. A/1553-1554/WZB/AHD/09 dtd.20.07.2009.
  - ▶ Penalty imposed under Section 78 ibid without confirming violation and suppression and rely upon case law of Nizam Sugar Factory reported in 2006(197) ELT-465(SC).
- 4. Personal hearing in the matter was held on 25.07.2018. Shri J. N. Bhagat, Consultant, appeared on behalf of the appellant and reiterated the grounds of appeal and submitted copies of Board's Circular No.1065/4/2018-CX dated 08.06.2018, order of the Commissioner(Appeals), Tribunal and High Court alongwith additional written submission made on 25.07.2018.
- 5. I have carefully gone through the appeal memorandum, submissions made at the time of personal hearing and evidences available on records. I find that the main issue to be decided is whether the appellant is entitled to Cenvat

credit of service tax paid on Outward Freight services availed on direct sale from the factory gate i.e. beyond the 'place of removal' or otherwise during the relevant period. Accordingly, I proceed to decide the case on merits.

- 6. Prima facie, I find that the adjudicating authority has confirmed the demand alongwith interest and imposed penalty on the ground that Outward Freight services which are received after clearance of final products from the 'place of removal' i.e. factory gate. Hence, aggrieved with the impugned order, the appellant has preferred the present appeal. The period covered in the present appeal is from January-2008 to September-2008.
- 7. In this regard, I find that the issue involved was already settled by the Hon'ble CESTAT, Chennai Larger Bench in the case of ABB Ltd. Vs. CCE & ST, Banglore [2009(15) STR-23(Tri.LB)]. However, in the appeal before the High Court of Karnataka by the deptt against the said judgment of the CESTAT, the Hon'ble High Court of Karnataka upheld the decision of the Larger Bench of the Tribunal. As against this order of the High Court of Karnataka, the department filed Civil Application No.11402/2016 against ABB Ltd. before the Hon'ble Supreme Court of India. This civil application was tagged with Civil Appeal No.11710/2016 filed by CCE, Belgaum Vs. M/s. Vasavadatta Cements Ltd. The Hon'ble Supreme Court of India vide judgment dated 18.01.2018 [ reported in 2018(11) GSTL-3 (SC)] on the subject matter has categorically discussed the words and phrase "from the place of removal" as it stood in the definition of 'input service' in Rule 2(I) ibid prior to amendment w.e.f. 01.04.2008 and held as under:

"Cenvat credit - Input services - GTA services - Outward Transportation of manufactured product - Place of removal - Definition of input services as it existed prior to amendment in 2008, included term "from place of removal" - Certainly it has to be upto a certain point - Thus GTA services used for outward transportation of goods from place of removal, i.e., factory gate up to first point of delivery viz. a Depot or a Customer's premises covered under input services - However, post 1-4-2008 amendment, said term having been substituted by term "upto the place of removal", credit beyond such place not admissible - There being no error in concurrent orders of CESTAT Larger Bench and High Court, impugned order sustainable - Rule 2(I) of Cenvat Credit Rules, 2004. [paras 5, 6, 7, 8]"

Following the ratio of this judgment of the Hon'ble Supreme Court of India, I hold that the appellant is eligible for availing Cenvat credit of service tax paid on the Outward Freight in case of direct sale from the factory gate and accordingly allow the appeal filed by the appellant with consequential relief, if

any, for the period covered prior to 01.04.2008. Consequently, to this extent the demand and interest confirmed and penalty imposed vide impugned order is set-aside.

- As regards the period covered post 01.04.2008 and upto September-8. mainly relied upon the Circular 2008, I find that the appellant has No.97/8/2007-CX dtd.23.03.2007 whereas the adjudicating authority has relied upon the decision of the Apex Court in case of Escorts JCB [reported in 2002(146)ELT-31(SC)] and Tribunal Kolkatta's decision in case of Aditya Birla Insulators Ltd. [ reported in 2008(226) ELT-377(Tri. Kolkatta]. I find that both these decision pertains to period prior to 01.04.2008 i.e. amendment made in the definition of 'input service'. I also find that the adjudicating authority has failed to give findings on the subject matter w.r.t. para 8.2 of said circular dtd.23.03.2007. I also find that the appellant has not produced any documentary evidence in support of his claim before the adjudicating authority or this appellate authority. Hence, to this extent, matter is remanded back to the adjudicating authority to decide a fresh after following the principle of natural justice within 30 days of communication of this order. The appellant is also directed to produce documentary evidence in support of his claim.
  - 9. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है। The appeal filed by the appellant stands disposed of in above terms.

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested:

(B.A. Patel) Supdt.(Appeals)

Central GST, Ahmedabad.

## BY SPEED POST TO:

M/s. Somany Ceramics Ltd., 14, GIDC Industrial Estate, Taluka; Kadi, Distt. Mehsana.

## Copy to:-

- (1) The Chief Commissioner, CGST, Ahmedabad Zone.
- (2) The Commissioner, CGST, Gandhinagar (RRA Section).
- (3) The Joint Commissioner, CGST, Gandhinagar.
- (4) The Asstt. Commissioner, CGST, Division Kadi.
- (5) The Asstt. Commr(System), CGST, Gandhinagar. (for uploading OIA on website)
- (6) Guard file
- (Z)— P.A. file.