



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

वस्तु एवं सेवा

कर भवन,

सप्तमी मंजिल, पॉलिटेक्निक के पास,

आम्बावाडी, अहमदाबाद-380015

GST Building, 7th Floor,,

Near Polytechnic,

Ambavadi, Ahmedabad-

380015



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- क फाइल संख्या : File No : **V2/60/GNR/2019-20/14670 7014674**
- ख अपील आदेश संख्या : Order-In-Appeal No.: **AHM-EXCUS-003-APP-75-19-20**
दिनांक Date : **19-03-2020** जारी करने की तारीख Date of Issue: **08/06/2020**
आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals) Ahmedabad
- ग आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **AHM-CEX-003-ADC-JN-03-19-20** दिनांक : **24/6/2019** से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-ADC-JN-03-19-20**, Date: **24/6/2019**
Issued by: Additional Commissioner, CGST, Div: RRA, HQ, Gandhinagar Commissionerate, Ahmedabad.

- घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता
Name & Address of the Appellant & Respondent
M/s. Nico Extrusion 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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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 दिनोंक 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 दूसरा मंजिल, बहमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 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 ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से 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 पढी 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 filed 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 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.”

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

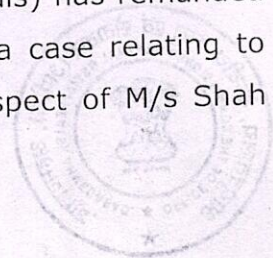


ORDER-IN-APPEAL

This appeal has been filed by M/s Nico Extrusion Ltd, Survey No.678/1/3, Plot No.4, Bhilad Silvassa Road, Naroli, Silvassa (Gujarat) [hereinafter referred to as "appellant"] against Order-in-Original No.AHM-CEX-003-ADC-JN-003-19-20 dated 24.06.2019 [hereinafter referred to as "impugned order"] passed by Additional Commissioner of CGST & Central Excise, Gandhinagar Commissionerate [hereinafter referred to as "adjudicating authority"].

2. Briefly stated, the facts of the case are that the appellant is engaged in manufacture of excisable goods viz. non ferrous metal alloy ingots and following the procedures prescribed under the Central Excise Rules, 2002 and the Cenvat Credit Rules, 2004. During investigation and examination of records of M/s Avadh Transport Service, Bhiwandi by the Preventive officers of Central Excise, Vapi Commissionerate, it was noticed that the appellant had issued nine invoices to M/s Shah Alloys Ltd, Santej, Gandhinagar Dist. (Gujarat) and the goods mentioned in the said invoices were not transported by M/s Avadh Transport Service to M/s Shah Alloys Ltd. On the basis of records forwarded by the Preventive Officers to the jurisdictional Central Excise Officers, further investigation was conducted at M/s Shah Alloys Ltd's end and it was noticed that they had availed fraudulent Cenvat Credit amounting to Rs.34,87,061/- on the basis of invoices issued by the appellant without receiving goods. It was also noticed that the appellant has not credited Central Excise duty in Government Account in respect of nine invoices issued. Accordingly, on completion of investigation, a Show Cause Notice dated 15.07.2010 was issued to M/s Shah Alloys Ltd for recovery of fraudulently availed Cenvat Credit amounting to Rs.34,87,061/- along with interest and imposition of penalty. The said Show Cause Notice further proposed imposition of penalty under Rule 26(2) of the Central Excise Rules, 2002 on the appellant for issuance of fake invoices to M/s Shah Alloys without delivery of goods so as to enable it to take Cenvat Credit fraudulently. Vide OIO No.AHM-CEX-003-ADC-063-13 dated 30.12.2013, the Additional Commissioner of Central Excise, Kalol Division has adjudicated the matter and ordered for recovery of Cenvat Credit wrongly availed by M/s Shah Alloys Ltd along with interest and also imposed penalty of Rs.15,00,000/- under Section 11AC of the Central Excise Act, 1944 on them. The Additional Commissioner has also imposed penalty of Rs.15,00,000/- on appellant under Rule 26(2) of the Central Excise Rules, 2002.

2.1 Aggrieved with the OIO dated 30.12.2013, M/s Shah Alloys Ltd and the appellant had filed appeals before the Commissioner (Appeals) Ahmedabad, who, in turn decided the matter vide OIA No.AHM-EXCUS-003-APP-056 to 057-140-15 dated 16.07.2014. Vide impugned OIA, the Commissioner (Appeals) has remanded the case to the adjudicating authority on the grounds that [i] a case relating to parallel demand of Cenvat Credit involved in transactions in respect of M/s Shah



Alloys Ltd has already been covered in the show cause notice dated 24.07.2007 issued to the appellant by the jurisdictional Commissionerate which is sub-judice, hence deciding the subject matter is premature; and [ii] Cross-examination of various persons requested by M/s Shah Alloys Ltd and the appellant was not adhered to.

2.2 The adjudicating authority, vide impugned order, has again ordered for recovery of Cenvat Credit wrongly availed by M/s Shah Alloys Ltd along with interest and also imposed penalty of Rs.15,00,000/- under Section 11AC of the Central Excise Act, 1944 on them and also imposed penalty of Rs.15,00,000/- on appellant under Rule 26(2) of the Central Excise rules, 2002. The adjudicating authority has in Para 18 of Order-in-Original recorded findings of the Principal Commissioner, Central Excise, Vapi, who had vide Order-in-Original No.OMN-EXCUS-000-COM-044-18-19 dated 29.03.2019, adjudicated the Show Cause Notice dated 24.07.2007 issued against the appellant.

3. Aggrieved with the impugned order, the appellant has filed the instant appeal against imposition of penalty under Rule 26(2) of Rule ibid on the grounds that:

- The invoices raised by them were recorded in the dispatch and Cenvat Register of their company; that the recipient company M/s Shah Alloys Ltd had recorded the receipt of goods in their inward Cenvat Register and all other details were also available with the recipient company.
- The payment for the goods was done by the recipient company by account payee cheques through bank letter of credit to them; that no investigation was carried out by officers in respect of money flow back; that payment to transporter was also made through cheques based on the bills raised by the transporter.
- There were 51 invoices and deliveries made to M/s Shah Alloys by the appellant but only nine invoices were challenged by the authority.
- The statements recorded during cross-examination of all persons, except truck driver, in fact support the case of appellant. The decisions relied on by them in this regard was not considered by the adjudicating authority which is against the CBEC's instruction No.1063/2/2018-CX 3 dated 16.02.2018.
- Penalty under Rule 26(2) is not applicable to the appellant's case as the said Rule came into existence from 01.03.2007, whereas the period involved in the instant case prior to that period; that penalty under Rule 26(1) is also not applicable to their case as there was no situation which make the goods liable for confiscation.

4. Personal Hearing in the matter was held on 11.02.2020. Shri Harish Pandey, Legal Head of the appellant firm, appeared for the hearing. He reiterated the submissions made in Appeal Memorandum. He further submitted a written submission along with details of cross-examination of truck owner, partner of Transport Company, RTO, Mehsana and other relevant details.



5. I have carefully gone through the facts of the case, submissions made in Appeal Memorandum and also the submissions made during the course of personal hearing. I find that the limited issue to be decided in the instant case is relating to imposition of penalty of Rs.15,00,000/- under Rule 26(2) of Central Excise Rules, 2002 (forshort-CER) on appellant, alleging that they issued nine invoices as per details given in Show Cause Notice to M/s Shah Alloys Ltd without supplying corresponding goods so as to enable them to take Cenvat credit fraudulently.

6. I find that, vide impugned order, the adjudicating authority has ordered for recovery of Cenvat Credit amounting to Rs.34,87,061/- along with interest from M/s Shah Alloys Ltd and also imposed penalty on them under Section 11AC of the Central Excise Act, 1944 as well as on appellant under Rule 26(2) of the CER on the grounds that:

[i] A case regarding fraudulent availment of Cenvat Credit amounting to Rs.16,96,76,390/- without receipt of inputs in their factory and shown it to have utilized for the manufacture of finished goods, as alleged against the appellant vide show cause notice dated 27.04.2007, was confirmed by the Principal Commissioner of Vapi, vide order dated 29.03.2019; that from the said order, it is clear that when the appellant have not received the inputs in their factory and in turn disallowed the Cenvat Credit involved on such inputs wrong shown as receipt, the credit passed by the appellant to M/s Shah Alloys Ltd is not allowable as per law.

[ii] in the subject case, no goods were delivered to M/s Shah Alloys Ltd in respect of nine invoices in question issued by the appellant, but only Cenvatable invoices were issued for availing Cenvat Credit fraudulent by M/s Shah Alloys Ltd.

7. It is the contention of the appellant that the adjudicating authority has passed the impugned order by confirming the allegations stated in the impugned Show Cause Notice dated 10.07.2010, only on the basis of statement deposed by the Truck Driver and contrary details maintained by the Transporters Company and no other corroborative evidences brought on record for confirming the subject allegations.

8. I find that the entire case against the appellant pertains to nine invoices issued by them to M/s Shah Alloys Ltd, under which the excisable goods said to have been cleared. The main observation of the adjudicating authority is that the appellant has not physically removed the goods from their factory premises to M/s Shah Alloys Ltd, vide invoices in question as per truck receipt register and statements of Transporters, Truck drivers and authorized persons of the appellant as well as M/s Shah alloys Ltd, recorded during investigation. The details of the said nine invoices, truck number and conclusion of the investigating authority are as

under:



S No	Invoice No.	Description of goods	Truck No. under goods which delivered	Remarks by the Department
1	873/01.02.06	Pure Copper	DN09 7490	Truck arrived at Silvassa on 01.02.06 at 19.35 Hrs and halted at Krishna, Piparia and loaded on 02.02.06 from Bhiwandi as per Daily Report Book
2	868/30.01.06	-do-	MH04 P2300	The truck neither came nor loaded from Silvassa as per Daily Report on 31.01.06
3	893/05.02.06	-do-	MH04 P2300	-do- 05.02.06
4	898/07.02.06	-do-	DN09 8636	-do- 07.02.06
5	903/09.02.06	-do-	DN09 7940	-do- 09.02.06
6	923/12.02.06	-do-	DN09 7940	-do- 12.02.06
7	922/12.02.06	-do-	DN09 7940	The truck was loaded on 11.02.06 from silvassa to Nico, Kalyan
8	830/20.01.06	copper	GJ2 Y4327	As reported by RTO vide report dated 23.01.07 (Auto Rixa)
9	587/05.11.05	Copper wire	DN09 7940	Truck was loaded on 04.11.05 from Nico, Silvassa to Kalyan and no lading has been taken from Nico Silvassa on 05.11.05 as per daily report book

9. On other hand, I find that the appellant has submitted corroborative evidences contrary to the conclusion arrived by the department in the Show Cause Notice/impugned order. They submitted copy of above mentioned tax invoices, consignment note issued by the transport and weighbridge slip issued at destination point which shows the details of vehicles and freight charges received against LR No. and Truck No. etc.



10. I find that in the first round of litigation of the instant case before the Appellate Authority, the Commissioner (Appeals), vide OIA dated 16.07.2014, has remanded the matter to the adjudicating authority to allow cross-examination of various persons, whose statements were recorded by the department authority during investigation and also to verify the outcome of the case booked against the appellant by the Vapi Commissionerate.

10.1 It is observed from the records and finding of the adjudicating authority at para 27 of the impugned order that out of nine cases mentioned above, in eight cases transportation had been undertaken by M/s Avadh Transport Service and remaining one by truck owner of GJ 2Y 4327. I find that in the remand proceedings, cross-examination of owner of Truck No.GJ2Y 4327 and Shri Ashish Gupta, Partner



of M/s Avadh Transport Service, was held on 22.02.2018 and 06.03.2018 respectively. I have gone through the said statement of cross-examination. The owner of Truck No.GJ2 Y 4327 has stated in his cross-examination that his truck was in Kalol on the date as per invoice and the driver of the truck will know the name of company where the goods was unloaded. Shri Ashish Gupta, Partner of M/s Avadh Transport Service, stated that his company prepares records on the basis of LR, issue of Invoices, Payment Collection and the entry in receipt truck register may vary in dates. He further stated that the ledger accounts maintained by the appellant and weigh bridge details of their trucks are correct; that his company received payment from the appellant through cheques.

10.2 The adjudicating authority has contended that the said statements of the truck owner and partner of transporter during their cross-examination which is contrary to their statements given earlier, was due to appellant's influence with an intention to get favour from them. However, looking into the documents furnished by the appellant i.e. copy of above mentioned tax invoices, consignment note issued by the transport and weighbridge slip issued at destination point (showing details of vehicles and freight charges received against LR No. and Truck No. etc.) and the method of payment received, the contention of the adjudicating authority suffers from lack of verification/evidence, especially when the documents submitted by the appellant with regard to above nine cases are supporting their contention with regard to movement of goods from their factory to M/s Shah Alloys Ltd. Sample copy of one invoice, transport details and weighbridge slip is reproduced below:

For Nico Extrusion (P) Ltd. <i>Ashish Aggarwal</i> Authorised Signatory		Invoice for removal of excisable goods from factory or warehouse on payment of duty under Rule 2002 (11 and 8) of C. Ex. Rule 2002. TAX INVOICE & Invoice		  DUPLICATE FOR TRANSPORTER Used for taking MODVAT Credit		
Nico Extrusion Pvt. Ltd. LICENSEE Address : S. No. 678/1/3, Plot No. 4, Bhilad, Silvassa Main Rd., Harol, Silvassa - 396 235. Tel. No.: (0260) 5535035, Tel- Fax: (0260) 2650215. Head Office : 12, Niraj Industrial Estate, Off Mahatma Cave Rd., Andheri (E), Mumbai - 400 093. Tel. No.: 56938700-04, Fax: 26872152, E-mail: nico@nicocx.com		Cent. Ex. Regd. No. & ECC Code : AAA CN 2104 R XM 001 Name of Excisable Goods : <u>Pure Copper</u> Chapter/ Sub-heading No. : <u>24071200</u> Rate of Duty : <u>16%</u> No. & Date of Notification under which any concessional rate of duty is claimed		Range : II - Silvassa Div. : II - Silvassa Commissionerate : Vapi P.L.A. No. : 102/CH74,76,79,25/01-02 / Surat II Date of Preparation of Invoice : 9/12/06 Time of Preparation of Invoice : 8:10 PM In words : <u>Eight Lakhs</u>		
Name and address of Consignee : <u>M/s. Shah Alloys Ltd.</u> <u>Santet, Sola Kalol Road,</u> <u>Tal. Kalol,</u> <u>Dist. Gandhinagar</u>		Invoice No.: <u>903</u> Date: <u>9/12/06</u> L.R. No. <u>7768</u> Date: <u>9/12/06</u> Transporter : <u>Avadh Transport</u> Vehicle No. <u>DN-08-7946</u>		E.C.C. No. <u>AAOCS0475L7m01</u> VAT/C.S.T. No. <u>TIN-24560101282</u>		
Sr. No.	Description of goods	Packages	Identification Mark	Total Quantity (Kgs)	Selling Rate (Rs.)	AMOUNT (Rs.)
1	Pure Copper	161 Pcs		8000- kg	230-00	1846000-00



Avadh Transport Service

BRANCH: SILVASSA OFFICE: Ga'a No. A/1, Plot No. 40, Standard House, Dhanudiyeg Industrial, Co.op. Society Ltd., Pipena, Silvassa, (D2 NH) Ph.: 2645104

: HEAD OFFICE :
SHOP NO. 3, GUPTA COMPOUND, ANJUR PHATA, CHIWANDI - 421 302 DIST. THANE.
TEL: 273417, 271214. TELEFAX: 270878.

CONSIGNMENT NO. No. 7700 Date: 9/12/06 Vehicle No. DM-17-36 From: SILVASSA To: Santej Mahipor

CONSIGNOR'S NAME & ADDRESS		CONSIGNEE'S NAME & ADDRESS	
M/S. HIGH EXTRUSIONS PVT. LTD. S NO. 678/17, PLOT NO. 1, SHALU CHANDRA MAH GZ. 12, BAROLI, SILVASSA - 396230		MSTO ORDER Notified: State Bank of Saurashtra Edinbridge Gujarat Branch Ahmedabad Notified: Shah Alloys Ltd. m. 91112077, 91112077	
Packages	Description (Said to Contain)	WEIGHT Actual	Charged
161 100	Pure Copper Covered under U.C.N. 6032706 440000 224 at 24/11/06 of State Bank of Saurashtra Gujarat Bhavan Ellis Bridge, Ahmedabad Service Tax = 1111207 at 9/12/06 C No. 2456010282 at 5/1/07	8000	13
Gross Freight Less ABATEMENT @ 7.5% = Charges Freight For Service Tax Service Tax @ 10/20 Payable by Consignment		Freight Hamali SU/Ch. S.T./Ch. Risk Sh. TOTAL	
Acknowledgement Received the above mentioned goods in good order & sound condition		Signature of Booking Clerk	

CONSIGNEE COPY

VIJAY WEIGHBRIDGE
(ELECTRONIC COMPUTERISED)
24 HOURS SERVICE

SOLA-KALOL ROAD, NR. SHAH ALLOYS LTD., SANTEJ, DIST. : GANDHINAGAR PH. : 02764-286445

SERIAL NO. :	CHARGES :	VEHICLE NO. :	SUPPLIER :
0187 30	147700 Kg	DM-17-36	08:38
GROSS	05710 Kg	10:07:02 TIME	15:41
TARE	00000 Kg	10:07:06 TIME	
NETT		ITEM :	

(1) વજન કરતી વખતે પાટીએ પોતાના જવાબદાર માણસને
પાટી સાથે મોકલી વજન તપાસી લેવું.
(2) વજન કરી વિગત પાટી કોઈપણ વાતની જવાબદારી રહેતી નથી.
(3) પાટીની અંદર શું માલ છે તે તપાસવામાં આવતો નથી.

Thanking You
Signature

11. I further find that the adjudicating authority has not considered these facts available on records and also not recorded any finding on these documents which are vital to the instant case. The impugned notice and impugned order is silent on the aspect relating to preparation of these documents by the appellant's factory, transporter's premises and weighbridge authority. If these documents were prepared as per requirement of the appellant/M/s Shah Alloys Ltd, corroborative evidence should have been brought on the record. I find that the adjudicating



authority has concluded the facts that the goods removed by the appellant under the invoices in question were not received by M/s Shah Alloys Ltd only [i] on the basis of statement of Shri Sanjay K Pandya, Manager of M/s Shah Alloys Ltd, and [ii] the offence case booked against the appellant relating to fraudulent availment of Cenvat Credit amounting to Rs.16,95,76,390/- without receipt of raw-materials, which was confirmed by the Vapi Commissioner vide OIO dated 29.03.2019.

11.1 I have gone through the statement dated 09.01.2009, 02.06.2009 and 16.06.2009 of Shri Sanjay K Pandya. He had deposed in the said statements that that the entry made in the inward truck register and the invoices issued by the appellant are different and accordingly, it appears that the goods described in the invoices issued by the appellant had not been reached into the factory premises of M/s Shah Alloys Ltd, Santej and the Cenvat Credit availed by them on the said goods seems to be ineligible. I find that the said statement may be sufficient to establish charge of fraudulent Cenvat credit by M/s Shah Alloys Ltd without showing receipt of goods actually at their factory premises but it is not sufficient cause to establish that the appellant has not cleared the goods in question under nine invoices supra to M/s Shah Alloys Ltd. To establish the clearance of goods, the appellant submitted documents pertaining to transportation of said goods from their factory to M/s Shah Alloys Ltd, including Weighbridge slips at the destination point, which were not controverted by the investigating authority or adjudicating authority with corroborative evidence. The adjudicating authority has solely confirmed the allegation on the basis of statement of Shri Sanjay K Pandya of M/s Shah Alloys Ltd and the appellant could not cross-examine Shri Sanjay K Pandya of M/s Shah Alloys Ltd due to his sad demise. The statement of Shri Pandya only indicates that the goods in question were not reached at M/s Shah Alloys factory premises and Cenvat Credit availed by them is ineligible.

11.2 The other grounds taken by the adjudicating authority that the offence case booked against the appellant relating to fraudulent availment of Cenvat credit without receipt of materials with other charges was confirmed by ordering recovery of Cenvat Credit amounting to Rs.16,95,76,390/- with interest and imposition of penalty by the jurisdictional Principal Commissioner of CGST, Vapi; that when the appellant has manipulated the receipt of raw materials to avail Cenvat credit fraudulently and without consuming the same for manufacture of finished goods, the credit passed on finished goods by the appellant to M/s Shah Alloys Ltd is not feasible. In the said case, the Principal Commissioner of CGST, Vapi has held that the appellant, in collusion with their supplier of raw materials have shown the receipt and consumption of Cenvatable goods in their records for manufacture of the final goods and shown more production and clearances than what should have been actual one as per the consumption of the Furnace Oil shown in their records. Therefore, I observe that the said case was not a case of non-production of any finished goods at appellant's premises so as to prove that the goods cleared under the nine invoices to M/s Shah Alloys Ltd were not manufactured by the appellant.

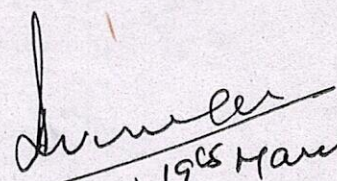


Under the circumstances, it cannot be construed that there was no production carried out by the appellant and no goods were cleared by them to M/s Shah Alloys Ltd and to any customer. The investigating authority has failed to bring evidence to that effect also while confirming the allegation against M/s Shah Alloys Ltd that the goods mentioned in the subject invoices were not at all manufactured by the appellant's firm. Looking into the facts and circumstances, it can be concluded that the goods removed and delivered by the appellant were not available at M/s Shah Alloys Ltd's factory premises but cannot be concluded that the goods were not actually manufactured by the appellant and not cleared to M/s Shah Alloys Ltd. Though there was a dispute about the non-availability of goods at M/s Shah Alloys Ltd's premises, supporting evidences with regard to clearance of goods from appellant's factory premises to M/s Shah Alloys Ltd were on records in the form of invoices, Lorry Receipt and Weighbridge Slip at destination place. Therefore, in view of above discussion, the allegation raised by the department against the appellant fails. Accordingly, penalty imposed under Rule 26 of the CER is not sustainable.

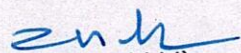
12. The appellant further argued that the penalty was imposed under Rule 26(2) of the Rules ibid which has been introduced with effect from 01.03.2007; that the alleged offence said to be committed prior to the introduction of the said Rule penalty cannot be imposed under Rule 26(2). I find that there are judicial pronouncements in support of the adjudicating authority while imposing penalty under said Rule, However, since the penalty imposed on appellant is not sustainable on merits, I do not find it proper to discuss the said contention.

13. In view of above discussion, I find that the allegation against the appellant that they had issued invoices to M/s Shah Alloys Ltd without supplying corresponding goods from their factory has not been established and proved by the department which has been elaborately discussed hereinabove. In view of the above, I do not see any justification to penalize the appellant in this context. Therefore, I set aside the penalty imposed on appellant.

14. In view of above, I allow the appeal filed by the appellant. The appeal stands disposed of in above terms.


(Akhilesh Kumar)
Commissioner (Appeals)
/03/2020

Attested by


(Mohanan V.V)
Superintendent (Appeals)
CGST, Ahmedabad.



By RPAD

To

M/s Nico Extrusion Pvt Ltd,
Survey No.678/1/3, Plot No.4,
BhiladSilvasa Road, Naroli, Silvassa (Gujarat)

Copy to:

1. The Principal Chief Commissioner of CGST, Ahmedabad Zone.
2. The Commissioner of CGST, Gandhinagar
3. The Additional Commissioner of CGST, ~~System~~, Gandhinagar
4. The Assistant Commissioner of CGST, system, Gandhinagar.
5. P.A File
6. Guard file.

