आयुक्त (अपील) का कार्यालय
Office of the Commissioner (Appeals)
केंद्रीय जीएसटी अपील आयुक्तालय - अहमदाबाद
Central GST Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ 26305065-079 : टेलेफैक्स26305136 - 079 :

DIN-20211064SW000000AE86

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/204/2020/3640 TO 3644

ख अपील आदेश संख्या Order-In-Appeal No. **AHM-EXCUS-003-APP-024/2021-22**
दिनॉक Date : 30.08.2021 जारी करने की तारीख Date of Issue : 13.10.2021

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. KLL DIV/CEX/AC-AD/18/2020-21 dated 21.07.2020 passed by the Assistant Commissioner, Central GST & Central Excise, Kalol Division, Gandhinagar Commissionerate.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant

M/s Harra Polypack,
767/6, Moti Bhoyan,
Vadsar, Opp. Tata Housing,
Near Ridhi Plastic,
Kalol, Gandhinagar-382721.

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 अलत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन 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 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.

(क) 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।

(A) 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.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी 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।

(c) 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 अपीलः-

Appeal to Custom, Excise, & Service Tax Appellate Tribunal:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत के अंतर्गतः-

Under Section 35B/ 35E of Central Excise Act, 1944 or Under Section 86 of the Finance Act, 1994 an appeal lies to :-

(क) 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 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद 380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of 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 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 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 adjudicating 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 in invited to the rules covering these and other related matter contained in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

➪ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

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।

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 Harra Polypack, 767/6, Moti Bhoyan, Vadsar, Opp.: Tata Housing, Near Ridhi Plastic, Kalol, Gandhinagar-382721 (hereinafter referred to as the "*appellant*") has filed the present appeal against the Order-in-Original No.KLL DIV/CEX/AC-AD/18/2020-21 dated 21.07.2020 (hereinafter referred to as the "*impugned order*") passed by the Assistant Commissioner, Central GST & Central Excise, Kalol Division, Gandhinagar Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. The facts of the case, in brief, are that the appellant is engaged in manufacture of HD/PP Woven Bags/Woven Laminated Fabrics / Flexi Lami Pack (Pouches) falling under Chapter Heading No.3923 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as "*CETA*") and was holding Central Excise Registration No.AAGFH0347DEM001. During the course of audit of the records of the appellant, it was observed that the appellant was having purchase orders with some of the clients on FOR basis and accordingly collected freight charges from their clients for delivery of final products at the buyer's premises and that as per the terms of the order, the goods were to be delivered at the place of the buyer and it is only at the place where the acceptance of supplies was to be effected and hence the sale takes place only at the buyer's premises. Accordingly, the place of removal is buyer's premises and not factory gate and expenses which are incurred till the place of removal of goods should be included in the valuation of goods for the purpose of excise duty as per Section 4 of the Central Excise Act, 1944. Non-inclusion of freight income in the assessable value for computation of central excise duty on goods sold in such cases has resulted in short payment of excise duty which was worked out to Rs.3,30,625/- for the period from March-2016 to June-2017, as per audit.

2.1 The audit has further observed that the appellant has short paid central excise duty by misclassifying their finished product i.e., Printed Laminated Pouch under CETH No.39231090 instead of CETH No.39232990. It is the contention of the audit that the plastic pouch is a form of a plastic bag and the same would fall under CETH 39232990 which attracts duty @15% vide Entry at Sr.No.148A of the Notification No.12/2012-CE dated 17.03.2012 amended vide Notification No.12/2016-CE dated 01.03.2016. The appellant was paying duty under CETH No.39231090 @ 12.5% contending that as there is no proper classification available under chapter heading 3923 for pouches, they have classified the same under the heading 39231090 which pertains to other items for packing of goods which is more appropriate for such type of small pouches. The short payment of duty pointed out by the audit on account of mis-classification was Rs.1,07,002/- covering period from March, 2016 to June, 2017.

2.2 Based on the above audit objections, the appellant was issued with a Show Cause Notice (in short '*SCN*') No.38/2018-19/CGST Audit dated 07.05.2019 from F.No.VI/1(b)-12/AP-69/ Cir-X/2017-18 proposing recovery of central excise duty short paid along with interest and imposition of penalty. The said SCN was adjudicated vide the impugned order wherein the adjudicating authority has confirmed the demand in the SCN and also imposed penalty under Section 11AC(1)(c) of the Central Excise Act, 1944.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal on the following grounds:

- The adjudicating authority has confirmed the demand without considering the facts of the case properly;
- The confirmation of demand beyond the period of limitation is not sustainable in law;
- In the present case, the audit party has not issued any query memo and therefore, not given the proper opportunity to the appellant to explain the facts. Instead of issue the query memo, audit party has taken the Audit Para behind the back of the appellant. Therefore, apparently this is case of violation of principles of natural justice;
- The appellant took the purchase order from various parties which are of ex-factory gate price and collect the freight charges, which are nothing but the reimbursement of freight charges paid by the appellant on behalf of the various parties;
- The appellant manufacture the PP woven bags/sacks as per the specification given by the parties and print the design which is given and approved by the various parties as per their order. Therefore, the ownership in the goods transfer to the buyer as and when the goods are manufactured by them as the said material cannot be sold to any other person except the buyer;
- In the terms and conditions laid down in the purchase order, it is clear that the sale price is fixed ex-factory and freight is to be paid by the buyers;
- Applying the ratio of the decision of Hon'ble Supreme Court dated 23.04.2015 in the case of M/s Roofit Industries Ltd. for payment of duty on freight is not proper and correct;
- The extension of the meaning of "or any other place or premises from where the excisable goods are to be sold' in the definition is not at all acceptable on the grounds that (i) the goods were cleared on payment of duty by issuing invoice in favour of the buyer clearly indicating the name of the buyer and delivery of goods; (ii) the appellant has paid the VAT on the transaction value, which clearly indicates that the sale took place. In case of transfer of goods other than sale, VAT not applicable; and (iii) the appellant has not taken any excise registration at the place of delivery and therefore, no credit has been taken by them and they have never issued any

invoice/document which indicate that they have carried out any business activity from that premises;

- Since the goods were cleared from factory gate, the place of removal for the purpose of Section 4(1)(a) of the Central Excise Act, 1944 was factory gate and so Explanation 2 of the Rule 5 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules is not applicable and the appellant has rightly calculated the assessable value and paid duty on the said amount;
- The facts of their case is different from the facts in the case of Roofit Industries decided by the Supreme Court which was relied upon by the adjudicating authority;
- In the given case, the property of the goods passed at the factory gate only and hence no excise duty is leviable on the freight charges paid by them;
- The appellant rely on the case laws in the case of Commissioner of Customs and Central Excise, Pune Vs. M/s Ispat Industries Ltd. in Civil Appeal No.637 of 2007 (Supreme Court), Escorts JCB Ltd. Vs. Commissioner of Central Excise, Delhi Civil Appeal No.7230 of 1999 and 1163 of 2000 and Prabhat Zarda Factory Ltd. - 2002 (146) ELT 497 (SC); and
- Chapter Heading 39232990 is specifically applicable to "Sacks and Bags" which means large bag and not the very small bag. Therefore, applying a classification code i.e. 39232990 which is specifically for the larger bags is not at all justified and hence should not be applied. In the past, the Government has levied higher excise duty under this Chapter by bifurcating the same product for "Industrial and Non-industrial use', whereas the Chapter Heading 39231090 is the chapter heading which is used for other items for packing of goods. As there is no proper classification available under the Chapter heading 3923, they have classified the same under heading 39231090 which is more appropriate for such type of small pouches. Therefore, the classification of the pouches under the chapter heading 39231090 is correctly done and duty @12.5% is correctly paid.

4. Personal hearing in the matter was held on 23.06.2021 through virtual mode. Shri Pradeep G. Tulsian, Chartered Accountant, appeared on behalf of the appellant for hearing. He reiterated the submissions made in the appeal memorandum.

5. I have carefully gone through the facts of the case and submissions made by the appellant in the Appeal Memorandum and oral submissions made at the time of personal hearing. The issues to be decided in the case are (i) whether the freight charges collected by the appellant from their clients/buyers for delivery of final products at their premises is includible in the transaction value of goods for the purpose of levy of central excise duty or not; and (ii) whether the finished goods "Printed Laminated Pouch" manufactured and cleared by the appellant is classifiable under CETSH No.39231090 as contended by the appellant or under CETSH No.39232990 as observed by the Audit?

6. As regards the first issue, it is the case of the department that since the appellant was having purchase orders on FOR sale basis and were collecting freight charges from their clients for delivery of final products at the buyer's premises and as per the terms of the order, the goods were to be delivered at the place of the buyer and it was only at that place where the acceptance of supplies was to be effected, the 'place of removal' in the case for the purpose of assessment of duty is buyer's premises and not factory gate and accordingly, the freight charges collected by the appellant in the case would form part of the transaction value to determine the duty liability. The appellant on the other hand contends that the sale price is fixed ex-factory and freight is to be paid by the buyers and the freight charges collected by them were nothing but the reimbursement of freight charges paid by them on behalf of the various parties.

6.1 In this regard, I find that the issue as to whether the *freight* and *insurance charges* are to be included in the Transaction Value, for the purpose of computing excise duty, has been examined by the Hon'ble Supreme Court of India vide their judgments in the case of CCE Vs. M/s. Roofit Industries Ltd. - 2015 (319) E.L.T. 221 (S.C.), CCE Vs. Ispat Industries Ltd. - 2015 (324) E.L.T. 670 (S.C.) and CCE, Mumbai-III Vs. Emco Ltd. - 2015 (322) E.L.T. 394 (S.C.). Based on these judgments, the Central Board of Indirect Taxes & Customs has issued Circular No.1065/4/2018-Cx. dated 08.06.2018 clarifying the principle to be followed for determination of 'place of removal' in general and in exceptional cases. As per the Circular, in general the principle laid by Hon'ble Supreme Court in the case of CCE Vs. Ispat Industries Ltd. - 2015 (324) E.L.T. 670 (S.C.) has to be applied as per which 'place of removal' is required to be determined with reference to 'point of sale' with the condition that place of removal (premises) is to be referred with reference to the premises of the manufacturer. It is clarified that the said general principle would apply to all situations except where the contract for sale is FOR contract in the circumstances identical to the judgment in the case of CCE, Mumbai-III v. Emco Ltd. - 2015 (322) E.L.T. 394 (S.C.) and CCE v. M/s. Roofit Industries Ltd. 2015 (319) E.L.T. 221 (S.C.) and in the case of FOR destination sale, such as M/s. Emco Ltd. and M/s. Roofit Industries, where the ownership, risk in transit, remained with the seller till goods are accepted by buyer on delivery and till such time of delivery, seller alone remained the owner of goods retaining right of disposal, the 'place of removal' is to be determined in terms of the said judgments. As per the said judgements, the 'place of removal' on such cases would be place of buyer as the sale of goods did not take place at the factory gate of the assessee but at the place of the buyer on the delivery of the goods in question.

6.2. Thus, I find that the issue on hand is to be decided in terms of principle laid down by the above referred Supreme Court judgments which emphasized that the 'place of removal' depends on the facts of each case.

6.3 After going through the copies of purchase order relied upon in the SCN, it is observed that the terms of delivery of goods therein were F.O.R. destination. The goods under reference therein were to be delivered at the place of the buyer or at the place as directed by them and it was at that place where the acceptance of supplies was to be effected. It is abundantly clear from the said documents that the freight element was either included in the price of the product or the same was borne by the supplier viz. the appellant. Further, it is found that the appellant had to bear the responsibility of delivering the goods at the buyer's premises in good condition (i.e. FOR sale) and the payment was to be made after verification by buyer. This clearly implies that the seller viz. the appellant will bear the risk of loss of the goods until delivery is completed and the ownership in the goods remains with him till the goods reach the destination and the consideration was to pass on only after the receipt of the goods in good condition which was at the premises of the buyer. Thus, it can be easily inferred that title to the Goods shall be vested in the buyer at the time of delivery of the goods in good condition. As held by the Apex Court in the case of Roofit Industries Ltd., the clear intent of the contract between the two parties was to transfer the property in goods to the buyer at the premise of the buyer when the goods are delivered and by virtue of Section 19 of the Sale of Goods Act, the property in goods was transferred at that time only. Further, also as per Section 24 of the Sale of Goods Act, when the goods are delivered to the buyer on approval or on sale or return or the similar terms, the property therein passes to the buyer only when the buyer signifies his approval/acceptance. All these facts, in my view, conclusively establishes that the sale of goods in the case did not take place at the factory gate of the appellant but at the place of the buyer on the delivery of the goods in question. That being so, the place of removal of goods in the case undisputedly would be the 'buyer's premises' in view of the principle laid down by Hon'ble Supreme Court in the case of CCE Vs. M/s. Roofit Industries Ltd. 2015 (319) E.L.T. 221 (S.C.) and CCE, Mumbai-III Vs. Emco Ltd. - 2015 (322) E.L.T. 394 (S.C.) as clarified by the Central Board of Excise and Customs vide Circular No.1065/4/2018-CX. dated 08.06.2018.

6.4 The appellant has contended that since they manufacture the PP Woven bags/sacks as per the specification and the design given and approved by the various parties as per their order, the ownership in the goods transfer to the buyer as and when the goods are manufactured by them as the said material cannot be sold to any other person except the buyer. The above view of the appellant does not carry any merit as the transfer of the ownership of the goods in the context of sale is determined by the provisions of Sale of Goods Act, 1930 as per which the property passes when intended to pass by the parties involved. In the facts of the case, it is very clear from the purchase orders that the ownership of the goods would be transferred only when it is accepted by the buyer at their premises. Mere manufacture of goods as per buyer's specification does

not involve transfer of ownership of goods. It is further contended by the appellant that the sale price was fixed ex-factory and freight was to be paid by the buyers. This argument of the appellant is not supported by evidences available on records. Nor have they come up with any evidences in support of their contention either during the adjudication stage or in appeal proceedings. There is nothing in the purchase orders available on records to suggest that the price is ex-factory or that freight charges are to be paid on behalf of the buyer and the same are to be charged separately in the invoice. On the contrary, it is clearly mentioned in these purchase orders that the freight was either included in the price of goods or it was to be borne by the supplier. Further, the purchase order in the present case was for supply of the goods to the buyer at the destination specified by them on F.O.R site basis. The arguments raised by the appellant in this regard are, therefore, devoid of any merits.

6.5 The appellant's attempts to distinguish the facts of their case with that of the Roofit Industries also fail for being not supported by facts and evidences on records. The reliance placed by them on the decision of Hon'ble Supreme Court in the case of Ispat Industries also does not help them as the facts in the case clearly stand distinguished on the face of terms of the Purchase Order discussed in para 6.3 above which was not there in the case of Ispat Industries. It is expressly mentioned in the present case that the freight cost was either included in the sale price of goods agreed upon or the same was to be borne by the supplier. Further, the purchase order in the present case was for supply of the goods to the buyer at the destination specified by them on F.O.R site basis.

6.6 In view thereof, I concur with the findings of the adjudicating authority that the place of removal in this case is the buyers premises and therefore the freight charges, collected from the buyers are to be included in the transaction value for computation of Central Excise duty. Accordingly, the impugned order confirming demand on the issue is upheld for being legal and proper.

7. With regard to the issue of classification of plastic pouches manufactured and cleared by the appellant, it is observed that the appellant has classified the product in question under CETSH No.39231090 on the contention that there is no proper classification available under Chapter Heading 3923 for the product 'plastic pouch' and hence they classified it under CETSH No.39231090 which is used for other items for packing of goods. The said view of the appellant does not seem to be correct as the CETSH No.39231090 is the sub classification of the subheading No.392310 which pertains to '*Boxes, cases and similar articles*' and is meant for other goods specifically falling under that subheading 392310. The said entry does not cover other items for packing of goods not specified elsewhere in the subheading No.3923 as understood by

the appellant. Such category of goods viz. *goods not specified elsewhere in the subheading No.3923* would fall under subheading No.392390 - *Other* and under CETSH No.3923 9090. Therefore, the product 'plastic pouches' in question can not fall under CETSH No.39231090 as contended by the appellant. The department has sought the classification of the impugned product under CETSH 39232990 under sub heading which pertains to '*Sacks and Bags (including cones)*' on the ground that plastic pouch is a form of a plastic bag. The adjudicating authority, in this regard, relying on the dictionary meaning of the term "pouch" has observed that pouch is one type of bag having small size for carrying small quantity of material. The appellant also did not dispute to the meaning of pouch as a very small bag as evident from their submissions. Their contention is that the said goods would not merit classification under the sub heading pertaining to 'Sacks and Bags' as the said sub heading is meant for large bag and not the very small bag. I do not find any merit in the said contention of the appellant as the sub heading pertaining to '*Sacks and Bags*' does not distinguish the goods covered therein based on their sizes but is classified based on the nature of plastic material used for manufacturing the said products. That being so, plastic bags, irrespective of their size, would be covered under the said sub heading. Therefore, the product 'plastic pouch' more appropriately seems to be classifiable under sub heading No.39232990 as contended by the department. Further, as rightly observed by the adjudicating authority, the other characteristics of the product like flexibility, printing, lamination, etc. are not relevant factors affecting the classification of the product. Neither is there any such argument from the appellant's side. In view of the above, I uphold the classification of the impugned product under CETSH No.39232990. When the product is held classifiable under Chapter sub heading No.392390, the same would be leviable to central excise duty @15% in terms of Entry No.148AA of the Notification No.12/2012-CE dated 17.03.2012 as amended by Notification No.12/2016-CE dated 01.03.2016. Since the appellant was paying excise duty @12.5%, there was short payment of excise duty on the part of the appellant in respect of the clearances of the impugned product which required to be recovered from them. The impugned order confirming the demand in this regard is therefore upheld being legal and proper.

8. The appellant has also raised the grounds of violation of principles of natural justice in the appeal for the reason that they were not given proper opportunity by the Audit party as the Audit Para was taken without issue of query memo. They further contended that the SCN was issued on wrong facts which was not at all relevant with them as was evident from second para of page 3. It is observed that the same contentions were raised by the appellant before the adjudicating authority also. The adjudicating authority in his order at para 15 (I) and (II) has very specifically examined and discussed the above contentions of the appellant and has given the finding that the contentions are

not correct as per facts available on records. In view of the findings of the adjudicating authority in this regard, I do not find any merit in the contentions reiterated by them in the appeal, especially when they have not pointed out any objection on the said findings.

9. It is apparent from the case records that the issue of short levy of duty was detected during audit of the record of the respondent. The same would have remained undetected if audit has not taken place. In the era of self assessment, it is the duty of the assessees to correctly assess their duty liability. In the instant case, the respondent has failed to assess correctly their duty liability. Further, the material facts were not disclosed by them to the department in any manner. From these actions, the intention to evade payment of duty is clearly visible in the case and hence extended period of limitation is rightly invokable for recovery of duty short paid and the penalty under Section 11AC of the Act becomes imposable and as per the said Section, the said penalty must be equal to demand confirmed in view of the decisions of the Hon'ble Supreme Court in the case of Union of India Vs. Rajasthan Spinning & Weaving Mills [2009 (238) ELT 3 (S.C) and Union of India Vs. Dharmendra Textile Processor [2008 (231) ELT 3 (SC)].

10. In view of the above discussions, the appeal filed by the appellant is rejected being devoid of any merits and the impugned order passed by the adjudicating authority is upheld.

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

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

30th August 2021.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 30.08.2021

Attested

(Anilkumar P.)
Superintendent (Appeal)
CGST, Ahmedabad.

BY R.P.A.D. / SPEED-POST TO :

M/s Harra Polypack,
767/6, Moti Bhoyan,
Vadsar, Opp. Tata Housing,
Near Ridhi Plastic,
Kalol, Gandhinagar-382721.

Copy to:-

1. The Chief Commissioner, CGST &Central Excise, Ahmedabad Zone.
2. The Commissioner, CGST &Central Excise, Gandhinagar Comm'rate.
3. TheAsstt/Dy.Commissioner, CGST& Central Excise, Kalol Division, Gandhinagar Comm'rate.
4. The Asstt. Commissioner, System, CGST & Central Excise, Gandhinagar Comm'rate.
5. Guard File.
6. P.A. File.