सत्यमेव जयते

आयुक्त(अपील)का कार्यालय,
Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
. ☎ 07926305065 - टेलेफैक्स07926305136

DIN : **20220764SW000000F4A5**

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/514/2021/2432 - 2436

ख अपील आदेश संख्या Order-In-Appeal Nos.**AHM-EXCUS-003-APP-29/2022-23**
दिनाँक Date : **30-06-2022** जारी करने की तारीख Date of Issue 11.07.2022

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

ग Arising out of OIO No. **AHM-CEX-003-ADC-MSC-009-20-21** दिनाँक: **25.02.2021** passed by Additional Commissioner, CGST& Central Excise, Gandhinagar Commissionerate

ध अपीलकर्ता का नाम एवं पता Name & Address

Appellant

1. **M/s United Metachem Industries**
   Plot No. 3549, Phase-IV,
   GIDC Chhatral, Kalol,
   Gandhinagar

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 अतत 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 हानिकार खाने 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 मे 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 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।

(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 भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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 के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 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,BahumaliBhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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 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 contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(57) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर 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:
(cliv) amount determined under Section 11 D;
(clv) amount of erroneous Cenvat Credit taken;
(clvi) 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

The present appeal has been filed by M/s. United Metachem Industries, Plot No. 3549, Phase-IV, GIDC, Chhatral, Ahmedabad- 382 729 (hereinafter referred to as the appellant) against Order in Original No. AHM-CEX-003-ADC-MSC-009-20-21 dated 25.02.2021 [hereinafter referred to as "*impugned order*"] passed by the Additional Commissioner, CGST, Commissionerate : Gandhinagar [hereinafter referred to as "*adjudicating authority*"].

2. Briefly stated, the facts of the case is that intelligence gathered by the officers of the Directorate General of Central Excise Intelligence, Zonal Unit, Ahmedabad (now DGGI) indicated that M/s. Harshlaxmi Chemisolv, Ahmedabad, were selling Organic Chemicals such as Toluene, Nitro-Benzene, Phenol etc. to different buyers based in Delhi, Kundali, Panipat, Sonipat (Haryana) but passing on the cenvat credit to different manufacturers/dealers based at Vapi, Ankleshwar, Ahmedabad etc. without physical supply of the corresponding goods. Accordingly, searches were carried out at the office premises of M/s.Harshlaxmi Chemisolv and various documents and records were seized. Scrutiny of the seized records revealed that M/s.Harshlaxmi Chemisolv had issued invoices showing clearances of chemicals to the appellant only on paper but actually the corresponding goods were not supplied to the appellant. It further appeared that though the appellant had made payment to M/s.Harshlaxmi Chemisolv by cheque, M/s. Harshlami Chemisolv had only retained 10% of the total Central Excise duty plus VAT and returned the remaining amount to the appellant in cash. It further appeared that M/s.Harshlaxmi Chemisolv has issued invoices in the capacity of third stage dealer to the appellant, which is not a valid document for availing cenvat credit in terms of Rule 9(1)(a)(iv) of the Cenvat Credit Rules, 2004 (hereinafter referred to as CCR, 2004).

2.1 Statement of the partner of the appellant firm was recorded wherein he, inter-alia, admitted that they had merely received invoices in respect

of excisable goods but the corresponding goods were not received by them. They had thereby wrongly availed cenvat credit amounting to Rs.75,83,568/-. He also admitted that they had availed cenvat credit on the strength of invoices issued by M/s.Harshlaxmi Chemisolv but stated that they were not aware that invoices were issued on the basis of second stage dealer.

2.2 The appellant was issued a SCN vide F.No. DGGSTI/AZU/36-48/2017-18 dated 29.09.2017 wherein it was proposed to :

- Demand and recover wrongly availed cenvat credit amounting to Rs.75,83,568/- under Rule 14 of the CCR, 2004 read with Section 11A (4) of the Central Excise Act, 1944;
- Demand and recover Interest under Rule 14 of the CCR, 2004 read with Section 11AA of the Central Excise Act, 1944;
- Impose penalty under Rule 15 (2) of the CCR, 2004 read with Section 11AC(1) of the Central Excise Act, 1944;
- Impose penalty under Rule 26 (1) of the Central Excise Rules, 2002.

In the above notice, M/s. Harshlaxmi Chemisolv, the transporter M/s. Shreeram Bajrang Transport & Warehousing Co. and others were also made noticee and penal action was proposed against them.

3. The said SCN was adjudicated vide the impugned order wherein the demand was confirmed against the appellant along with interest. Penalty of Rs.75,83,568/- and Rs.7,50,000/- was imposed under Rule 15 (2) of the CCR, 2004 read with Section 11AC (1) of the Central Excise Act, 1944 and Rule 26 (1) of the Central Excise Rules, 2002 respectively. Penalties were also imposed on the other co-noticees.

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

i) They had in their reply to the SCN clearly argued that the entire investigation has been based on third party evidences and oral

evidences and by discarding the evidences recovered from their premises. However, the adjudicating authority has not appreciated their submissions and the case laws relied upon by them and proceeded to arbitrarily confirm the demand along with interest and penalty.

ii) They had purchased the inputs on the basis of invoices, the payment of which was done by them through cheque/bank and the inputs were received in their factory, accounted for and used in the manufacture of finished goods which were cleared on payment of excise duty. These facts were known to the investigation at the time of search of their factory and were not disputed. These facts were also brought to the notice of the adjudicating authority but he has remained silent on the most vital evidences and proceeded on the basis of a diary recovered from the dealer's premises, which is of third party and has no statutory value and is a doubtful piece of evidence.

iii) The investigation was not extended to the alleged actual buyers to whom the dealer had allegedly sold the goods in cash. The investigation has proceeded on the basis of oral statements which have been recorded under threat, fear and duress only to make a case. As such the same does not hold any evidential value.

iv) Reliance has been placed upon statements of various persons, which have been retracted while submitting their defence submissions before the adjudicating authority. Retracted statement cannot be used as an evidence and the case has to be proved on the basis of corroborative evidences, which are absent in the case.

v) The entire case was based on a dairy recovered from the premises of the dealer and oral evidences. The dairy was not recovered during the first search undertaken on 10.09.2014 but detected during the subsequent search on 16.09.2014. Further, the adjudicating authority has not relied on the books maintained by them or the dealer and the VAT returns filed by the dealer.

vi) The impugned order has been passed in a cursory, superficial and summary manner. The various submissions made by them and the judicial pronouncements relied upon have not at all been properly and judiciously considered and dealt with. The allegations in the SCN have almost been reproduced in the form of 'findings' with some cosmetic changes here and there.

vii) They had sought cross examination of the Authorised Signatory of the dealer firm and the transporters whose statements have been relied upon. However, the adjudicating authority has denied the same without assigning any sufficient reasons. The statements cannot, therefore, be considered as admissible evidences. As per Section 9D of the Central Excise Act, 1944 the adjudicating authority is required to inform the reason for not allowing cross examination to the appellant. However, in the instant case, no reason has been communicated for not allowing cross examination. Further, in terms of the said Section 9D unless and until the person whose statement is relied upon is allowed to be cross examined, the statement cannot be relied upon.

viii) Where a person summoned for cross examination does not respond, his presence must be enforced failing which the evidence tendered by him, which is the subject matter of cross examination, cannot be relied upon. They rely upon the decision in the case of Shalimar Agencies Vs. Commissioner of Customs, Kandla – 2000(120) ELT 166 (Tri.); L. Chandrasekhar Vs. Collector of Customs – 1980 (48) ELT 289 (Tri.).

ix) It is settled law that judgments of the higher forums are required to be followed and applied by all lower authorities and non following is breach of judicial discipline.

x) During investigation various records were recovered by the investigation and the same have not been discarded. However, the investigating agency as well as the adjudicating authority have ignored these vital evidences on the basis of which the entire case would have disappeared in thin air.

xi) They manufactured goods out of the said raw materials and cleared the same on payment of central excise duty. If it is the allegation that they had not received the goods, then from where did they get the raw material from which they had manufactured finished goods. The statutory records maintained by them were available with the investigating agency and the same were required to be examined with reference to the oral evidences and if any contradiction was noticed, further investigation was required to be undertaken, which was not done so.

xii) Statutory records are admissible evidence as per Section 36A of the Central Excise Act, 1944 according to which unless contrary is proved, it is presumed that the content of such document is true. They rely upon the decision in the case of Prag Penta Chem Pvt. Ltd. – 2018 (360) ELT 1025 (Tri. Delhi); IMI Abrasives Pvt. Ltd. – 2017 (345) ELT 0285 (Tri.Delhi).

xiii) During the search of their factory premises neither any shortage nor excess of raw material or finished goods have been noticed by the investigating agency. If the allegations of the investigating agency are true, shortage of raw material would have been found in their factory premises.

xiv) The entire case of the department is based on assumptions and presumptions, conjectures and surmises which have no sanctity of law. They have received inputs in the factory premises which were duly accounted for and utilized in the manufacture of finished goods and cleared on payment of duty. These facts have not been disputed.

xv) The investigating agency was required to bring on record how they were attaining their production without physical receipt of inputs. The department has failed to give any evidence from where they have received such huge amount of inputs which were used in manufacture of finished goods. There is no documentary evidence to show that they had received input from any other source.

xvi) In a similar matter where allegation was that credit had been availed without receipt of raw material in the case of Tejal Dyestuff Industries – 2007 (216) ELT 310 (Tri.), it was held that the Revenue cannot make its case on the basis of statements alone in the absence of independent evidence to corroborate the same. The said decision was upheld by the Hon'ble Gujarat High Court – 2009 (234) ELT 242 (Guj.).

xvii) They rely upon the judgment in the case of Motabhai Iron & Steel Industries – 2014 (302) ELT 69 (Tri.-Ahmd) which was maintained by the Hon'ble High Court of Gujarat – 2015 (316) ELT 0374 (Guj.). The said decision was followed in Yashka Polymers Pvt Ltd. Vs. CCE, Ahmedabad- II in Order No. A/10082-10083/2020 dated 14.01.2020.

xviii) The above case laws are squarely applicable in the instant case as in the present case also the investigating agency has never tried to investigate if the dealer had issued only invoices to them, where the goods of the invoice were delivered to various buyers who had utilized them. The present case is also due to the outcome of the same investigation of alleged supply of invoices without corresponding goods, where M/s. Yashka Polymers were one of the recipients as in the present case. The decision of the Hon'ble Tribunal has to be followed in the present case. They also rely upon the decision in the case of Krebs Bio-Chemicals & Industries Limited – 2017 (352) ELT 261 (Tri.Hyd).

xix) Regarding the allegation that M/s. Harshlaxmi have supplied goods as third stage dealer, it is submitted that from the face of the invoice, they cannot by any means establish that the invoice issued by the dealer is on the basis that the dealer is third stage dealer. The dealer has mentioned in the invoice that M/s.Yug International Pvt. Ltd is first stage dealer and manufacturer/importer is M/s. Thirumalai Chemicals Limited. The investigation has failed to place on record as to whether BMG Chemicals Pvt Ltd is first stage dealer or the consignment agent of Thirumalia Chemicals Limited.

xx) M/s.BMG Chemicals is the consignment agent of the manufacturer M/s.Thirumalia Chemicals. Thus Yug International is the first stage dealer, while Harshlaxmi is the second stage dealer.

xxi) In the case of Vivan Corporation, it is submitted that the manufacturer is M/s.MLSPL and M/s.Vivan Corporation is the first stage dealer. The transaction between Vivan Corporation, Bhiwandi and Vivan Corporation, Ahmedabad is not sale but a stock transfer.

xxii) They had taken cenvat credit on the strength of an invoice which is a document prescribed under Rule 9 (2) of the CCR, 2004. They had cleared the goods on payment of duty and therefore, the same amounts to reversal of cenvat credit in terms of the decision of the Bombay High Court in the case of Ajinkya Enterprises.

xxiii) They cannot make it out on the basis of the details mentioned in the invoice that the same is issued by a second stage dealer or third stage dealer. Even if the dealer has mis-represented himself as second stage dealer, the payment of duty has not been disputed. Thus, cenvat credit cannot be denied. They rely upon the decision in the case of Atlas Pharmachem Industries Pvt. Ltd – 2018 (363) ELT 1060 (Tri.-Ahmd); Gharda Chemicals Ltd. – 2004 (172) ELT 491 (Tri.-Mumbai).

xxiv) Regarding the allegation that they had shown sale of excisable goods valued at Rs.3,83,09,177/- which remains outstanding till 05.03.2017, it is submitted that due to one or other reason in business a huge amount is required to be kept outstanding for a long period due to reasons best known to both the parties i.e. the seller and buyer. The said amount have been settled by them and their supplier but the facts have not been placed on record by the investigation to mis-lead the adjudicating authority.

xxv) Regarding the denial of cenvat credit of Rs.2,84,972/- availed on the basis of invoice in the name of Narayan Industries, Ahmedabad, it is submitted that it is nowhere alleged that they had not received the goods and recorded the same in their records

and that payment of the said invoice was made to M/s.Harshlaxmi. The goods were meant for them and transported to them by the dealer. However, the dealer had erroneously mentioned the name of Narayan Industries in the invoice.

xxvi) It is a settled law that cenvat credit cannot be denied on the ground that the name of the manufacturer is different from that disclosed on an invoice. They rely on the decision of the Hon'ble Bombay High Court in the case of Raymond Limited – 2010 (258) ELT 187 (Bom.)

xxvii) When the demand is not sustainable on merits as well as on limitation and there being no element of fraud, collusion, willful mis-statement or suppression of facts with intent to evade payment of duty, penalty under Rule 15 (2) read with Section 11AC cannot be imposed.

xxviii) In cases where the details relating to such transactions are recorded in the specified records for the disputed period, the penalty shall be 50% of the duty so determined. The penalty of Rs.75,83,568/- is, therefore, illegal, unjustified and untenable in law.

xxix) When the demand itself is not maintainable, the question of recovery of interest does not arise.

xxx) Penalty under Rule 26 (1) of the Central Excise Rules, 2002 cannot be imposed on a juristic person who does not act in person in making any invoice which could be used for taking invalid cenvat credit. The juristic person cannot concern himself in transporting, removing, depositing or in any manner dealing with excisable goods which he knows or has reason to believe are liable for confiscation. They rely upon the decision in the case of Apple Sponge and Power Ltd. – 2018 (362) ELT 894 (Tri.-Mumbai).

xxxi) The allegation in the instant case is of availment of cenvat credit without receipt of goods and as such no goods have been alleged to be involved in the case. Thus penalty under Rule 26 can otherwise also not be imposed.

5. Personal Hearing in the case was held on 05.05.2022 through virtual mode. Shri Anil Gidwani, Advocate, appeared on behalf of the appellant for the hearing. He stated that the Hon'ble Tribunal has decided the matters relating to other parties in investigation and dropped the SCN. He further reiterated the submissions made in appeal memorandum.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and material available on records. The dispute involved in the present appeal relates to denial of cenvat credit on three different counts, which are as below :

A) Cenvat credit availed on the strength of invoices issued by M/s.Harshlaxmi Chemisolv without physical receipt of corresponding goods.

B) Cenvat credit availed on the strength of invoices issued by third stage dealer.

C) Cenvat credit availed on the strength of invoice which is in the name of Narayan Industries, Ahmedabad.

7. Regarding the first issue pertaining to cenvat credit availment without physical receipt of corresponding goods, I find that the case against the appellant has been made out on the basis of the evidence contained in a diary recovered from the premises of M/s.Harshlaxmi Chemisolv. The contents of the dairy were also confirmed by the Power of Attorney Holder of M/s.Harshlaxmi Chemisolv in the statement recorded by the investigating officers. Further, the Partners of the appellant firm, in their respective statements, admitted to have availed cenvat credit without receipt of corresponding goods. As against this, the appellant have challenged the evidentiary value of the dairy recovered from the premises of Harshlaxmi Chemisolv. The said dairy was recovered in the course of the search carried out for the second time at the premises of the said firm. The appellant have also contended that the statements used against them do not have evidentiary value as the cross-examination of the persons

tendering the statement did not take place. The appellant have contended that they had received the goods which were recorded in the records maintained by them and the finished goods manufactured out of these raw materials were cleared on payment of duty. They have also contended that no investigation was carried out at the end of the alleged actual receivers of the goods.

7.1 In this regard, I find that though there are evidences which points towards the fact of the appellant having availed cenvat credit without receipt of corresponding goods, the same is not conclusive inasmuch as the investigation has not brought on record any shortage or excess of raw material in the course of the search at the appellant's premises. It is obvious that if the appellant were availing cenvat credit without physical receipt of the goods, there would be a shortage of raw material physically available in the factory premises of the appellant. However, no such evidence has been brought on record in the investigation or in the SCN. Further, if the appellant was not receiving the goods, in respect of which cenvat credit was availed by them, how and from whom were the raw material for manufacture of the finished goods being procured by them. If only invoices are being received by the appellant without receipt of the corresponding goods, it would lead to the obvious and natural corollary that the appellant are not actually manufacturing any finished goods and clearances of finished goods are fictitious. However, theses issues have apparently not been subjected to investigation and the SCN as well as the impugned order are silent on these aspects.

7.2 The appellant have, in the course of the personal hearing submitted that the Hon'ble Tribunal has dropped the SCN in respect of the other parties in investigation. I find that in the case of M/s.Yahska Polymers Pvt. Ltd and M/s.Vardhaman Chemicals involving similar facts and issues, the Hon'ble Tribunal had vide Final Order No. 10082-10083/2020 dated 14.01.2020 allowed the appeals of the parties. The relevant part of the said order is reproduced as below :

> 6. Heard Learned Authorised Representative, considered the grounds of appeals and perused the case records. I find that the allegations of non

receipt of goods alongwith the invoices by both the Appellants from M/s Laxmi Dyechem and M/s Harshlaxmi Chemosolv are based upon the diary/ norte books seized from said two concerns. Further the statements of authorised persons of said two concerns as well as authorised persons of the Appellant concerns have also been relied upon to show that no inputs were received by them. In case of M/s Yahska Polymers, the statement of transporter has also been relied upon to show that no goods were consigned to M/s Yahska. However I find that no investigations has been conducted to ascertain from the parties to whom the inputs were allegedly actually sold by M/s Laxmi Dyechem and M/s Harshlaxmi Chemisolv to ascertain the actual position. The show cause notice is absolutely silent about the investigation at the end of alleged actual recipients who allegedly received the goods without cover of invoice. On the other hand the records and documents maintained by the Appellant concerns showing receipt of inputs in their premises, accounting of same, utilisation of such inputs in manufacture of finished goods and clearances thereof on payment of duty and the said vital fact has not been disputed by any evidence. No alternative input shown to have been procured or used by the Appellants in place of alleged non received inputs. During visit to both the Appellants by the officers no discrepancy in raw material or finished goods was found which can point out any alleged violation. No evidence in the form of any cash coming back to the Appellant concerns after payment of consideration through banking channels towards purchase of inputs from M/s Laxmi Dyechem and M/s Harsh Laxmi Chemosolv has been found. The Appellant M/s Yahska in their reply to show cause had also contended that the goods received by them were emptied in tanks having capacity viz. 4 tanks of 25000 Ltrs. 2 Tanks of 20,000Ltrs, 1 tank each of 13 and 14000 Ltrs each, 3 tanks of 8000 Ltrs. and 1 tank of 7000 Ltrs. Also they had jacketed vessel of 7000 and 10,000 Ltrs. respectively. They also stated that the tanker can also be unloaded in barrels of 200 Ltrs. Similarly in case of M/s Vardhman Chemicals they had capacity to store the goods. In such case only on the basis of diary/ note books seized from third party or the statements it cannot be said that the Appellants did not receive the goods. The input output ratio of Appellant Units has not been challenged. Pertinently in absence of investigation at the end of actual recipients, the allegation of availing credit by the Appellants only on the basis of invoice without actual receipt of goods cannot be allowed to sustain. My view is also based upon the Hon'ble High Court Judgment in case of M/s Motabhai Iron & Steel Industries 2015 (316) E.L.T. 374 (Guj.) wherein while upholding the Tribunal order it held as under :

> *" 19 - From the findings recorded by the Tribunal, it is apparent that payment to M/s. Vasmin Corporation in respect of purchases was made through banking channels. Under the circumstances, the Tribunal has lightly held that the demand cannot be confirmed against the assessee. The Tribunal has further found that it is an undisputed fact that all the purchases were duly recorded in the statutory books of the assessee and the goods were also found to be entered in its statutory records. That the Department had not made any investigation at the unit of the assessee, which could have supported the findings of the adjudicating authority. None of the consignors of the goods have denied the clearance of goods to the assessee. There was no evidence on record to show that the records maintained by the assessee were not correct. The Tribunal, was accordingly, of the view that on the basis of statements of some transporters which were not corroborated by any material on record, a huge credit could not be disallowed. It is under these circumstances that the Tribunal has set aside the demands and the penalties imposed upon the assessee and the co-noticees."*

6.1 Similarly in case of G.S Alloys Castings Ltd. 2016 (331) ELT 310, the Tribunal held as under :

> *"8. Even otherwise, the Revenue is silent on the issue that if the appellant has not received the materials in question, how have they manufactured the corresponding final products. It is not the Revenue's case that they have procured the raw material from any other alternative source. It is not only inpractical but impossible to manufacture the final product without raw material in question. The appellants having reflected the raw material in their Cenvat credit account and having shown the utilization of the same, heavy duty stands cast on the Revenue to establish that such raw material was not the one which was covered by invoice in question and stands procured by the assessee from any other source. There is neither any allegation much less any evidence to reflect upon the procurement of raw material from any outside source."*

7. Thus in view of my above findings and judgments cited above, I do not find any reason to demand and recover Cenvat credit from both the Appellants. I accordingly set aside both the impugned orders and allow the appeals with consequential reliefs, if any arise, in accordance with law."

7.3 The adjudicating authority has, at Para 32.6 of the impugned order, held that the judgment of the Hon'ble Tribunal in the case, supra, was not applicable on the grounds that in the said case, the appellant had shown receipt of inputs in their premises, accounting of the same, manufacture of finished goods and clearances thereon on payment of duty and that these vital facts have not been disputed by any evidence. He has further observed that in the said case, supra, the input-output ratio was not challenged. I am of the view that the adjudicating authority has erred in appreciation of the facts and evidences involved in the present case and thereby wrongly holding that the judgment of the Hon'ble Tribunal in the above case was not applicable.

7.4 I find from the material on record that the department has not disputed the statutory records maintained by the appellant wherein the receipt of inputs were recorded by them. It is also not disputed by the department that the appellant was clearing their finished goods on payment of duty. Further, the appellant had raised these issues before the adjudicating authority, however, without countering the contention of the appellant with any material evidence, the adjudicating authority has simply held that there was no physical receipt of goods. I further find that

it is stated at Para 5.1 of the impugned order that at the time of search of the factory of the appellant on 07.05.2015, the factory was closed for maintenance purpose and no manufacturing activity was carried out there. However, it is not forthcoming from the records as to the date from when the factory was closed for maintenance purpose. It is also not forthcoming whether, at the time of search of the factory, there was any physical stock of inputs, semi-processed goods or finished goods available in the factory. Neither is there any mention of the stock of inputs and finished goods as per the statutory records on the date of search. In the absence of any such physical stock verification and also considering the fact that the details mentioned in the statutory records maintained by the appellant have not been disputed, it cannot be alleged that the appellant had not received the inputs under the invoices of M/s.Harshlaxmi Chemisolv. Mere reliance upon the private records seized from the premises of M/s.Harshlaxmi Chemisolv without any corroboration of the nature mentioned above is not sufficient for alleging non receipt of inputs. Without corroborative evidence, the allegation of non receipt of inputs by the appellant would tantamount to mere presumption on the part of the investigation.

7.5 Considering the facts involved in the instant appeal, I am of the view that the above judgment of the Hon'ble Tribunal in the case of M/s.Yahska Polymers Pvt. Ltd and M/s.Vardhaman Chemicals, supra is squarely applicable to the facts involved in the present appeal. Being the judgment of the jurisdictional Ahmedabad Tribunal, the same is binding upon me and, therefore, in terms of the principles of judicial discipline and by following the judgement of the Hon'ble Tribunal, I hold that the demand for cenvat credit is not sustainable and is accordingly set aside.

8. Regarding the issue of availment of Cenvat credit on the strength of invoices issued by a third stage dealer, I find that Rule 9 (1) of the CCR, 2004 has prescribed the documents on the strength of which cenvat credit can be taken. In terms of Rule 9 (1) (iv) of the CCR, 2004, cenvat credit can be taken on the strength of invoice issued by "*a first stage dealer or a*

second stage dealer, as the case may be, in terms of the provisions of Central Excise Rules, 2002'. Accordingly, only the invoices issued by a first stage or second stage dealer are valid document for availing cenvat credit and, therefore, invoices issued by a third stage dealer are not valid documents for availing cenvat credit as per the legal provisions existing during the material time.

8.1 The appellant have contended that in respect of the invoices issued by M/s. Harshlaxmi Chemisolv, which were issued on the basis of invoices of M/s.Yug International, the invoice mentioned that M/s.Yug International is the first stage dealer of M/s. Thirumalai Chemicals Ltd. They contended that M/s.BMG Chemicals Pvt. Ltd is the consignment agent of M/s.Thirumalai Chemicals Ltd. in terms of Rule 2 (ij) of the CCR, 2004 and therefore, M/s.Yug International is the first stage dealer while M/s.Harshlaxmi Chemisolv is the second stage dealer. Further, regarding the invoices of M/s. Harshlaxmi Chemisolv issued on the basis of invoices of M/s.Vivan Corporation, they contended that M/s.MLSPL is the manufacturer, while M/s.Vivan Corporation is the first stage dealer. The transaction between M/s. Vivan Corporation, Bhiwandi, and M/s.Vivan Corporation, Ahmedabad, is not sale but a stock transfer. Therefore, invoices of M/s.Harshlaxmi Chemisolv is that of a first stage dealer.

8.2 I further find that neither the investigation nor the SCN have covered the issues raised by the appellant. It has not been brought out in the investigation whether M/s.BMG Chemicals is a consignment agent of the manufacturer. This is a critical aspect which determines whether M/s.Yug International is a first stage or second stage dealer. It is also not forthcoming from the investigations and the SCN whether the transactions between M/.Vivan Corporation, Bhiwandi and M/s.Vivan Corporation, Ahmedabad is a stock transfer or a sale which is pertinent to determine whether M/s.Harshlaxmi Chemisolv is a first stage or second stage dealer in respect of the invoices issued on the basis of invoices of M/s.Vivan Corporation. Further, I find that the adjudicating authority has

not given any clear finding on these aspects of the case and has simply reproduced the allegations in the SCN as his findings.

8.3 I find that the Hon'ble Tribunal, Ahmedabad had in the case of Atlas Pharmachem Indus. Pvt. Ltd., Vs. Commissioner of Central Excise, Ahmedabad-I – 2018 (363) ELT 1060 (Tri.-Ahmd) held that :

> **"7.** The grounds raised before me by both the Counsel for the appellants are legal in nature therefore the same can be addressed before me although not contested before the authorities below. Therefore, the same cannot be ground for confirmation of the demand. I, further find that in this case the main appellant has taken Cenvat Credit on the strength of invoice, which is a document a prescribed under Rule 9(2) of Cenvat Credit Rules, 2004 and having full particulars of the supplier of the goods. Therefore, in terms of Rule 3 of Cenvat Credit Rules, 2004, the main appellant is entitled to take Cenvat Credit. Further, I find that the main appellant has cleared the goods on payment of duty therefore, the payment of duty by the main appellant shall amount to reversal of Cenvat Credit in terms of the decision of the Hon'ble Bombay High Court in case of *M/s. Ajinkya Enterprises* (supra). Therefore, the Cenvat Credit cannot be denied to the main appellant; consequently, no penalty is imposable on the main appellant further, goods are not liable to confiscation and no redemption fine is imposable."

8.4 I find that in the instant case, in respect of the invoices purportedly issued in the capacity of third stage dealer, it is not disputed that the appellant had received the goods in their factory premises and neither is the duty paid nature of the goods disputed. Therefore, the above judgment of the Hon'ble Tribunal is applicable to the facts and circumstances of the present case. Further, being the judgment of the jurisdictional Tribunal at Ahmedabad, the same is binding upon me. Therefore, in terms of judicial discipline, I follow the above judgment of the Hon'ble Tribunal and hold that cenvat credit cannot be denied to the appellant.

9. As regards the issue of availment of cenvat credit on the strength of invoice which is in the name of M/s.Narayan Industries, I find that the said invoice issued by M/s.Harshlaxmi Chemisolv has been issued in the name and address of M/s.Narayan Industries, Ahmedabad, and contains the VAT Number, CST number and Central Excise Registration number of M/s.Narayan Industries only. The said invoice does not contain any particulars or details of the appellant which leads one to believe that M/s.Harshlaxmi Chemisolv had by clerical mistake, as contended by the

appellant, mentioned the name of M/s.Narayan Industries instead of the appellant. Rule 9 (2) of the CCR, 2004 stipulates that :

> "No CENVAT credit under sub-rule (1) shall be taken unless all the particulars as prescribed under the Central Excise Rules, 2002 or the Service Tax Rules, 1994, as the case may be, are contained in the said document:".

9.1 Rule 11 of the Central Excise Rules, 2002 stipulates that no excisable goods shall be removed from a factory of warehouse except under an invoice signed by the owner of the factory or his authorized agent. Sub-rule (2) of Rule 11 of the Central Excise Rules, 2002 stipulates that :

> " The invoice shall be serially numbered and shall contain the registration number, address of the concerned Central Excise Division, name of the consignee, description, classification, time and date of removal, mode of transport and vehicle registration number, rate of duty, quantity and value of goods and duty payable thereon :".

9.2 In terms of the above provisions of the CCR, 2004 and CER, 2002, cenvat credit can be taken only on an invoice which contains the details as prescribed in sub-rule (2) of Rule 11 of the Central Excise Rules, 2002. In the instant case, I find that the details of the appellant i.e. the registration number, name of the appellant as well as the address of the concerned Central Excise Division are not mentioned. On the contrary, all these details pertaining to M/s.Narayan Industries, Ahmedabad are mentioned in the said invoice. Accordingly, the said invoice is not a valid document for availing cenvat credit by the appellant and, therefore, the appellant are not eligible to take cenvat credit on the basis of the said invoice. Therefore, I find no merit in the contention of the appellant in this regard.

9.3 The appellant have in their support relied upon the judgment of the Hon'ble Bombay High Court in the case of Raymond Limited – 2010 (258) ELT 187. However, I find that the facts involved in the said case are totally different from that of the present case. In the case before the Hon'ble High Court, the issue involved was difference in the name of the manufacturer found on the goods as compared to that mentioned in the invoice/Bill of Entry. However, in the instant case, the invoice on the strength of which cenvat credit has been availed by the appellant is not at all in their name and does not contain any particulars or details of the appellant. Therefore, I find that reliance upon the said judgment is mis-

placed and does not help the case of the appellant. Consequently, I am of the considered view that the appellant are not eligible to avail cenvat credit on the strength of an invoice which is not in their name but in the name of M/s. Narayan Industries. Accordingly, I uphold the impugned order confirming demand for cenvat credit along with interest and penalty.

10. In view of the above facts, I uphold the impugned order insofar as it pertains to the demand for cenvat credit of Rs. 2,84,972/- availed on the strength of invoice in the name of M/s.Narayan Industries. The appellant are also liable to pay interest under Rule 14 of the CCR, 2004 read with Section 11AA of the Central Excise Act, 1944 as well as penalty under Rule 15 (2) of the CCR, 2004 read with Section 11AC (1) of the Central Excise Act, 1944.

10.1 I set aside the impugned order insofar as it pertains to the remaining portion of demand for cenvat credit. The penalty imposed on the appellant under Rule 26(1) of the Central Excise Rules, 2002 is also set aside.

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 June,

(Akhilesh Kumar)
Commissioner (Appeals)

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

Date: 30.06.2022.

केन्द्रीय कर आयुक्त (अपील) अहमदाबाद
OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS) AHMEDABAD

BY RPAD / SPEED POST

To

M/s. United Metachem Industries,
Plot No. 3549, Phase-IV, GIDC,

Appellant

Chhatral, Ahmedabad- 382 729

The Additional Commissioner,
CGST & Central Excise,
Commissionerate : Gandhinagar

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Gandhinagar.
3. The Assistant Commissioner (HQ System), CGST, Gandhinagar.
   (for uploading the OIA)
4. Guard File.
5. P.A. File.