आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
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सत्यमेव जयते

आज़ादी का अमृत महोत्सव

By Regd. Post

DIN No.: 20230164SW0000839507

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/CEXP/161/2022-APPEAL/6720-25
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-085/2022-23 and 29.12.2022
(ग)	पारित किया गया / Passed By	श्री अखिलेश कुमार, आयुक्त (अपील) Shri Akhilesh Kumar, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	02.01.2023
(ङ)	Arising out of Order-In-Original No. AHM-CEX-003/JC-MT-20-21-22 dated 01.02.2022 passed by the Joint Commissioner, CGST & CE, HQ, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Johnson Controls-Hitachi Air Conditioning India Pvt. Ltd., Hitachi Complex, Near Tulsi Petrol Pump, Karannagar, Kadi, Mehsana, Gujarat-382727

कोई व्यक्ति इस अपील-आदेश से असंतोश अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील अथवा पुनरीक्षण आवेदन प्रस्तुत कर सकता है, जैसा कि ऐसे आदेश के विरुद्ध हो 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 :-

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 : -

(क) 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।

In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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।

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

(घ) 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।

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.

(2) 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.

(3) 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 :-

(2) उक्तलिखित परिच्छेद में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवांकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद-380004।

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

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public

sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संषोधित की अनुसूची -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 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 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.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपीलो 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)।

(1) खंड (Section) 11D के तहत निर्धारित राशि;
(2) लिया गलत सेनवैट क्रेडिट की राशिय;
(3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा ' लंबित अपील' में पहले पूर्व जमा की तुलना मेंए 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.

(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।

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. Johnson Controls-Hitachi Air Conditioning India Ltd., Hitachi Complex, Near Tulsi Petrol Pump, Karannagar, Kadi, Mehsana-382727 (hereinafter referred to as "*the appellant*") against Order–in–Original No. AHM-CEX-003-JC-MT-20-21-22 dated 01.02.2022 (for brevity referred to as "*the impugned order*") passed by the Joint Commissioner, CGST, & Central Excise, Gandhinagar (for short referred to as the "adjudicating authority").

2. The appellant are engaged in the manufacturing of Air-Conditioners and trading of Refrigerators falling under Chapter 84 of the CETA, 1985. They were holding Central Excise Registration No. AABCA2392KXM003 as well as Service Tax Registration No.AABCA2392KST001 and had availed CENVAT credit of duty/tax paid on inputs, input services and capital goods.

2.1 Facts of the case, in brief, are that during the course of audit, conducted by CERA, Ahmedabad, a test check of records of the appellant was carried out for the period F.Y.2013-14 to March, 2018. The auditors observed that the appellant have declared the sale of scrap having Assessable Value (A.V.) of Rs.8,55,24,078/- for the F.Y. 2016-17 in the ER-1 Returns and paid Central Excise duty amount of Rs.1,06,90,510/-. However, it was observed by the auditors that the value of scrap disclosed in the Profit & Loss A/c for the same period was Rs.12,28,53,000/- and the receipt of Rs.11,40,97,308/- was disclosed in Form 3CD of the ITR, as sale of scrap. Thus, three different values were reflected in three different records. Accordingly, LAR No.508/2018-19 dated 27.09.2018 was issued to the appellant for short payment of Central Excise duty amount of Rs.35,71,165/- detected (12.5% of Rs.2,85,73,230/-[Difference between Rs.11,40,97,308/- & Rs.8,55,24,078/-]). The auditors also recorded that the appellant did not submit the required documents for F.Y. 2013-14, 2014-15 & 2015-16 and, therefore, asked for detailed reply after verification in this regard from the Range Superintendent.

2.2 In view of the above, the Range Superintendent vide letters dated 19.09.2018 & 19.12.2018, asked the appellant to pay the differential duty of Rs.35,71,165/- for the F.Y.2016-17 and also requested them to provide the value of scrap declared in the Tax Audit Report (Form 3CD) & Profit & Loss A/c for the F.Y. 2015-16 and pay up the differential duty, if any. As huge difference in the value of scrap in different document was noticed, Statement of Shri Rajesh Shah, Authorized Signatory of the appellant, was recorded on 14.09.2020 wherein he informed that the goods manufacture in the appellant's factory are cleared on payment of central excise duty. The scrap arising during the manufacturing process of finished goods in the factory is cleared by them on payment of excise duty and clearance of such scrap is shown in the ER-1 return. On clearance of finished goods, the stock is then transferred to their branches located across the country. From the branches, the goods are sold to various authorized dealers from where the ultimate customers can purchase the finished goods for their own use. In some cases, the customer buys the good directly from the factory also. The finished goods cleared are covered by a warranty wherein the repair or replacement of goods, in case of defect, is done. Such repair is either done at the premises of the customer or the goods are brought back to the Kadi Repair Centre (KRC) or respective branches. The damaged parts are disposed directly from the branches as scrap on which central excise

duty is not discharged under the bonafide belief that branch office or KRC are neither a factory nor the activity of repair and replacement carried out at these branch offices amounts to manufacture, in terms of Section 2(f) of the CEA, 1944. The scrap cleared from branches include coils, fan motors, broken plastic parts, compressor, capacitor, PCB, controller assembly and packing material etc and identical scrap is cleared from KRC also.

2.3 On the basis of information submitted by the appellant, it appeared that the appellant has cleared waste & scrap valued at Rs.9,27,94,834/- during the period March 2015 to F.Y. 2016-17 (upto March, 2017) without payment of central excise duty amounting to Rs.1,15,99,354/-. Further, invoice-wise details of the clearance submitted by the appellant showed that the finished goods like Window Air Conditioner, Condensor, Set free-Indoor Unit/Outdoor Units, Split/Ductable etc were also cleared from their Kadi manufacturing unit under MRP in terms of Section 4A of the CEA, 1944. On such clearances, they availed the benefit of abatement under Notification No.26/2012-CE(NT) dated 10.05.2012, by paying excise duty at the abated value of 35% on the retail sale price. However, it was noticed that Water Cooler Chiller and 'Parts of Air Conditioner' in certain cases were not cleared under Section 4A but were cleared on transaction value, under Section 4 of the Act ibid. The ER-1 filed by the appellant showed that for June, 2015 and October, 2016, 'Parts of Air Conditioner' (falling under CETH 84159000) were not cleared under Section 4A, though the invoice-wise dispatch details of said goods showed that the appellant had availed the benefit of abatement under Section 4A. Thus, the 'Parts of Air Conditioner' valued at Rs.2,37,03,642/- was found to be mis-declared in ER-1 for availing inadmissible abatement, which needed to be re-determined in terms of Section 4 at the value of Rs.3,64,67,162/-. Accordingly, short payment of central excise duty to the tune of Rs.15,95,497/- for June, 2015 and October, 2016 was also noticed.

3. A Show Cause Notice (SCN) No.GEXCOM/ADJN/ST/ADC/120/2020-ADJN-O/O COMMR-CGST-GANDHINAGAR dated 29.09.2020 was, therefore, issued to the appellant proposing recovery of central excise duty amounting to **Rs.1,15,99,354/-** (*on clearance of the scarp valued at Rs.9,27,94,834/- during March 2015 to F.Y. 2016-17*) and proposing (*rejection of abatement on clearance of 'Parts of Air Conditioner' valued at Rs.2,37,03,642/- which was found mis-declared in ER-1 return*) and demanding Central Excise duty amount of **Rs.15,95,497/-** on said goods under the provisions of Section 11A(4) of the CEA, 1944 alongwith interest u/s 11AA. Penalty under Section 11AC equivalent to the above demand was also proposed.

4. The said SCN was adjudicated vide the impugned order, wherein, out of the total demand of Rs.1,15,99,354/-, the duty demand of Rs.94,32,520/- was confirmed alongwith interest. The adjudicating authority observed that in the SCN, the value of Rs.1,69,24,564/- (reflected in ER-1 return for the period March, 2015) was not deducted from the total clearance value shown in Annual Report for said period, which led to double taxation. He, therefore, deducted the value reflected in ER-1 from the said value. He also observed that the value mentioned in two invoices was added twice as a result the duty demand of Rs.51,264/- was waived by the adjudicating authority. Based on above observation, the duty demand of Rs.21,66,834/- was dropped out of the total demand of Rs.1,15,99,354/-. The central excise duty amount of Rs.15,95,497/- demanded on 'Parts of Air Conditioner' was withdrawn by treating the value reported in the

dispatch details as unabated value under Section 4A and the figures shown in ER-1 as abated value and thereby, considering the duty demand being excess as duty was discharged properly. Penalty equal to tax confirmed was imposed on the appellant by the adjudicating authority.

5. Being aggrieved with the impugned order passed by the adjudicating authority, the appellant has preferred the present appeal against the confirmed demand on the grounds, which are elaborated below:-

- The impugned order is a non-speaking order as the judgments relied by the appellant, were not considered though they were squarely applicable. They placed reliance on following decisions:-
  - *Cyril Lasardo (Dead) Vs Juliana Maria Lasardo-2004(7) SCC 431*
  - *Shukla & Brothers- 2010 (254) ELT 6 (SC)*

- Department has failed to discharge its burden of proof to the effect that the appellants are liable to pay excise duty. Reliance placed on Garware Nylons Ltd-1996(10) SCC 413; Foto Centre Trading Co.- 2008(225) ELT 193 (Bom); Khalsa Charan Singh & Sons- 2010(255) ELT 379 (P&H).

- Excise duty is leviable only on scrap arising out of a process amounting to manufacture. No manufacturing activity is undertaken at the Kadi Repair Branch or other branches, therefore, the demand of excise duty on the scrap arising at these locations is not maintainable. They placed reliance on following decisions:-
  - *Delhi Cloth & General Mills Ltd.-1977(1) ELT (J199)(SC);*
  - *J.G.Glass Industries- 1998 (97) ELT 5 (SC);*
  - *Servo –Med Industries Pvt. Ltd.-2015(319) ELT 578 (SC)*

- Repair of defective or damaged goods would not amount to manufacture. Reliance is placed on following case laws:-
  - *Value Industries Ltd-2015 (9) TMI 297*
  - *Sudhir Engineering Co- 2006(206) ELT 481 (Tri)*
  - *Shriram Refrigeration Industries Ltd- 1986 (26) ELT 353 (Tri-Del) & 1999 (113) ELT A121 (SC)*

- Mere mentioning of item in a tariff entry is not sufficient to levy excise duty unless process is manufacturing as held in the case of
  - *Markfed Vanaspati & Allied Industries-2003(153) ELT 491(SC);*
  - *S.R.Tissues Pvt. Ltd- 2005(186) ELT 385 (SC),*
  - *Grasim Industries Ltd-2011(273) ELT 10 (SC).*
  - *Diesel Components Works – 2000(120) ELT 648 (T)*

- Branch locations or KRC cannot be treated as the 'place of removal' for the purpose of demanding excise duty on scrap cleared from such locations. As these locations are not factory, warehouse or depot / premises of consignment agent.

- The revenue from scrap declared in the annual report cannot be considered as revenue for levy of excise duty without identifying whether the scrap is of manufactured goods or not. Reliance placed on Deltac Enterprises- 2018 (10) GSTL 392 (Tri-Del); Convergys India Service Pvt. Ltd-2018(1) TMI 1174.

- If the activity of the repair at the branch locations or KRC amounted to manufacture then the appellant would be eligible for Cenvat Credit of the new replacement parts received from the factory for carrying out the repairs/replacement as well as the goods received for repair or reconditioning in terms of Rule 16 of the CER, 2002. As these goods shall be treated as inputs used for manufacturing of goods at the branch or KRC.

- Extended period is not invokable as there is no suppression of facts with the intent to evade payment of duty. The demand is based on annual report which is a public document. Hence the demand is time barred. Decisions relied upon are Cosmis Dye Chemicals-1995(75) ELT 721 (SC); Swarn Cars Pvt Ltd -2020(2) TMI 222.

- No interest could be levied as the duty itself is not payable. Also no penalty imposable when there is no suppression of facts. Hindustan Steel Ltd-1969(2) SCC 627.

6. Personal hearing in the matter was held on 23.11.2022. Shri Jenish Kothiwala, Assistant Manager (Indirect Taxation), appeared on behalf of the appellant. He re-reiterated the submissions made in the appeal memorandum.

7. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made by the appellant in the appeal memorandum as well as during personal hearing. The issue to be decided in the present appeal is as to whether the waste and scrap cleared by the appellant from the branch offices are excisable for levy of central excise duty or not? The demand pertains to the period March 2015 to F.Y. 2016-17 (upto March, 2017).

8. The SCN alleges that as per the term '*manufacture*', defined in Section 2(f) of the CEA 1944, the manufacturing activity covers activities associated with completion of final product for the marketable condition. Therefore, till the time of final packing of finished goods (in the case of transaction value based valuation under Section 4) up to the point of 'place of removal', activities related with making the product marketable for fetching a desirable consideration shall be construed as part of manufacturing. Any waste generated during these activities (part of manufacturing) shall be excisable provided the same is covered under the definition provided under Section 2(f). As the finished goods are transferred to branches and sale of goods takes place from these branches, then in terms of Section 4(c)(iii) of the CEA, 1944 read with Circular No.988/12/2014-CX dated 20.10.2014, the branch would be the place of removal. Revenue observed that the appellant had cleared scrap like coils, fan motors, broken plastic parts, compressor, capacitor, PCB, controller assembly and packing material etc from branches without payment of duty, however, identical scrap was cleared from Kadi Repair Centre (KRC) on

payment of duty. In short, the scrap and waste generated during the repair and replacement of the Air Conditioner or Refrigerators which are excisable goods and are incidental and ancillary to the manufactured product, hence, the process of generation of scrap and waste amounts to the manufacture, in terms of Section 2(f) of the Act.

8.1 The appellants, on the other hand, are contending that the excise duty is leviable only on scrap arising out of a process amounting to manufacture. Repair of defective or damaged goods would not amount to manufacture. They claim that branches are not factory, warehouse or depot / premises of consignment agent and as no manufacturing activity is undertaken at these branches, the demand of excise duty on the scrap generated at these locations is not maintainable. Moreover, branch locations or KRC cannot be treated as the 'place of removal', as the goods are received at their such premises for repair or reconditioning and not for manufacturing.

8.2 It is observed that the appellant is engaged in the manufacture of Air Conditioners and parts thereof as well as trading of Refrigerators. They have a repair unit called Kadi Repair Center (KRC) and adjacent to the factory, further, they have various branches for the purpose of sales across India. These branches are not part of the factory registered with the department. The finished goods cleared from factory are cleared on payment of central excise duty and the scrap generated at the factory is also cleared on payment of duty. However, the scrap generated while carrying out the repair work of defective pieces at the respective branches /KRC, returned by the customer during the warranty period, are not cleared on payment of duty under the belief that the repair work does not amount to manufacture. I find that the Revenue has never disputed the fact that the branches of the appellant were carrying out only repair work. So the question arises is whether the repair and replacement of the parts of Air Conditioner or Refrigerators is incidental and ancillary to the manufactured product, and whether the process of generation of scrap and waste during such process amounts to manufacture, in terms of Section 2(f) of the Act?

8.3 It is settled law that central excise duty is a duty levied on manufacture of goods. Unless goods are manufactured, they cannot be subjected to payment of excise duty. For being exigible to central excise duty, goods must satisfy the test of being produced or manufactured. The terms '*manufacture*' defined in Section 2(f) of the CEA, 1944 is reproduced below:-

> *(f) **"manufacture" includes any process, -***
>
> *(i) incidental or ancillary to the completion of a manufactured product;*
>
> *(ii) which is specified in relation to any goods in the Section or Chapter notes of [the Fourth Schedule] as amounting to [manufacture; or]*
>
> *[(iii) which, in relation to the goods specified in the Third Schedule, involves packing or repacking of such goods in a unit container or labelling or re-labelling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer,]*
>
> *and the word "manufacturer" shall be construed accordingly and shall include not only a person who employs hired labour in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;]*

8.4 The charging Section 3 of the Act comes into play only when the goods are excisable goods under Section 2(d) of the Act, falling under any of the tariff entry in the Schedule to the Tariff Act and are manufactured in the terms of Section 2(f) of the Act. The conditions contemplated under Section 2(d) and Section 2(f) has to be satisfied conjointly in order to entail imposition of central excise duty under Section 3 of the Act. The term manufacture under Section 2(f) includes any process incidental or ancillary to the completion of the manufactured product. This 'any process' can be a process in manufacture or process in relation to manufacture of the end product, which involves bringing some kind of change to the raw material at various stages by different operations. The process in manufacture must have the effect of bringing change or transformation in the raw material and this should also lead to creation of any new or distinct and excisable product. The process in relation to manufacture means a process which is so integrally connected to the manufacturing of the end product without which, the manufacture of the end product would be impossible or commercially not suitable.

8.5 Hon'ble Apex Court has in several decisions starting from *Tungabhadra Industries* v. *CTO,* AIR 1961 SC 412, *Union of India* v. *Delhi Cloth & General Mills Co. Ltd.*, AIR 1963 SC 791 = 1977 (1) E.L.T. J199 (S.C.), *South Bihar Sugar Mills Ltd.* v. *Union of India*, AIR 1968 SC 922 = 1978 (2) E.L.T. J336 (S.C.) *and in line of other decisions* has explained the meaning of the word 'manufacture' thus :

> *"14. The Act charges duty on manufacture of goods. The word 'manufacture' implies a change but every change in the raw material is not manufacture. There must be such a transformation that a new and different article must emerge having a distinctive name, character or use."*

8.6 In *Ujagar Prints (II)* v. *Union of India*, (1989) 3 SCC 488 = 1988 (38) E.L.T. 535 (S.C.), this Court has laid down the test to ascertain whether particular process amounts to manufacture:

> *"whether the change or the series of changes brought about by the application of processes take the commodity to the point where, commercially, it can no longer be regarded as the original commodity but is, instead, recognised as a distinct and new article that has emerged as a result of the processes."*

8.7 Thus, manufacture, under the central excise law, is the process or activity which brings into being articles which are known in the market as goods and to be goods, these must be different, identifiable and distinct articles known to the market as such. It is then only that manufacture takes place attracting duty. In order to be goods, it was essential that as a result of the activity, goods must come into existence. For articles to be , these must be known in the market as such and these must be capable of being sold or are being sold in the market as such. There must be activity which brings transformation to the article in such a manner that different and distinct article comes into being which is known as such in the market. In the instant case, the goods, which required repair/ replacement under warranty period or the goods which got damaged during transportation, were brought back to the branch offices or KRC for carrying out the requisite repair work. The defective parts were removed and a new part was installed. The defective replaced parts were then sold as scrap. A significant point to be noted is that the new parts were always cleared from factory on payment of excise duty and so has the old parts suffered incidence of duty at the time when the finished goods were

removed. Once the defective parts are replaced and cleared from the branches, they carry same identity and they are not identified as a distinct article. Only difference is that they can no longer be used as parts of Air Conditioner but has to be cleared as scrap. Moreover, these scrap were not generated during any process incidental or ancillary to the completion of the manufactured product but were generated while replacing/repair of a defective part. A process is generally an activity performed on the subject-matter in order to transform or reduce it to a certain stage. Replacing the defective parts of the Air Conditioner with a new one does not transforms the final products into a new product. Therefore, in my considered view, the scrap generated during such process does not amount to manufacture.

8.8 Further, it is also observed that Hon'ble Apex Court in the case of **Grasim Industries Ltd- 2011(273) ELT (10) SC**, held that repairing activity does amount to manufacture in relation to the end product. Waste & scrap generated during repairing does not amount to manufacture hence not dutiable - Sections 2(d), 2(f) and 3 of Central Excise Act, 1944. Relevant text of the judgment is reproduced below:-

> *"14. In the present case, it is clear that the process of repair and maintenance of the machinery of the cement manufacturing plant, in which M.S. scrap and Iron scrap arise, has no contribution or effect on the process of manufacturing of the cement, which is the excisable end product, as since welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc. which are used in the process of repair and maintenance are not raw material used in the process of manufacturing of the cement, which is the end product. The issue of getting a new identity as M.S. Scrap and Iron Scrap as an end product due to manufacturing process does not arise for our consideration. The repairing activity in any possible manner cannot be called as a part of manufacturing activity in relation to production of end product. Therefore, the M.S. scrap and Iron scrap cannot be said to be a by-product of the final product. At the best, it is the by-product of the repairing process which uses welding electrodes, mild steel, cutting tools, M.S. Angles, M.S. Channels, M.S. Beams etc."*

8.9 The above judgment was also relied by the appellant and I find that the ratio of above judgment is squarely applicable to the instant case. I also find that in the instant case, the coils, fan motors, broken plastic parts, compressors, capacitors, PCB, controller assembly and packing material etc were actually raw material of the finished goods (Air Conditioner or Refrigerators), but being defective/damaged, they have lost their utility. Hence, they no longer remain parts or raw material for the finished product. These defective / damaged parts are not emerging from any process which transforms them into a new distinct product having commercial identity, hence were cleared as scrap. The scrap and waste arise only when the appellant undertakes repairing or replacement work of the defective goods. As they do not arise regularly and continuously in the course of a manufacturing of Air Conditioner, such scrap cannot be called a by-product either. I, therefore, agree with the contention of the appellant that unless the particular excisable product falling under the particular tariff entry is manufactured in the sense of Section 2(f) of the Act, it does not entail or attract the operation of Section 3 of the Act. So long as the conditions or requirements of excisable goods and manufacture, as envisaged by Section 2(d) and Section 2(f), respectively, of the Act, are not satisfied, the scrap and waste would not attract the levy of excise duty under the charging Section 3 of the Act.

9. Revenue has also alleged that since the goods were transferred to 'Branch Locations' of the appellant from where the sale of these goods took place, hence these

locations, in terms of Section 4(c)(iii) of Central Excise Act, 1944 and Board's Circular No. 988/12/2014-CX, dated 20-10-2014, shall be treated as the 'place of removal'.

9.1 To examine this issue, the term 'place of removal' as defined under Section 4 of the CEA, 1944, is reproduced below:-

> *(c) "**place of removal**" means –*
>
> *(i) a factory or any other place or premises of production or manufacture of the excisable goods;*
>
> *(ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without [payment of duty;]*
>
> *[(iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;] from where such goods are removed;*

9.2 Further, in terms of CBIC Circular No. 988/12/2014-CX, dated 20-10-2014, place where sale takes place and where the transfer in property of goods takes place from the seller to the buyer, is the place of removal. In terms of Section 4, the excise duty is chargeable on any excisable goods with reference to their value on removal of the goods, where the goods are sold for delivery at the time and place of the removal, where the assessee and buyer are not related and price is the sole consideration. In any other cases, the value shall be determined in the manner prescribed. In the instant case, since it has been established that the scrap cleared are not excisable, therefore, the question of charging central excise duty on it merely because they are cleared from branches, is out of question. The goods received at branch locations or KRC are undisputedly for repair or reconditioning and not for manufacturing. Hence, these locations cannot be treated as the 'place of removal' for the purpose of charging central excise duty.

10. The SCN also alleges that the appellant had cleared the scrap from Kadi Manufacturing Unit on payment of duty, however, on clearance of scrap from other branches, central excise duty was not discharged. It is observed in this regard that Shri Rajesh D.Shah, Manager of the appellant firm, in his statement recorded on 14.09.2020 has clearly stated that their manufacturing premises / factory is situated at Kadi. Apart from factory, they have a repair unit called Kadi Repair Centre (KRC) located in Kadi, adjacent to the factory, and 25 other branches locations, for sales across India. At Kadi manufacturing premises, they are manufacturing Air Conditioners & parts thereof. During this manufacturing process, various kinds of scraps (Aluminum Scrap, Iron scrap, Copper Scrap, Plastic Scrap, G.P. Process etc) gets generated, which are cleared on payment of duty. The clearance of these scrap is also reflected in their ER-1 return. He also provided the data of excisable scrap and non-excisable scrap cleared from Kadi Unit. He further stated that the scrap generated at branches including KRC, are cleared without payment of duty. As no manufacturing activities are carried out at these locations, they are not registered with the department. He also produced a VAT/CST Registration Certificate for these premises. He further clarified that the value shown in Annual Report for respective years also includes the income of scrap sold at branches located across India, hence the variation in ER-1. All the above facts clearly indicate that the appellant were not carrying out any manufacturing activities at the branches and KRC. Hence, central excise duty was not discharged on clearance of scrap from such locations. However, for the scrap generated at Kadi manufacturing unit during the

process of manufacturing Air Conditioners, they cleared the scrap on payment of duty as this scrap was generated during the manufacturing process. I, therefore, find that the revenue from scrap declared in the Annual Report cannot be considered as revenue for levy of central excise duty, without identifying, whether the scrap generated is out of manufactured goods or not.

11. I find that department has failed to discharge its burden of proof to the effect that the appellants are liable to pay central excise duty. Mere generation of scrap and waste during the repair and replacement of the defective piece of Air Conditioner does not make them excisable goods unless it is established that the process of generation of scrap and waste amounted to the manufacture in terms of Section 2(f) of the Act. In the absence of it being so specified, the commodity would not become excisable merely because a separate tariff item exists in respect of that commodity. Thus, I find that the onus of establishing the levy of Central Excise duty in terms of Section 3 of the CEA, 1944, has not been discharged by the department. It is a trite law that the burden of proof of establishing the levy of duty lies on the revenue authorities and without discharging such onus, no recovery of duty could sustain. This finding is supported by the judgment of Hon'ble Supreme Court in *Cooperative Company Ltd.* v. *Commissioner of Trade Tax, U.P.* [(2007) 4 SCC 480], wherein it has been held that burden of proof of establishing the levy of tax lies on the revenue authorities.

12. Thus, applying the ratio of above decisions and in view of the aforesaid discussion, I find that the scrap generated during the repair and replacement of the parts of Air Conditioner from the branch office of appellant are not excisable as they are not incidental and ancillary to the manufactured product. As the process of generation of scrap and waste does not amount to manufacture, as defined in Section 2(f) of the Act, I therefore, hold that the impugned order confirming the demand of Rs.94,32,520/- in the matter fails to sustain legally as well as on merits and deserves to be set-aside. Consequently, when the demand fails, there cannot be any question of interest and penalty.

13. In view of above discussion and the decisions of the various judicial forum, I set-aside the impugned Order-in-Original.

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.

(Akhilesh Kumar) 29th December, 2022.
Commissioner (Appeals)

Date: 12.2021

Attested
(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,

M/s. Johnson Controls-Hitachi Air Conditioning India Ltd., - **Appellant**
Hitachi Complex, Near Tulsi Petrol Pump,
Karannagar, Kadi,
Mehsana-382727

Joint Commissioner, - **Respondent**
CGST, & Central Excise,
Gandhinagar

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad Gandhinagar.
3. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad Gandhinagar. (For uploading the OIA)
4. The Superintendent (System), CGST, Appeals, Ahmedabad, for uploading the OIA on the website.
5. Guard File.