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 SPEED POST

DIN:- 20230964SW000092449A

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/CEXP/422 /2022-APPEAL /6292-96
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-098/2023-24 and 15.09.2023
(ग)	पारित किया गया / Passed By	श्री शिव प्रताप सिंह, आयुक्त (अपील) Shri Shiv Pratap Singh, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	25.09.2023
(ङ)	Arising out of Order-In-Original No. KLL DIV/ST/PARAS MANI TRIPATHI/133/2021-22 dated 15.06.2022 passed by the Deputy Commissioner, CGST, Division-Kalol, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	M/s Vishakha Polyfab Pvt. Ltd., Plot No. 549/2, Vadsar, P.O.-Khatraj, Tal-Kalol, Gandhinagar, Gujarat-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 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 सेवाकर 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."

अपीलियआदेश / ORDER-IN-APPEAL

This order arises out of an appeal filed by M/s Vishakha Polyfab Pvt. Ltd., Plot No. 549/2, Vadsar, P.O.-Khatraj, Tal-Kalol, Gandhinagar, Gujarat-382721 (hereinafter referred to as '*appellant*') against Order in Original No. KLL DIV/ST/PARAS MANI TRIPATHI/133/2021-22 dated 15.06.2022 (hereinafter referred to as '*the impugned order*') passed by the Deputy Commissioner, CGST, Division - Kalol, Commissionerate: Gandhinagar (hereinafter referred to as '*the adjudicating authority*').

2. The facts of the case, in brief, are that the appellant was registered under Central Excise department having registration no. AAACV6439RXM001 and engaged in the manufacture of multilayered plastic extruded lay flat tubing (both plain and printed), printed bags, printed pouches and zip fresh pouches (for storing vegetables) etc., all falling under Chapter 39 of the first schedule of Central Excise Tariff Act, 1985 (CETA-1985). They were also availing and utilizing the benefit of Cenvat credit on inputs and input services under the Cenvat Credit Rules, 2004. During the course of their production they also generated waste in all categories and their basic raw material was plastic granules.

2.1 During the course of audit for the period from F.Y. 2013- 14 to F.Y. 2015-16, conducted by the officers of Central Excise Revenue Audit (CERA) party they used half margin memo No. CERA-VIII/TBA-Plastic/AR-IV, Div-kalol/H.M. no.1 dated 24.11.2016. The Audit officers observed that the appellant was engaged in carrying out both manufacturing as well as trading activities. They were manufacturing plastic bags/pouches and flexible extruded films. During test check of their records Audit officers observed that the appellant had carried out trading activities i.e high sea sale and purchase. They had availed Cenvat credit on common input services used for both manufacturing of excisable goods and trading of goods e.g. Chartered accountant service, Telephone Service, Transportation, Cleaning and Forwarding Service, Banking and other Financial service.

2.2 The Audit officers further observed that, although the appellants were engaged in manufacturing as well as trading services and availing Cenvat credit of inputs, Input Services and also common inputs and common input services, however, they had neither maintained separate records for manufacturing and trading activities, nor did they reverse any Cenvat credit under Rule 6(3) of the Cenvat Credit Rules, 2004.

The ST-3 Returns filed by the appellant did not show any reversal of Cenvat credit under Rule 6(3) of the Cenvat Credit Rules, 2004. From this the audit inferred that Cenvat credit availed by the appellant on common input services used for providing exempted services was required to be reversed, but not reversed by the appellant and therefore the same has resulted in in-correct availment and utilization of Cenvat Credit.

3. Show cause notice F. No. V.39/03-014/SCN-DEM/2017-18 dated 04.05.2017 (in short SCN-1) was issued to the appellant covering the period from F.Y. 2012-13 to F.Y. 2016-17 (up to December, 2016). Vide the said SCN-1 it was proposed to demand and recover an amount of Rs. 29,15,829/- under the provisions of Rule 14 of Cenvat Credit rules, 2004 (CCR,2004) read with Section 11A(4) of the Central Excise Act, 1944 by invoking extended period of limitation alongwith interest under Rule-14 of CCR, 2004. The amounts reversed and/or paid by the appellant was proposed to be appropriated against the above demand and interest. Penalty was proposed under Section 15(2) of the CCR,2004.

3.1 Subsequently, information pertaining to the further period i.e Jan-2017 to June-2017 in respect of trading was called for from the appellant and another show cause notice F. No. AR-IV/KLL/CERA/HM.1/Visakha/17-18 dated 24.08.2017 (in short SCN-2) was issued to the appellant for the period from January 2017 to June 2017. Vide the said SCN-2 it was proposed to demand and recover an amount of Rs. 5,48,659/- under the provisions of Rule 14 of Cenvat Credit rules, 2004 (CCR,2004) read with Section 11A(1) of the Central Excise Act, 1944 alongwith interest under Rule-14 of CCR, 2004 readwith Section 11AA of the CEA,1944. Penalty was proposed under Section 15(1) of the CCR,2004.

4. Both the above said show cause notices were adjudicated vide OIO No. AHM-CEX-003-AC-27-28-2018 dated 05.03.2018 by the adjudicating authority. Thus, the adjudicating authority confirmed the demand of Rs. 34,64,488/- (29,15,829/- for the period of F.Y. 2012-13 to December -2017 + Rs. 5,48,659/- for the period from January 2017 to June 2017) under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A of the Central Excise Act, 1944 and ordered to appropriate an amount of Rs. 12,428/- (Rs. 11,010/- + Rs. 1,418/-) already reversed by the appellant. He also ordered to recover interest under the provisions of Rule 14 of Cenvat Credit Rules, 2004 read with Section 11AA of the Central Excise Act, 1944. Equivalent penalty amounting to Rs. 29,15,829/- was imposed under Rule 15(2) of Cenvat

Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944 and penalty of Rs. 54,866/- (not exceeding 10%) was imposed under Rule 15(1) of Cenvat Credit Rules, 2004 read with Section 11AC(1)(a) of the Central Excise Act, 1944.

5. Being aggrieved with the said OIO No. AHM-CEX-003-AC-27-28-2018 dated 05.03.2018 the appellant preferred an appeal before the Commissioner (A), Ahmedabad. The Commissioner (Appeals), Ahmedabad decided the appeal vide Order–in-Appeal (OIA) No. AHM-EXCUS-003-APP-65-18-19 dated 09.08.2018, wherein the case was remanded back to the adjudicating authority for adjudication afresh following the principles of natural justice. The Commissioner (Appeals) directed that *"the adjudicating authority should discuss all the submissions made by the appellant in the impugned order. The appellants are hereby directed to submit all the required documents and case laws and provide utmost cooperation to the adjudicating authority."*

5.1 In the remand proceedings the matter was decided vide the impugned order wherein the demand of proportionate credit of common inputs taken amounting to Rs. 4,73,038/- was confirmed along with interest for the period 2012-13 to 2017-18 under Cenvat Credit Rules,2004 read with Section 11A(4) of the Central Excise Act, 1944 and the amount already paid by appellant on various dates was appropriated. Penalty of Rs. 1,18,259/- (25% of the demand confirmed, the appellant had already paid the dues alongwith interest) was imposed under the provisions of Rule 15(2) of Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944.

6. Aggrieved with the decision of the adjudicating authority, the appellant filed the instant appeal on following grounds:

- The impugned order passed by the adjudicating authority, in so far as imposition of penalty of Rs.1,18,259/- is concerned, is not proper, legal and sustainable on the ground that it is passed against provisions of Rule 15(2) and Section 11AC and the precedent decisions.
- It is submitted that appellants are aggrieved with the order of the adjudicating authority in so far as imposition of penalty is concerned. In as much as it is the case of the department that appellants were required to pay an amount @ 6% of the value of exempted services as per the provisions of Rule 6(3)(i) of CCR, 2004. However, as per the provisions of Rule 6(3)(ii) and 6(3)(iii) of CCR, 2004 appellant was required to pay an amount as determined under Sub-

rule (3A) of Rule 6 of CCR. The appellant computed the amount attributable to input services used in or in relation to provision of exempted services and paid the same. Therefore, question of violation of Rule 6(3) does not arise. The appellant paid the amount under the provisions of Rule 6(3)(ii)/ (iii) by determining the amount under Rule 6(3A) of CCR. The payment of amount under Rule 6(3)(ii)/(iii) is not in dispute and accordingly, the demand raised in respect of violation of Rule 6(3)(i) by way of show cause notices stands dropped by adjudicating authority vide impugned order. In this connection relevant text of para 03.04 is reproduced herein below:

> The calculation and details of payment submitted by the assessee were duly verified by the concerned range officer and confirmed. Since the assessee has discharged the liability of reversal of proportionate credit taken along with applicable interest, the demand for reversal of credit based on the provisions of 6(3) of CCR, 2004 is not sustainable.

Upon perusal of above findings, it clearly establishes that demand was not sustainable and therefore vacated in the adjudication order. Since demand has been dropped, question of imposition of penalty does not arise. More specifically allegation of violation of Rule 6(3) also does not stand once the proportionate amount attributed to input services used in or in relation to provision of exempted services was paid under the provisions of Rule 6(3)(i/iii) of CCR. Therefore, imposition of penalty is against the provisions of Rule 15(2) of CCR or Section 11AC of CEA. Consequently, order of imposition of penalty may please be quashed and set aside.

- They submitted that when the demand has been held not sustainable by the adjudicating authority, penalty ought not to have been imposed against the appellants. They rely on the judgements of hon'ble Courts and Tribunals which are as under:-
  - The decision of Larger Bench of Hon'ble Tribunal in the case of Godrej Soaps V/s. CCE, Mumbai cited at 2004(174JELT-25(Tri.-LB). The Hon'ble Tribunal after relying on the judgment of Hon'ble Supreme Court in the case of CCE V/s. H.M.M. Ltd. reported in 1995(76)ELT-497(SC).
  - Relying on above decision, Hon'ble Tribunal in the case of Hindustan Petroleum Corporation Ltd. V/s. CCE, Pune-III cited at 2014(302)ELT-478(Tri.-Mumbai).

Accordingly, penalty was set aside in light of the above precedent decisions of Hon'ble Tribunal, the impugned order may please be quashed and set aside.

It is submitted that under the provisions of Rule 6(3) of CCR a manufacture of goods or provider of output service, opting not to maintain separate accounts, has three options as under:

> (i) pay an amount equal to six percent of value of the exempted goods and exempted services; or
> (ii) pay an amount as determined under sub-rule (3A); or
> (iii) maintain separate accounts for the receipt, consumption and inventor, of inputs as provided for in clause (a) of sub-rule (2) take CENVAT credit only on inputs under sub-clauses (ii) and (iv) of said clause (a) and pay an amount as determined under sub-rule (3A) in respect of input services. The provisions of sub-clauses (i) and (ii) of clause (b) and sub-clauses (i) and (ii) of clause (c) of sub-rule (3A) shall not apply for such payment:

- However, demand was raised presuming that if separate records are not maintained, the appellant was required to pay an amount equal to 6/7% of value of exempted goods and exempted services. Further, not keeping separate records and not paying 6/7% of value of the exempted goods and exempted service has been considered violation of Rule 6(3) of CCR. Since option provided under Clause (ii) and (iii) of Sub-rule (3) of Rule 6 of CCR were also applicable to the appellant and appellant paid the amount in accordance with the Rule 6(3)(ii)/(iii) of CCR, the allegation of violation of CCR cannot be held against the appellant. Therefore, penalty ought not to have been imposed on the appellant. They rely on the decision of Hon'ble Tribunal in the case of CCE&ST, Udaipur V/s. Secure Meters Ltd. cited at 2017(354)ELT- 146(Tri.-Del). In this case penalty was imposed on the appellant on the ground that cenvat credit was availed even on exempted final product and reversal was made only after issuance of notice to show cause. The Commissioner (Appeals) accepted the appeal preferred by the assessee by arriving at the conclusion that once reversal has been made, no penalty could have been imposed. The above decision of Hon'ble Tribunal was questioned before Hon'ble High Court of Rajasthan. The Hon'ble High Court in their judgment reported at 2017(354)ELT-A32(Raj.) has held as under:

> From perusal of the facts stated in the order passed by the Commissioner (Appeals) and the Tribunal, it is apparent that the findings are based upon the law laid down by Hon'ble Supreme Court in the case of *Chandrapur Magnet Wires {P) Ltd, Nagpurv. Collector of Central Excise, Central Excise Collectorate, Nagpurreported* in (1996) 2 SEC 159. In the case aforesaid, the Apex Court held that no penalty could have been imposed after reversal of the Cenvat benefit availed on an exempted final product. The only difference in the instant matter

is that the reversal in the case in hand was made after issuance of notice to show cause. We are of considered opinion that the prime issue is reversal and not the issuance of notice to show cause, as such, we do not find any wrong with the order passed by the Tribunal affirming the order passed by the Commissioner (Appeals).

In light of the decision of Hon'ble Tribunal and affirmed by Hon'ble High Court of Rajasthan, which squarely applies in the present case, order of imposition of penalty may please be quashed and set aside.

- Further, they submitted that penalty under Rule 15(2) of CCR or Section 11AC of CEA is imposable if cenvat credit has been taken or utilized wrongly by reason of fraud, collusion or any wilful mis-statement or suppression of fact or contravention of any of the provisions of excise Act or Rules with intent to evade payment of duty. However, without establishing the essential ingredients of the provisions of Rule 15(2) of CCR or Section 11AC of CEA penalty has been imposed. They reply on various judgements of Hon'ble Courts and Tribunal which are as under:-
  - Krishna Auto Sales V/s. CCE&ST, Chandigarh-I cited at 2015(40)5TR-1121(Tri.-Del.)
  - Bal Pharma Ltd. V/s. CCEC&ST, Bangalore-I cited at 2015(323)5LT-607(Tri.Bang.)
  - Varun Coatings V / s. CCE, Thane-II cited at 2014(306)ELT643(Tri.-Mumbai)
- They submitted that adjudicating authority imposed penalty of Rs. 1,18,259/- under the provisions of Rule 15(2) of CCR read with Section 11AC of CEA. However, adjudicating authority has not discussed or given any finding in respect of imposition of penalty. It is well settled that imposition of penalty without stating any reasons is not sustainable. In this connection, they rely on the decision of Hon'ble Tribunal in the case of Dugar Tetenal India Ltd. V/s. CCE, Jaipur cited 2002(147)ELT-578(Tri.-Del.) and on the decision of Hon'ble Tribunal in the case of Sunrise Enterprise V /s. CC(Import), Mumbai cited at 2011(274JELT-200(Tri.-Mumbai). In light of the decisions, order of imposition of penalty is bad in law, and therefore same may please be quashed and set aside.

5. Personal hearing in the case was held through virtual mode on 30.06.2023. Shri P G Mehta, Advocate, appeared for personal hearing online as authorised representative of the appellant. He re-iterated the submissions made in Appeal

Memorandum and submitted that the amount under demand was fully paid, as mentioned in the order itself. Therefore, no penalty was to be imposed. He requested to set aside the impugned order.

6. I have carefully gone through the facts of the case as well as the available records, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellant during personal hearing. The issue to be decided in the case is, whether the impugned order passed by the adjudicating authority, imposing penalty amounting to Rs. 1,18,259/- in the facts and circumstances of the case is legal and proper or otherwise.

6.1 I also find that the impugned order has confirmed and appropriated the proportionate credit of common inputs taken amounting to Rs. 4,73,038/- under CCR, 2004 read with Section 11A(4) of the CEA, 1944 alongwith interest. These facts of the impugned order are not disputed by the appellant. This implies that the appellant is in agreement with the confirmation and appropriation of the proportionate credit of common inputs availed.

7.3 It is further observed from the impugned order that the Penalty amounting to Rs. 1,18,259/- was imposed under the provisions of Rule-15(2) of the Cenvat Credit Rules, 2004 read with Section 11AC of the Central Excise Act, 1944. In order to have a proper understanding, the relevant portion of Rule-15(2) of the Cenvat Credit Rules, 2004 and Section 11AC of the Central Excise Act, 1944 are reproduced below :

> ***15. Confiscation and penalty.-*** *(1) If any person, takes CENVAT credit in respect of input or capital goods, wrongly or without taking reasonable steps to ensure that appropriate duty on the said input or capital goods has been paid as indicated in the document accompanying the input or capital goods specified in rule 9, or contravenes any of the provisions of these rules in respect of any input or capital goods, then, all such goods shall be liable to confiscation and such person, shall be liable to a penalty not exceeding the duty on the excisable goods in respect of which any contravention has been committed, or ten thousand rupees, whichever is greater.*
>
> *(2) In a case, where the CENVAT credit in respect of input or capital goods has been taken or utilized wrongly on account of fraud, willful mis-statement, collusion or suppression of facts, or contravention of any of the provisions of the Excise Act or the rules made thereunder with intention to evade payment of duty, then, the manufacturer shall also be liable to pay penalty in terms of the provisions of section 1 IAC of the Excise Act.*

7.3.1 ***Section 11AC. Penalty for short-levy or non-levy of duty in certain cases.*** -

> *(1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows :-*

(a) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, for any reason other than the reason of fraud or collusion or any wilful mis-statement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay
duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty not exceeding ten per cent. of the duty so determined or rupees five thousand, whichever is higher :
***Provided** that where such duty and interest payable under section 11AA is paid either before the issue of show cause notice or within thirty days of issue of show cause notice, no penalty shall be payable by the person liable to pay duty or the person who has paid the duty and all proceedings in respect of said duty and interest shall be deemed to be concluded;*
(b) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (a) is paid within thirty days of the date of communication of the order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent. of the penalty imposed, subject to the condition that such reduced penalty is also paid within the period so specified;
(c) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined :
***Provided** that in respect of the cases where the details relating to such transactions are recorded in the specified record for the period beginning with the 8th April, 2011 up to the date on which the Finance Bill, 2015 receives the assent of the President (both days inclusive), the penalty shall be fifty per cent. of the duty so determined;*
(d) where any duty demanded in a show cause notice and the interest payable thereon under section 11AA, issued in respect of transactions referred to in clause (c), is paid within thirty days of the communication of show cause notice, the amount of penalty liable to be paid by such person shall be fifteen per cent. of the duty demanded, subject to the condition that such reduced penalty is also paid within the period so specified and all proceedings in respect of the said duty, interest and penalty shall be deemed to be concluded;
(e) where any duty as determined under sub-section (10) of section 11A and the interest payable thereon under section 11AA in respect of transactions referred to in clause (c) is paid within thirty days of the date of communication of the order of the Central Excise Officer who has determined such duty, the amount of penalty liable to be paid by such person shall be twenty-five per cent. of the duty so determined, subject to the condition that such reduced penalty is also paid within the period so specified.
(2) Where the appellate authority or tribunal or court modifies the amount of duty of excise determined by the Central Excise Officer under sub-section (10) of section 11A, then, the amount of penalty payable under clause (c) of sub-section (1) and the interest payable under section 11AA shall stand modified accordingly and after taking into account the amount of duty of excise so modified, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay such amount of penalty and interest so modified.
(3) Where the amount of duty or penalty is increased by the appellate authority or tribunal or court over the amount determined under sub-section (10) of section 11A by the Central Excise Officer, the time within which the interest and the reduced penalty is payable under clause (b) or clause (e) of sub-section (1) in relation to such increased amount of duty shall be counted from the date of the order of the appellate authority or tribunal or court.
***Explanation 1.** - For the removal of doubts, it is hereby declared that-*
(i) any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where no show cause notice has been issued before the date on which the Finance Bill, 2015 receives the assent of the President shall be governed by the provisions of section 11AC as amended by the Finance Act, 2015;
(ii) any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where show cause notice has been issued but an order determining duty under sub-

section (10) of section 11A has not been passed before the date on which the Finance Bill, 2015 receives the assent of the President, shall be eligible to closure of proceedings on payment of duty and interest under the proviso to clause (a) of sub-section (1) or on payment of duty, interest and penalty under clause (d) of sub-section (1), subject to the condition that the payment of duty, interest and penalty, as the case may be, is made within thirty days from the date on which the Finance Bill, 2015 receives the assent of the President;

(iii) any case of non-levy, short-levy, non-payment, short-payment or erroneous refund where an order determining duty under sub-section (10) of section 11A is passed after the date on which the Finance Bill, 2015 receives the assent of the President shall be eligible to payment of reduced penalty under clause (b) or clause (e) of sub-section (1), subject to the condition that the payment of duty, interest and penalty is made within thirty days of the communication of the order.

***Explanation 2.** - For the purposes of this section, the expression "specified records" means records maintained by the person chargeable with the duty in accordance with any law for the time being in force and includes computerized records.]*

8. Examining the above legal provisions with the facts of the case I find that, the proportionate credit of common inputs obtained was confirmed vide the impugned order for reasons of *(a) fraud; or (b) collusion; or (c) any wilful mis-statement; or (d) suppression of facts; or (e) contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty.* Accordingly, the adjudicating authority had ordered imposition of Interest under Rule 14 of the CCR, 2004 read with Section 11AA of the Central Excise Act, 1944. Further, due to confirmation of Cenvat in terms of the above grounds, penalty was imposed in terms of Rule 15(2) of the CCR, 2004 read with Section 11AC of the CEA, 1944.

9. The appellant have contended that the demand of reversal of proportionate credit amounting to Rs. 4,73,038/- vide the impugned order is incorrect. In this regard referring back to the SCN-1 & SCN-2, I find that the Cenvat credit demanded vide both the SCN were arising out of the violations of provisions of Rule-6(3) of the Cenvat Credit Rules, 2004. Further, it is also observed that from the impugned order that the adjudicating authority has recorded at para 03.04 that, *"reversal of credit based on the provisions of Rule 6(3) of the CCR, 2004 is not sustainable"*. Hence, bare perusal of the impugned order makes it clear that the demand confirmed is out of the scope of the SCN. It is a settled Law that the SCN is the basis of the litigation arising with respect to the proposal contained therein and the adjudicating authorities have to remain within the four bounds of the said SCN. In the instant case, I find that the adjudicating authority has travelled out of the scope of the SCN to confirm the demand amounting to Rs. 4,73,038/- vide the impugned order attributing to reversal of proportionate credit. These finding are sufficient in addition to hold that the confirmation of demand of Cenvat credit of Rs. 4,73,038/-is not only beyond the scope of SCN but is also contradictory to the findings of the adjudicating authority.

Accordingly, the impugned order is liable to be held unreasonable, legally unsustainable and liable to be set aside. In view of the above findings, as the demand stands unsustainable, the question of interest and penalty does not arise.

9.1 In respect of the imposition of 25% penalty vide the impugned order, I find that Section 11 AC (1) (b) prescribes 25% penalty, in case, the demand is paid within 30 days of the date of communication of the order. However, in the instant case the demand was paid by the appellant before the issuance of the impugned order, therefore the interest amount has been wrongly quantified by the adjudicating authority and is therefore liable to be set aside.

10. In view of the above discussions, I am of the considered view that the impugned order is liable to set aside alongwith the amount of interest. However, I also find that the appellants have not disputed the confirmation and appropriation of the amount of Rs. Rs. 4,73,038/- vide their appeal memorandum, hence, they would not be eligible for claiming any refund of the amount appropriated vide the impugned order.

11. Accordingly, the impugned order confirming the penalty amounting to 1,18,259/- is set aside and the appeal filed by the appellant is allowed.

12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.

(Shiv Pratap Singh)
Commissioner (Appeals)
Date: 15 Sept, 2023

Attested:

(Somnath Chaudhary)
Superintendent(Appeals),
CGST, Ahmedabad.

By Regd. Post A. D

To,
M/s Vishakha Polyfab Pvt. Ltd.,
Plot No. 549/2, Vadsar, P.O.-Khatraj,
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Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Principal Commissioner, CGST and Central Excise, Commissionerate: Gandhinagar.
3. The Deputy/Asstt. Commissioner, Central GST, Division-Kalol, Commissionerate: Gandhinagar.
4. The Superintendent (Systems), CGST, Appeals, Ahmedabad for uploading the OIA on website.
5. Guard file
6. PA File