



सत्यमेव जयते

आयुक्त का कार्यालय
Office of the Commissioner
केंद्रीय जीएसटी, अपील अहमदाबाद आयुक्तालय
Central GST, Appeals Ahmedabad Commissionerate
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी, अहमदाबाद-380015
GST Bhavan, Ambawadi, Ahmedabad-380015
Phone: 079-26305065 - Fax: 079-26305136
E-Mail : commrappl1-cexamd@nic.in
Website : www.cgstappealahmedabad.gov.in



आज़ादी का
अमृत महोत्सव

By SPEED POST

DIN:- 20240564SW0000999EF9

(क)	फ़ाइल संख्या / File No.	GAPPL/COM/CEXP/321 & 320/2023-APPEAL / 4971 - 26
(ख)	अपील आदेश संख्या और दिनांक / Order-In-Appeal No. and Date	AHM-EXCUS-003-APP-007 & 008/2024-25 and 24.04.2024
(ग)	पारित किया गया / Passed By	श्री ज्ञानचंद जैन, आयुक्त (अपील्स) Shri Gyan Chand Jain, Commissioner (Appeals)
(घ)	जारी करने की दिनांक / Date of issue	01.05.2024
(ङ)	Arising out of Order-In-Original No. KLL DIV/EX/YOGENDRA SINGH RAWAT/227/23-24 dated 30.05.2023 passed by the Assistant Commissioner, CGST, Division- Kalol, Gandhinagar Commissionerate	
(च)	अपीलकर्ता का नाम और पता / Name and Address of the Appellant	1. M/s Rajkamal Industrial Pvt Ltd, 401, 4th Floor, Dev Arc Corporate, Above Croma, Opp. Big Bazar, S. G. Highway, Ahmedabad – 380015 2. Shri Bhadresh Chinubhai Mehta, Director of Rajkamal Industrial Pvt Ltd..

कोई व्यक्ति इस अपील-आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील 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:-

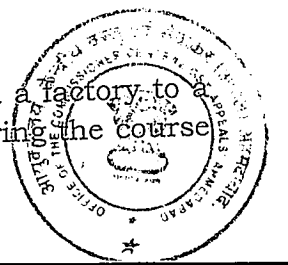
Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त 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 में 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 warehouse or to another factory or from one warehouse to another during the course



of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

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

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 ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं 2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

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 दिनांक 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 रुपये 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.

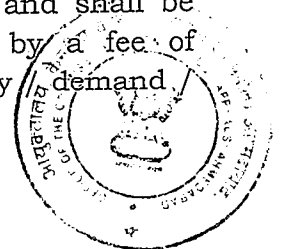
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवा कर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-
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. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

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

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

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची -1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या 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 is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) एके प्रति अपील 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 राशि;
- (3) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि।

यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में 'अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

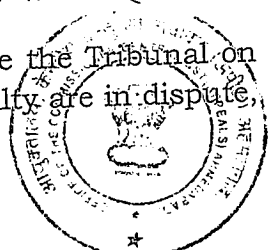
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

(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."



अपीलिय आदेश/ ORDER-IN-APPEAL

On similar issue, following appeals have been filed by the appellants against the Order in Original No. KLL DIV/EX/YOGENDRA SINGH RAWAT/227/23-24 dated 30.05.2023 [hereinafter referred to as "the impugned order"] passed by the Assistant Commissioner, CGST & Central Excise, Gandhinagar Commissionerate [hereinafter referred to as "the adjudicating authority"].

Table-A

Sr. No.	Appeal No.	Name of Appellant	Amount Involved
01	GAPPL/COM/CEXP/321/2023	M/s Rajkamal Industries Pvt. Ltd. 401, 4 th Floor, Dev Arc Corporate, Above Croma, Opp. Big Bazar, S.G. Highway, Ahmedabad-380015 (hereinafter referred to as 'Appellant-1')	Penalty Rs.37,32,516/- u/r 26(2) of CER, 2002
02	GAPPL/COM/CEXP/320/2023	Shri Bhadresh Chinubhai Mehta Director of M/s Rajkamal Industries Pvt. Ltd. (hereinafter referred to as 'Appellant-2')	Penalty Rs.37,32,516/- u/r 26 (2) of CER, 2002

2. The M/s Rajkamal Industries Pvt. Ltd- **Appellant-1** are engaged in purchase and sale of various petro chemical products and were holding Central Excise Registration and Service Tax registration. The unit was also availing the CENVAT Credit under the CENVAT Credit Rules, 2004. Shri Bhadresh Chinubhai Mehta – **Appellant-2** is the Director of Appellant-1.

2.1 Briefly stated the fact of the case are that based on an intelligence gathered by DGGI, , RU, Vapi, it was observed that M/s. Aristo Chemicals and M/s Aristo Oil Chem Pvt Ltd, 204, Quantum Tower, Ram Baug Lane, S.V.Road, Malad (W), Mumbai-64, were engaged in trading of various petroleum products like Lubricating Oil, Base Oil and Light Liquid Paraffin etc. falling under Chapter 27 of First Schedule to the CETA, 1985 and HSN code 2710 and were facilitating the manufacturers/industrial users to avail the irregular Cenvat credit/ITC without actual receipt and use of inputs in or in relation to manufacture of excisable goods or without actual supply and receipt of the goods by way of issuing the Duty/Tax invoice without actual delivery of the goods specified therein. Intelligence further indicated that the business firms or persons who were actual recipient of these goods were re-packing/re-selling or selling their resultant goods clandestinely without preparing any bill/invoice for sale or supply of goods to their buyers and evading payment of Central Excise duty/Tax.

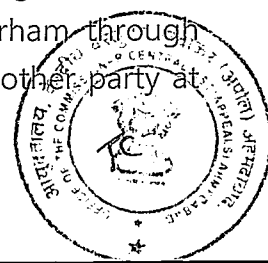
2.2 Intelligence further suggested that they were supplying a substantial quantity of the procured goods viz. Base Oil and Light Liquid Paraffin on cash basis without bill to the buyers who were engaged in repacking and selling. Besides genuine supply of these products to the industrial users under proper invoices, these dealers were also issuing the Cenvatable invoices in the name of such industrial users to facilitate these buyers to avail Cenvat credit/ITC without actual delivery of the goods to them, but the same goods were actually delivered to the buyers engaged in re-packing and



selling business, who subsequently used to sale these goods in the market on cash basis. Since, the aforesaid goods were transported through tankers, the entire quantity of the consignment covered under manufacturer/supplier's invoice were being sold to the different buyers on cash basis other than the buyer to whom the Cenvatable/ITC invoices were raised. The information received indicated that these dealers were procuring their inputs from M/s Savita Oil Technologies Ltd, Silly, Silvassa, M/s Gandhar Oil Refinery Pvt Ltd, Silvassa, M/s Apar Industries Ltd, Silvassa, M/s Panama Petrochemicals Ltd, Daman and M/s Jell Pharmaceuticals Pvt Ltd, Silvassa etc. and were undertaking this business activity mainly through the transporters namely M/s Sanjay Road lines, Kurla, Mumbai and M/s Laxmi Bulk Carrier, Vapi etc.

2.3 During investigation it has been found that Appellant-1 have destroyed the invoices issued to various customers involving GST amounting to Rs.62,59,469/- (Rs.51,55,459 of GSTIN 24AAF9382N1ZO and Rs.11,04,010/- of GSTIN 27AAF9382N2ZH). They have mailed/issued 20 invoices involving GST amounting to Rs.34,48,296/- which were later on destroyed. Appellant-2 has already accepted their liability and have paid partial amount against the accepted tax liability. He also accepted in his statement that 20 invoices shown to him, have been issued to different buyers' invoices either of the same date or nearby dates to the different persons i.e. individuals/ firms/companies without any supply of goods. He admitted that they have paid the GST amount mentioned in invoices issued without supply of goods but they have not paid the GST amount mentioned in the said 20 invoices under which actual delivery of the goods were effected to different buyers and agreed to pay the amount of GST involved in the said 20 and 31 invoices. Similarly, on verification of records of various transporters such as M/s. Sachin transport, M/s. Laxmi Bulk Carrier, M/s. Hariom Bulk Carrier & M/s. Pawan Road Lines, it has been observed that they have issued only invoices to M/s Arham Petrochem Pvt Ltd, without actual supply of goods. The goods were cleared on invoices and without payment of applicable taxes, the said goods were appearing as closing stock and were illicitly cleared to be adjusted by way of issuing invoices and the same adjustment have been done by Appellant-2 by way of issuing invoices to various buyers without actual supply of goods and M/s Arham Petrochem Pvt Ltd was one of such buyers. This fact also has been accepted by some of the transporters in their statement that they have not transported invoices issued by Appellant-1 for M/s Arham Petrochem Pvt Ltd. Some of the transporters have accepted that only LR's/bills have been issued but no payment of the said bills have been taken. Even in some cases the amount has been transferred to some of transporters through banks which have been adjusted in other consignments or have been adjusted through angadias. In the same manner they have wrongly passed on Cenvat Credit amounting to Rs.37,32,516/- vide 43 invoices issued during the period from April, 2015 to June, 2017. The said details have been shown in Annexure "B" of the SCN.

2.4 Evidence gathered during verification of the records revealed that the goods consignments meant for Raipur through transporter M/s Laxmi Bulk Carrier have diverted to Surat/Ahmedabad to M/s Parswa enterprises instead of transportation to Raipur. Further the goods which have been claimed to be transported through transporter M/s Hariom bulk carrier to Ahmedabad have actually been diverted to Sarigam/Sanand. Whereas on scrutiny of consignments dispatched by Appellant-1 to Arham through transporter M/s Pawan Road Lines have actually been diverted to some other party at Ahmedabad.

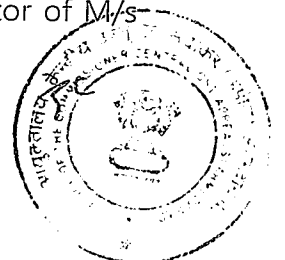


2.5 A SCN No. V/15-21/DGGI/Vapi/2018-19 dated 16.09.2020 was issued to the **Appellant-1** proposing penalty under Rule 26(2) of the CER, 2002 and separate penalty under Rule 26(2) of the CER, 2002 was also proposed to be imposed on Shri Bhadresh Chinubhai Mehta, Director (**Appellant-2**).

3. The said SCN was adjudicated vide the impugned order wherein, the penalty of Rs.37,32,516/- each was imposed on the Appellant-1 & Appellant-2.

4. Aggrieved by the impugned order, both the appellants have preferred the appeal. Both **Appellant-1 & Appellant-2** have contended the penalty on following grounds;

- The adjudicating authority has not provided the opportunity to cross examine the statements of Shri. Sudhakar B. Shah (Partner of Laxmi Bulk Carrier), Shri. Mansukhlal Bhimani (Proprietor of M/s Shiv Logistics), and Shri. Chhabinath Yadav (Proprietor of Sachin Transport Co.) though the Appellants have specifically requested the right for cross examination in their reply dated 17.04.2021.
- If the Adjudicating Authority wants to rely on the statement, he has to first admit the statement in evidence in accordance with Section 9D(1)(b) of IPC. Adjudicating Authority has to summon the person who had made the statement, examine him as witness in the adjudication proceeding, and arrive at an opinion that the statement should be admitted in the interests of justice. If the Adjudicating Authority chooses not to examine any witnesses in adjudication, their statements cannot be considered as evidence.
- The Hon'ble Punjab and Haryana High Court in the case of **G-Tech Industries v Union of India** reported in 2016 (339) E.L.T. 209 (P & H) has held that Section 9D of the Act has to be construed strictly, as mandatory and not merely directory. Reliance is also placed upon the following decisions wherein the Hon'ble Courts have held that denial of cross examination is violation of principle of natural justice:
 - Commissioner of Central Excise, Meerut-I v Parmarth Iron Pvt. Ltd. reported in 2010 (260) ELT 514 (All);
 - Commissioner of C. Ex., Lucknow v Premier Alloys Ltd. reported in 2019 (366) ELT 659 (All);
 - Mansa Cigarettes Pvt. Ltd. v Commissioner of C. Ex. & ST, Vadodara-I reported 2019 (370) ELT 1609 (Tri.-Ahmd);
 - Nidhi Auto Pvt. Ltd. v Commissioner of Central Excise, Noida-I reported in 2020 (3) GSTL 419 (Tri.-All)
- Therefore, in absence of any corroborative evidence, when the sole case of the adjudicating authority relies upon the statement of the transporter, cross examination ought to have been granted. A statement under Section 14 of the Act, like all testimony, must be subjected to recourse of cross-examination, to be drawn into the evidentiary pool to form a basis for reasoning or conclusion, denial of which is violation of provisions of Section 9D of the Act. In view thereof, since the adjudicating authority denied cross examination, statements of Shri. Sudhakar B. Shah (Partner of Laxmi Bulk Carrier), Shri. Mansukhlal Bhimani (Proprietor of M/s



Shiv Logistics), and Shri. Chhabinath Yadav (Proprietor of Sachin Transport Co.) has no evidentiary value.

- Penalty under Rule 26(2) of the said Rules can be imposed only on natural person and it cannot be imposed on the artificial person or company because the goods are handled by natural living person and not by an artificial entity and declaration can only be made or caused to be made by a natural person. Reliance in this regard is placed on the decision of Hon'ble Mumbai Tribunal in the case of **Apple Sponge and Power Ltd. v. Commissioner of Service Tax** 2018 (362) E.L.T 894 (Tri-Mum) wherein the Hon'ble Tribunal in the context of Rule 26 of the Central Excise Rules held as under:

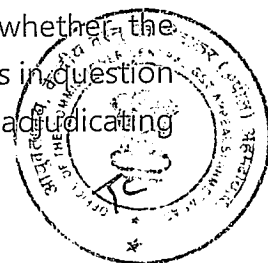
"I also find that penalty under Rule 26 can be imposed only on the natural individual person and not on the artificial person or company because the goods is handled by natural living person and not by an artificial entity."

- Further, reliance is also placed upon the decision of the Bangalore Tribunal in the case of **Homag India Pvt. Ltd. v Commr. of C. Ex., ST. & Cus., Bangalore-II** reported in 2017 (357) E.L.T. 1194 (Tri. - Bang.) wherein the Hon'ble Tribunal held as under:

"6. After considering the submissions of both the parties and perusal of the material on record as well as the judgments cited at the bar, I find that the reference to the word "person" in Rule 26 refers to only the natural person and company cannot be penalized under Rule 26 of the Central Excise Rules, 2002"

Since, in the present case, the Appellant is a Company, penalty under Rule 26 (2) cannot be imposed.

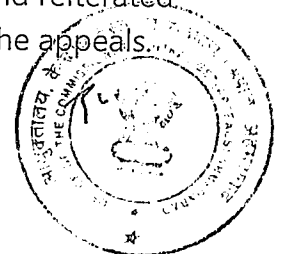
- The adjudicating authority has imposed penalty of Rs.37,32,516/- each on the Appellant and on the Director on the basis of the statements of the transporters which were not cross examined. Some of the transporters provided names of the buyers wherein the goods were delivered. Despite of these facts, the Department did not investigate the case at the end of the alleged buyers whether the goods were delivered to them or not. If the Department had investigated at the end the alleged buyers, the correct facts would have revealed.
- Further, Penalty under Rule 26 can be imposed only if a person who acquires possession of or is in any way concerned in transporting /removing / dispatching or in any other manner deals with any excisable goods for which he knows or reason to believe that goods are liable for confiscation. In the present case, the Appellant delivered the goods to the Buyer which can be seen from the invoices issued to the Buyer and from the statement of Shri. Ashish Agarwal wherein he explicitly stated that he has received the goods.
- In Para 30.3 of the Impugned Order he has held that issuance of invoices, payment of duty, filing of returns is not relevant as the moot question is whether the transportation of goods were made by the supplier and were the goods in question was delivered at the premises of M/s Arham. The sole argument of the adjudicating



authority is based on the denial of transportation of goods by the transporters without any evidentiary evidence. In Para 30.3 of the Impugned Order, the adjudicating authority has held that transporters have provided corroborative evidence in the form of Trip Register or similar documents maintained by the transporters. The Trip Register maintained by the transporter are handwritten register which cannot be solely relied upon. Other than handwritten trip register and oral statements which were not cross examined, the Department has not relied upon any other documentary evidence.

- The adjudicating authority at Para 30.4 has held that the statement provided by the Director of the Appellant is in the form of confessional statement and this confessional statement along with trip register is the evidence to arrive at the conclusion that the invoices were issued without actual supply of goods. The adjudicating authority has erred in holding that the statement of the Director of the Appellant was a confessional statement. It is submitted that the Appellant supplied the goods to M/s. Arham during the period of 2015-17 for which allegations were made that the Appellant supplied invoices without supply of goods. During statements, the Director was shown invoices for the period 2017-18. None of the invoices pertaining to period 2015-17 were shown to the Director.
- It is well settled position that confessional statement without any corroborative evidence cannot be relied upon. Reliance is placed upon the following decisions:
 - Pioneer Industries v Commissioner of Central Excise, Mumbai-II reported in 2006 (193) ELT 506 (Tri.-Mumbai);
 - Commissioner of C. Ex., Thane-II v Seven Seas Corporation reported in 2010 (259) ELT 652 (Bom.);
 - Portland Cement (I) Ltd. v Commissioner of Central Excise, Lucknow reported in 2015 (326) ELT 304 (Tri.-Del)
- The Appellant submits that they supplied the goods to M/s. Arham during the period of 2015-17. During investigations, director of the Appellant was shown invoices for the period 2017-18 while recording his statement. None of the invoices pertaining to period 2015-17 were shown to the Director. Therefore, in absence of any corroborative evidence, statements of transporters ought not be relied upon especially when cross examination has been denied.
- The entire case has been booked based on oral statement without any corroborative evidence. During the course of search, no incriminating documents were found from the premises of the Appellant. It is not the case that the Company received cash payment from the alleged buyers. It is not the case that the Company paid cash to any person after receipt of money from M/s Arham through cheque subsequently. In absence of any corroborative evidences, penalty under Rule 26 cannot be imposed. Reliance is placed upon the decision of the Hon'ble Mumbai Tribunal in the case of Meenakshi Ferro Ingots Pvt. Ltd. Versus Commissioner of C. Ex., Pune-III reported in 2016 (344) E.L.T. 1085 (Tri. - Mumbai).

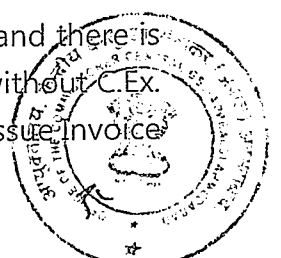
5. Personal hearing in the matter was held on 10.04.2024. Ms. Shweta Garge, Advocate, appeared for personal hearing on behalf of both the appellants and reiterated the submissions made in the appeal memorandum and requested to allow the appeals.



6. I have carefully gone through the facts of the case available on record, grounds of appeal in the appeal memorandum, oral submissions made during personal hearing, the impugned order passed by the adjudicating authority and other case records. The issue before me for decision in the present appeal is whether the imposition of penalty under Rule 26(2) amounting to **Rs.37,32,516/-** each on **Appellant-1** and **Appellant-2** vide the impugned order passed by the adjudicating authority in the facts and circumstances of the case is legal and proper or otherwise. The demand pertains to the period **F.Y. 2015 to up to June 2017**.

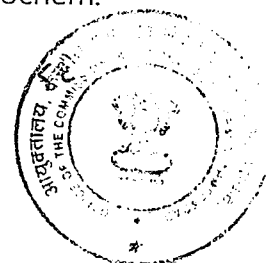
6.1 It is observed that the adjudicating authority at the impugned order confirmed the imposition of penalty on Appellant-1 & 2 on the findings discussed below;

- The contention of Appellant-1 that goods were received by the Arham Petrochem is far from truth and legally not tenable as M/s. Arham Petrochem Pvt. Ltd have failed to identify the transporter in major cases and shifted the responsibility on the supplier. Various transporters have denied to have transported the goods in question, when statement was shown, Shri Ashish Sureshchandra Agarwal, did not comment nor did he opposed the same. No evidence was not brought on the record, to substantiate that such goods were actually received by them. Therefore, when person whom the supplier and / or recipient has casted the responsibility to transport the goods and the said transporter have specifically denied to have transported the goods in question, the supplier and recipient cannot claim that goods were supplied or were received.
- Whether the Invoices were issued, duty has been paid, returns are filed, is not relevant when the moot question as to whether transportation of goods by the supplier were actually delivered at the premises of M/s. Arham Petrochem to which the Transporters have denied to have transported the goods. Therefore, the claim that goods were supplied and were delivered has not taken place. Arham Petrochem failed to produce any such evidence which establish that goods in question were actually received by them. Also Appellant-1 & Appellant-2, failed to produce any evidence that goods were transported by them and were delivered to Arham Petrochem. Hence, the mere contention will not help the Appellant-1 & Appellant-2 to sustain legally.
- During the search and seizure, certain records, both documentary and electronically, were seized under panchnama, which is corroborative as well as independent in nature. The Trip Register or similar documents maintained by the transporters clearly mentions that the goods were delivered elsewhere and not at the place of consignee i.e. Arham Petrochem, in some cases, the vehicle shown for transportation of goods were engaged in transportation of goods at different location on the date or nearby date. No reply in this regard is made either by Arham Petrochem or Appellant-1 & 2.
- On the argument that statement of alleged buyers was not recorded and there is no iota of evidence to show that they have cleared the goods illicitly without C.Ex. Invoices, he held that the issue in the present notice is with regards to issue Invoice



without supply of goods and availment of Cenvat Credit without actual receipt of goods. There is no allegation of illicit or clandestine removal of goods. Hence, contention is misplaced by the Appellant-1 & 2.

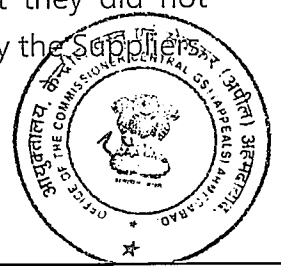
- As per the records of transporters, the goods were unloaded elsewhere than the premises of Arham Petrochem. Statement of Appellant-2 (Shri Bhadresh Chinubhai Mehta, Director of M/s. Rajkamal Industries Pvt. Ltd) was recorded on 07.09.2018 wherein he clearly stated that there are cases where some transporters had given their lorry receipt books to them which were issued by them to cover the sale invoices of the goods sold, that M/s Laxmi Bulk Carriers, Vapi, M/s Hariom Bulk Carrier, Vapi Sanjay Roadlines, Mumbai, are such transporters. Further, the names of transporters mentioned by Appellant-2 have denied to have transported the goods. When the statements of transporter namely M/s. Sanjay Road lines, Mumbai was shown to Appellant-2 he stated it was to adjust the stock of the goods which were supplied unaccounted under these 21 invoices shown to him, they have issued different invoices either of the same date or nearby dates to the different persons i.e. individuals/ firms/companies without any supply of goods, however, they have paid the GST amount mentioned in such invoices issued without supply of goods. It is confession that there was no actual transportation of goods and Invoices were issued to adjust the stock of goods which were supplied unaccounted.
- Regarding statement and retraction of statement he held that the Trip register of transporter and confessional statement itself is evidence to arrive at conclusion that Invoices were issued without actual supply of goods.
- On the contention of the Appellant-2 that while recording the statement he was shown the invoices pertaining to period 2017-18 and not for the disputed period, he finds that at Annexure-B to the Show Cause Notice, 43 Invoices have been listed along with the other details such as Invoice No., Quantity, Value BED, Total, Name of Transporter, Vehicle No. etc., it was obligatory on the part of the Appellant-1 & 2 to have brought on records the details of transportation made by them with respect to Invoices mention. The Appellant-1 & 2 failed to submit any such evidence, hence their submission does not stand on merit. There is no denial by Appellant-1 & 2 along with documentary evidence, so as to substantiate the allegation raised vide the subject notice with respect to 43 Invoices mentions at Annexure-B attached to Show Cause Notice.
- Appellant-1 used to arrange for transportation of goods, and as per Annexure-B, Invoices were issued along with LR of various transporters namely, M/s. Laxmi Bulk Carrier, Hari Om Bulk Carriers, Jai Gurudev Roadlines etc. In the statement Shri Sudhakar B. Singh, Partner of M/s. Laxmi Bulk Carriers, admitted that they have never transported and delivered any consignment of Appellant-1 during the period 2014-15 to September, 2018. Appellant-1 should have produced the Invoice wise details of transportation of goods, as these 43 Invoices were issued by them and on the basis of these Invoices Cenvat Credit was taken by Arham Petrochem.



- The Appellant-1 & 2 have already stated that goods were actual received by Arham Petrochem but this the details of goods transported by Appellant-1 were required to support their claim. Arham Petrochem availed Cenvat Credit on the basis of Invoices issued by Appellant-1. They have shown to dispatch 2 consignments through transporter M/s Global Bulk Carrier valued at Rs. 16,52,654/- involving Cenvat Credit amounting to Rs.1,93,801/-, 1 consignment through transporter M/s M.K.Bulk Carriers valued at Rs. 8,02,095/- involving Cenvat Credit amounting to Rs.96,251/-; 1 consignment through transporter M/s Jai Gurudev Roadline valued at Rs. 7,81,275/- involving Cenvat credit amounting to Rs.93,303/-, 1 consignment through M/s Universal Logistics valued at Rs. 7,94,949/- involving Cenvat Credit amounting to Rs.94,905/-, 21 consignment through M/s Hari Om Transport, valued at Rs. 1,46,27,691/- wherein Cenvat Credit amounting to Rs. 17,36,743/- is involved, 1 consignment through transporter M/s Varuna Road lines valued at Rs. 10,60,681/- involving Cenvat Credit amounting to Rs.1,20,868/-. However, on scrutiny of the records of transporter, it revealed that no such transportation took place. Therefore, it was necessary for Appellante-1 to have brought on record, any evidence which can suggest that transportation of goods in question actually took place. However, no such evidence is brought on records that goods in question was transported by such transporters for the Invoices issued by Appellant-1 hence the adjudicating authority inferred that there was no transportation of goods and only Invoices were issued to facilitate Arham Petrochem to avail Cenvat Credit fraudulently. Appellant-1 & 2 in connivance with M/s. Arham Petrochem tried to pass the Cenvat credit without actual supply of goods. Such act of Appellant-1 & 2 has rendered themselves liable for penalty under Rules 26(2) of Central Excise Rules, 2002.

7. Both the appellants have strongly contested the above findings. They have primarily contested that the adjudicating authority has not provided the opportunity to cross examine the statements of Shri. Sudhakar B. Shah (Partner of Laxmi Bulk Carrier), Shri. Mansukhlal Bhimani (Proprietor of M/s Shiv Logistics), and Shri. Chhabinath Yadav (Proprietor of Sachin Transport Co.) though they specifically requested for the same vide their reply dated 17.04.2021. They claim that in the absence of any corroborative evidence, when the sole case of the adjudicating authority relies upon the statement of the transporter, cross examination ought to have been granted. Therefore, statements of Shri. Sudhakar B. Shah (Partner of Laxmi Bulk Carrier), Shri. Mansukhlal Bhimani (Proprietor of M/s Shiv Logistics), and Shri. Chhabinath Yadav (Proprietor of Sachin Transport Co.) has no evidentiary value.

7.1 It is observed that the adjudicating authority by relying on various case-laws and by countering the case-laws relied by the appellants denied the cross-examination of Transporters. He held that there are various other corroborative evidences and independent evidences which establish the non-receipt of goods. However, the adjudicating authority has not come up with any corroborative evidence to establish the non-receipt of goods in the factory of M/s. Arham Petrochem Pvt Ltd. The entire demand has been confirmed on the admissions made by the Transporters that they did not transport such goods as per the 'Trip Register' and the admissions made by the Supplier



No findings is given on the documentary or electronical evidences drawn which prove non-receipt of goods in the factory.

7.2 In my considered view, denying the opportunity of cross-examination of the witnesses whose statements were relied upon by the Adjudicating authority, is a serious lapse, which makes the order nullity, inasmuch as it amounted to violation of principles of natural justice. **Hon'ble Supreme Court, in the case of Andaman Timber Industries v. CCE, Kolkata-II - 2015-TIOL-255-SC-CX = 2015 (324) E.L.T. 641 (S.C.)** set aside the order and allowed the appeal of the assessee. *It has been observed that the Tribunal has simply stated that cross-examination of the said dealers could not have brought out any material which would not be in possession of the Appellants themselves to explain as to why their ex-factory prices remain static. It was not for the Tribunal to have guesswork as to for what purposes the Appellant wanted to cross-examine those dealers and what extraction the Appellant from them.*

7.3 Further, I find that Hon'ble **CESTAT, Ahmedabad Bench in the case of GUJARAT CYPROMET LTD. -2013 (289) E.L.T. 467 (Tri. - Ahmd.)** has also held that;

"29. I also find that identical sets of facts were in the case of NICO Extrusions Pvt. Ltd. (supra). In both these cases, the Bench has clearly held that the statements of the transporters, owners, owners of the vehicles, drivers and CHAs who have given inculpatory statements against the assessee, should be made available for cross-examination and it is also held that there were many statements which were inculpatory, in my view, the ratio of the said two cases in identical sets of facts would cover these cases also. I also find strong force in the contentions of the Id. Counsel that the director of the company has recorded in his statement that the statutory records indicate the true and correct entries as regards receipt and consumption of the goods. I find that in the cases of Dhakad Metal Corporation & Others (supra), Self Knitting Works (supra), Harika Resins Pvt. Ltd. (supra) (wherein I was one of the Member), in identical sets of facts, the co-ordinate Bench of the Tribunal, has remanded the matter back to the adjudicating authority at the stay stage itself by directing the lower authorities to allow the cross-examination of the persons as sought for by the assessee.

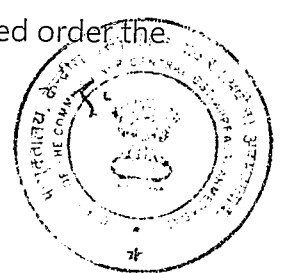
30. In my view, the charges of availment of Cenvat credit without receipt of the inputs are serious allegations which cannot be held as correct without adequate/cogent evidences and it is also imperative that the witnesses be cross-examined to bring the truth on record as to how they have stated that the goods were never transported to the appellant.

31. In my view, the Revenue's case in both these sets of appeals is mostly based upon the statements recorded of various persons and not on any corroborative evidences, as has been claimed."

[Emphasis supplied]

7.4 The above decision was affirmed by **Hon'ble High Court of Gujarat - 2017 (345) E.L.T. 520 (Guj.)** in Tax Appeal Nos. 269-273 of 2013, decided on 28-3-2013, wherein it was held that the Adjudicating Authority has heavily relied on the Cross-examination of witnesses therefore the assessee has right to seek their cross-examination. It cannot be rejected merely because the statements, according to the adjudicating officer, were recorded without threat, duress or coercion or that the witnesses at no stage retracted their statements, cannot be a ground for rejecting the request for cross-examination.

7.5 I find that the adjudicating authority has completely relied on the statements of transporters and he denied the cross-examination of these transporters. Even when the Appellants disputed the correctness of the statements and wanted to cross-examine, the Adjudicating Authority did not grant this opportunity to them. In the impugned order the



Adjudicating Authority has specifically mentioned that such an opportunity was sought by the Appellants. However, no such opportunity was granted and the aforesaid plea was rejected on the argument that such request is just to delay the adjudication proceedings and hence, there is no violation of principles of natural justice. I do not find any justification in such findings. I, by relying on the decision of the Apex Court find it sufficient enough to bring to the fore the requirement of permitting the cross-examination of witnesses whose statements are sought to be relied upon by the authorities. Hence, to that extent the impugned order is legally not sustainable.

8. Another contention of the appellants is that penalty under Rule 26(2) of the said Rules can be imposed only on natural person and it cannot be imposed on the artificial person or company because the goods are handled by natural living person and not by an artificial entity and declaration can only be made or caused to be made by a natural person. Further, they claim that Penalty under Rule 26 can be imposed only if a person who acquires possession of or is in any way concerned in transporting /removing / dispatching or in any other manner deals with any excisable goods for which he knows or reason to believe that goods are liable for confiscation.

8.1 I find that the entire demand has been raised on the allegation that the duty paid invoice were issued without actual supply of goods. The role of Appellant-1 & Appellant-2 was that they alongwith M/s. Aristo Oil Chem Pvt. Ltd., Mumbai & M/s. Aristo Chemicals, Mumbai issued invoices without actual supply of goods to the recipient Companies & firms. They engaged various transporters like M/s Global Bulk Carrier, M/s M.K.Bulk Carriers, M/s Jai Gurudev Roadline, M/s Universal Logistics, M/s Hari Om Transport, M/s Varuna Road to divert the consignment to other buyers. It is alleged that both the appellants failed to produce any evidence which could suggest that the transportation of goods in question actually took place and only invoices were issued based on which M/s. Arham Petrochemical Pvt. Ltd availed inadmissible Cenvat credit to the tune of Rs.48,08,435/-. It is alleged that Appellant-2 played a crucial role in carrying out the fraud of issuing bogus cenvatable invoices without actually supplying the goods.

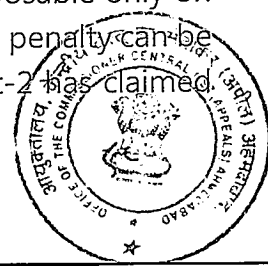
8.2 Penalty under Rule 26(2) of the CER, 2002 provides that;

RULE 26. Penalty for certain offences. —

(2) Any person, who issues —

- (i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or
- (ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.]

On plain reading of Rule 26, it is observed that penalty under sub-rule (2) is applicable on the person who issues the invoice without supplying the inputs for fraudulent passing on the cenvat credit. Penalty under sub-rule (2) is imposable only on the person who issues the invoice. Appellant-1 has claimed that the above penalty can be imposed on natural person and not on the Company. Further Appellant-2 has claimed



that his role was brought out clearly to prove that he facilitated M/s. Arham Petrochem for illegal availment of credit. Therefore, imposition of penalty is not sustainable.

8.3 In the instant case, Appellant-1 have issued invoices and delivered the goods to the buyers. So, far as all the purchases of inputs are duly recorded in statutory books by M/s Arham Petrochem Pvt. Ltd., non-receipt of such goods cannot be assumed merely on the depositions of the transporters. M/s Arham Petrochem Pvt. Ltd and their Director both of them before the adjudicating authority have claimed that the receipt of goods were entered in RG-23 Part-I and RG-23 Part-II Register however, these documents were not examined by the adjudicating authority. In some cases the transporters have provided the names of the buyers to whom they delivered their goods. But no investigation was carried out at the buyer's end to ascertain correct facts.

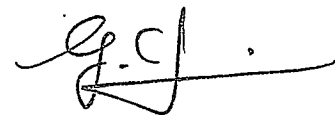
8.4 As per Section 3(42) of the General Clauses Act, the expression '**person**' shall include any company or association or body of individuals, whether incorporated or not. Therefore, it is clear that the word '**person**' always includes '**persons**'. In law it has always been interpreted by the courts that person includes both natural and juridical person and body of individuals. Hence, I find the contention of the appellant that the Company is not covered in person as non-maintainable.

8.5 Further, it is observed that the penalty has also been imposed on Appellant-2, who is a Director in Appellant-1 firm. This penalty is in consequence to the alleged role he played as a Director in issuing the invoices and diverting the goods to other buyers and facilitated M/s. Arham Petrochem for illegal availment of credit. As the penalty has been imposed on the Appellant-2 on same set of facts, I, therefore, find that my observations made **para-7 to 8.4** above shall be squarely apply to the facts and circumstances of Appellant-2 also.

9. As such, I am of the view that the impugned order is liable to be set aside on my above observations and findings and the matters are required to be remanded for fresh decision after allowing cross-examination of the witnesses whose statements are relied upon; and considering the documentary evidences produced by the appellants.

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

The appeals filed by the Appellant-1 & Appellant-2 stands disposed of in above terms.

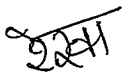


ज्ञानचंद जैन

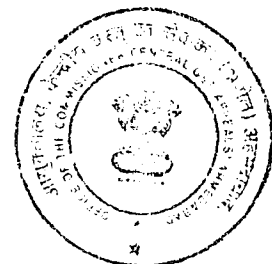
आयुक्त (अपील्स)

Dated: 24th April, 2024

सत्यापित/Attested :



रेखा नायर
अधीक्षक (अपील्स),
सी जी एस टी, अहमदाबाद



By REGD/SPEED POST A/D

To,

M/s. Rajkamal Industries Pvt. Ltd.
401, 4th Floor, dev Arc Corporate,
Above Croma, Opp. Big Bazar,
S.G.Highway, Ahmedabad-380015

-

Appellant-1

Shri Bhadrsh Chinubhai Mehta
Director of M/s. Rajkamal Industries Pvt. Ltd.
401, 4th Floor, dev Arc Corporate,
Above Croma, Opp. Big Bazar,
S.G.Highway, Ahmedabad-380015

-

Appellant-2

The Assistant Commissioner,
CGST & CEX, Kalol Division
Gandhinagar Commissionerate

-

Respondent

Copy to:

1. The Principal Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Gandhinagar
3. The Superintendent (Systems), CGST, Appeals, Ahmedabad, for publication of OIA on website.
- ✓ 4. Guard file.



