आयुक्त ( अपील ) का कार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
07926305065- टेलेफैक्स07926305136

DIN:20230464SW00005025EB

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/356/2022-APPEAL / 251 - 255

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-002-APP-216/2022-23
दिनाँक Date : **29-03-2023** जारी करने की तारीख Date of Issue 05.04.2023

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

ग Arising out of Order-in-Original No. **11/ADC/GB/2022-23** दिनाँक: **19.05.2022**, issued by Additional Commissioner, CGST, Ahmedabad-North

ध अपीलकर्ता का नाम एवं पता Name & Address.

1. Appellant

   **M/s. Big Box Conatiners Pvt. Ltd.,**
   **Survey No. 881/1, Opposite Gallops SEZ,**
   **Near Hotel Kankavati, Village- Rajoda,**
   **Sarkhej Bavla Road, Ahmedabad-382220**

2. Respondent
   **The Additional Commissioner,CGST, Ahmedabad North , Custom House,**
   **1st Floor, Navrangpura, Ahmedabad - 380009**

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

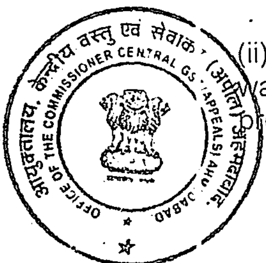
Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :
**Revision application to Government of India :**

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप--धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।



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

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

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

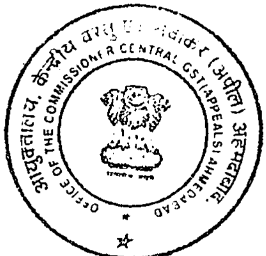
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

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



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

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के 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 संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the 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.

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

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

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

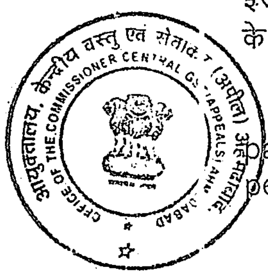
⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

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

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

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

इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।



In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

**ORDER – IN – APPEAL**

The present appeal has been filed by M/s. Big Box Containers Pvt. Ltd, Survey No. 881/1, Opposite Gallops SEZ, Near Hotel Kankavati, Village – Rajoda, Sarkhej Bavla Road, Ahmedabad-382220 (hereinafter referred to as "the appellant") against Order–in–Original No. 11/ADC/GB/2022-2023 dated 19.05.2022 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, CGST, Ahmedabad North (hereinafter referred to as the "adjudicating authority"). The appellant are engaged in the manufacture of corrugated boxes and sheets and were holding Central Excise Registration No. AADCB7995BEM001.

**2.** During the course of audit of appellant's records, carried out by the officers of CGST, Audit, Ahmedabad, for the period from April, 2016 to June, 2017; certain discrepancies were noticed, based on which following revenue paras were raised.

a) **Revenue Para-1:** The appellant during the audit period availed and utilized cenvat credit on the basis of invoices which were destroyed in a fire accident occurred on 30.04.2019. However, in the Panchnama drawn on 30.04.2019, by the Police Officer of Bavla Police Station, there was no mention of loss of documents. Thus, the Panchnama would not become an evidence for the loss of the invoice. It, therefore, appeared that the Cenvat credit amounting to Rs. 1,42,25,216/-, availed during April, 2016 to June, 2017, was in contravention to the provisions of Rule 9(1) read with Rule 9(5) and Rule 9(6) of the CCR, 2014.

b) **Revenue Para-2:** On reconciliation of income shown in the P&L Account with the Sales Income shown in the ER-1 Return of the appellant for the F.Y.2016-17, excess income of Rs. 1,07,18,834/- was noticed in P&L Account. As the appellant had not given a plausible explanation about the differential values, it appeared that there was suppression of material with intent to evade duty. Accordingly, central excise duty of Rs. 6,43,130/- was worked out on the differential income.

c) **Revenue Para-3:** On verification of the records and reconciliation of service tax paid under the Reverse Charge Mechanism (RCM) on GTA and Legal services, it was noticed that the appellant had shown lesser value in ST-3 as compared to the expenses shown in their financial records. It appeared that there was suppression of material with intent to evade taxes. Accordingly, Service Tax liability of Rs. 8,982/- was worked out for GTA service and Rs. 1,500/- for Legal services. The appellant later paid service tax amount of Rs. 8,982/- alongwith interest of Rs. 5,163/- and penalty of Rs. 775/- on 19.03.2021 vide Challan No. 21032400355271 but had not provided the DRC-03 for this payment.

**2.1.** A Show Cause Notice (SCN) No. GADT/TECH/SCN/CE/2/2021-TECH & LEGAL dated 13.04.2021 was issued to the appellant proposing demand and recovery of wrongly availed and utilized Cenvat credit amount of Rs. 1,42,25,216/-; Central Excise duty of Rs. 6,43,130/- under Section 11A(4); Interest under Section 11AA; Penalty under Section 11AC(1)(c) and Penalty under Rule 25 of the CER, 2002 were also proposed. Further, service tax demand of Rs. 7,482/- under GTA service and demand of Rs. 1,500/- under

Legal Service alongwith interest was proposed under Section 73(1) & 75 respectively. Penalty under Section 78(1) was also proposed on the appellant.

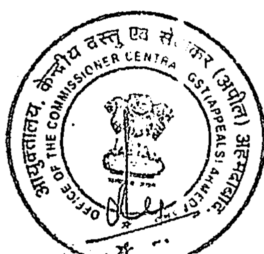
**3.** The said SCN was adjudicated vide the impugned order, wherein the demand of CENVAT credit amount of Rs. 1,42,25,216/- was dropped. However, the Central Excise duty demand of Rs. 6,43,130/- and Service Tax demand of Rs. 7,482/- under GTA service & Service Tax demand of Rs. 1,500/- under Legal Service were confirmed alongwith interest. Penalties equivalent to confirm demands were also imposed on the appellant.

**4.** Being aggrieved with impugned order passed by the adjudicating authority, the appellant have preferred the present appeal on the grounds, which are elaborated below:-

- The submissions made were blatantly ignored by the adjudicating authority without affording the reasons. They placed reliance on decisions passed in the case of Cyril Lasardo (Dead) – 2004(7) SCC 431; Shukla & Brothers-2010 (254) ELT 6 (SC).
- Confirming central excise duty liability based on the ITR without identifying the clearance of goods or goods recipient is unlawful. Reliance is placed on Shree Nirmalanand Steel Casting Pvt. Ltd. -2017(357) ELT 1012 (Tri-Del); Arunachal Plywood Indus Ltd.- 1999(107) ET 513 – (Tri); Steel Authority of India.
- The difference in the value as per P&L account and ER-1 returns is because the appellant had cleared the goods amounting to Rs. 1,28,34,116/- for home consumption and the same were not recorded as assessable value. However, central excise duty has already been discharged after utilizing the CENVAT credit. A reconciliation statement of balance sheet and the ER-1 returns has been submitted with defence reply which clarifies the difference in the sales amount as per ER-1 return. The copy of the ER-1 returns clarifies that the excise duty payable for the period January 2017 shall be Rs. 38,325 /-. However, the credit utilized by the Appellants for the payment of dutiable excisable goods was Rs. 7,82,481/-. Therefore, the duty amount has already been paid at the time of filing ER-1. Only because the assessable value was not shown does not mean that the duty has not been paid.

- The objection was raised by the audit department stating that the Appellants have short paid the service tax under RCM on GTA services and Legal services. The Appellants duly acknowledged the said objections and paid the amount of service tax along with interest and penalty vide Challan dated 19.03.2021. The copy of the challan is submitted. They claim as the amount of service tax alongwith interest and penalty was paid before issuance of show cause notice, the demand confirmed again vide impugned order is not tenable in the eyes of law and therefore shall be set aside.

- The impugned order confirmed the demand of central excise duty amounting to Rs. 6,43,130 /- short paid by the appellants on 13.04.2021 which is beyond the normal period of limitation of 1 year under Section 11A of the CEA, 1994. There is no allegation of fraud or collusion in the present matter. Further, there is also no suppression or misstatement or intent to evade payment of duty on the part of the Appellants. The onus is on the department to prove that any of



the above ingredients are present in the instant case. There is nothing on record to show the existence of fraud, collusion, suppression, willful misstatement or intention to evade excise duty. As these ingredients of the proviso to Section 11A are not present, the larger period of limitation is not invokable. Reliance is placed on the following cases in support of this submission:

- Shahnaz Ayurvedics v. CCE -2004 (173) ELT 337 (All) Affirmed in 2004 (174) ELT A34 (SC)
- Devans Modern Breweries Ltd. v. CCE-2006 (202) ELT 744 (SC)

➢ The whole demand for the F.Y. 2016-17, is based on the income tax return and balance sheet which is a public document and it is trite law that if the information is available in the public document then the allegation of suppression cannot sustain. For this reliance can be placed on the case of M/s Swarn Cars Pvt. Ltd. v. C.C.E., Kanpur 2020 (2) TMI 222.

➢ Non-disclosure of information which was not required to be disclosed or recorded by statutory provision or prescribed proforma does not amount to suppression or concealment and accordingly larger period of limitation cannot be invoked. In this regard, the appellants place reliance on the following decisions, which have held to the similar effect:

- Anand Nishikawa Co. Ltd. -2005(188) E.L.T. 149(SC)
- M/s. Chemphar Drugs and Liniments, Hyderabad -1989 (40) E.L.T. 276 (S.C.)
- Pahwa Chemicals Private Limited -2005 (189) E.L.T. 257 (S.C.)J
- Prolite Engineering Co - 1995 (75) ELT 257(Guj.)] upheld in UOI vs. Prolite Engineering Co. [1994 (70) ELT A153 (SC)];
- Cosmic Dye Chemical-1995 (75) E.L. T. 721 (S.C.)
- Cadila Laboratories Pvt. Ltd. vs. CCE 2003 (152) E.L.T. 262 (S.C.)

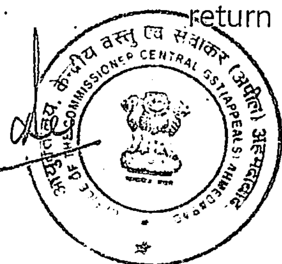
➢ When the demand is not sustainable, there can be no payment of interest under Section 11AA of the Central Excise Act, 1944. Reliance in this regard is placed on the decision of the Hon'ble Supreme Court of India in the case of Pratibha Processors vs. Union of India [1996 (88) ELT 12 (SC).

➢ Once the demand is found to be unsustainable, the question of imposition of penalty does not arise. Reliance placed on H.M.M. Limited -1995 (76) ELT 497 (SC), Balakrishna Industries - 2006 (201) ELT 325 (SC), Hyva India P. Ltd. -2008 (226) ELT 264 (Tri-Bang.). Thus, the proposal to impose penalty is not sustainable.

**5.** Personal hearing in the matter was held on 16.03.2023. Shri Amber Kumrawat, Advocate, appeared on behalf of the appellant. He reiterated the submissions made in the appeal memorandum.

**6.** I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum and the submissions made at the time of personal hearing. The issues to be decided in the present appeal are whether;

a) the central excise duty amount of Rs. 6,43,130/- demanded alongwith interest and penalty, in respect of differential income noticed on reconciliation of the sales income shown in P&L Account with that of the Sales Income reflected in the ER-1 return is legal and proper or otherwise?



b) the service tax demand of Rs. 7,482/- on GTA service and Rs. 1,500/- on Legal Service confirmed alongwith interest and penalties, is legal and proper or otherwise?

The demand pertains to the period April, 2016 to June-17.

**7.** It is observed that the central excise duty demand of Rs. 6,43,130/- alongwith interest was confirmed by the adjudicating authority on the grounds that the appellant have not submitted supporting documents to justify the difference noticed in the value shown as net sales in the balance sheet (domestic + exports), compared with the sales figures as per ER-1 returns for the relevant period. The appellant, on the other hand, have claimed that they have furnished P&L Accounts, Discounts of Sales Ledgers, job charges ledger, ER-1 of January, 2017, Credit Note Ledger, which reconciles the difference. The appellant with the appeal memorandum have submitted a copy of ER-1 Return of January, 2017 and a statement showing bifurcation of the sales values shown as per Audit, Book of Accounts and as per Balance Sheet. They have stated that the difference in the value as per P&L account and ER-1 returns was because the goods valued at Rs. 1,28,34,116/-, which were cleared for home consumption, were not recorded as assessable value in their ER-1 Returns. However, central excise duty of Rs. 7,82,481/- on such clearances has been discharged after utilizing the CENVAT credit.

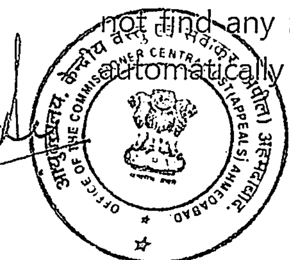
**7.1** On going through the ER-1 return of January, 2017 it is observed that the appellant has made the payment of Rs. 7,82,481/- through CENVAT credit and Rs. 25,895/- through PLA on the clearances of waste/scrap, corrugated sheets & corrugated boxes. However, these payments made do not justify that central excise duty has been discharged on the differential income/value of Rs. 1,07,18,834/- noticed in the P&L Account. It is observed that the Excise Manufacturing Units should file monthly returns in Form ER-1 which provides complete information on the assessable value of all clearances, CENVAT credit availed and utilized, balance duty payable and the duty paid for a particular month. The appellant themselves have admitted the fact that the differential sales value of Rs. 1,07,18,834/- was not reflected in their ER-1 Returns. Moreover, said differential value has been arrived for the F.Y. 2016-17 (April, 2016 to June 17). Hence, mere submission of ER-1 Return for the month of January, 2017 may not suffice the purpose unless any documentary evidences like invoices are produced to substantiate the duty payment. Further, the reconciliation statement submitted by the appellant also do not co-relate with the differential value pointed out by Auditors. Thus, mere bald statement that the duty has been discharged on such clearances may not substantiate their claim unless co-related and supporting documentary evidence are submitted, which, I find the appellant has miserably failed to do so. Hence, the argument put forth by them cannot be accepted on the face value. I, therefore, find that the central excise duty amount of Rs. 6,43,130/- confirmed on differential income is legally sustainable.

**8.** Further, the appellant have contended that the demand of central excise duty of Rs. 6,43,130/- is hit by limitation as there is no allegation or record to show the existence of fraud, collusion, suppression, willful misstatement or intention to evade excise duty. It is observed that the said demand was raised based on the audit objection. The appellant themselves have admitted that the differential value of sales noticed by the auditors was not reflected in their ER-1 Return. Further, they could not produce any

documents to substantiate their claim that the central excise duty of Rs. 6,43,130/- has been discharged by them. Though the appellant filed their ER-1 return but non-disclosure of correct clearance value which was noticed during the audit is a clear cut case of willful misstatement and suppression of value with intent to evade duty. The appellant have placed reliance on decisions passed in the case of Shahnaz Ayurvedics v. CCE -2004 (173) ELT 337 (All) Affirmed in 2004 (174) ELT A34 (SC) and Devans Modern Breweries Ltd. v. CCE-2006 (202) ELT 744 (SC), which I find are distinguishable on facts hence not applicable. In Shahnaz Ayurvedics, the classification list has earlier been approved by the Revenue and there is no concealment of fact. In the case of Devans Modern Breweries Ltd, five Show cause notices dated 10-8-1998, 23-9-1998, 26-11-1998, 31-12-1998 and 17-3-1999 for the period 18-2-1998 to 10-3-1998, 11-3-1998 to 22-5-1998, 23-5-1998 to 3-6-1998, 4-6-1998 to 30-6-1998 and December, 1998 to February, 1999 respectively were issued. Out of which the first four show cause notices were served on 14-1-1999 i.e. beyond the period of limitation. Whereas, in the instant case the difference in sale value was noticed in the books of accounts which were examined only during audit and not while scrutiny of ER-1 Returns. The appellant were required to self-assess their duty liability. It is not the case where value has been declared and subsequently duty demanded as they themselves admitted that the differential value was not reflected in ER-1 Return. I also do not agree with the contention that they were nor required to disclose such value in ER-1 return, as, it is a statutory return wherein the appellant was required to disclose all the clearance value. Thus, the case laws relied is not squarely applicable, as each case is distinguishable on factual matrix.

**9.** It is further observed that service tax demand of Rs. 7,482/- on GTA service and Rs. 1,500/- on Legal Service was confirmed by the adjudicating authority on the findings that the appellant have not disclosed correct value of said services in their ST-3 returns. The appellants have acknowledged the said objections and claim to have paid service tax amount of Rs. 8,982/- alongwith interest of Rs. 5,163/- and penalty of Rs. 775/- on 19.03.2021 vide Challan No.21032400355271. But the adjudicating authority observed that the appellant have not produced the DRC-03 as proof of payment, in the absence of which, their claim of having made the payment cannot be accepted. However, on going through the documents submitted alongwith the appeal memorandum, I find that the appellant have submitted the DRC-03, evidencing the payment of Rs. 15,628/- (Rs. 8982 + Rs. 5871 + Rs. 775) made against the SCN, which I find is sufficient to establish their claim of payment. Once the appellant have admitted their tax liability and requested to conclude the proceedings, it is the duty of the adjudicating authority to get the payment of tax, interest & penalties verified by the Range Superintendent and give a finding on the plea seeking conclusion of proceedings, which was not done. I, therefore, considering the DRC-03 as an evidence of tax payment, remand the matter to the adjudicating authority to examine the correctness of payment made by the appellant and to give a finding on their plea seeking conclusion of the proceedings.

**10.** Another contention put forth by the appellant is that when the demand is not sustainable, there can be no payment of interest under Section 11AA of the Central Excise Act, 1944. They placed reliance on the decision of the Hon'ble Supreme Court of India passed in the case of Pratibha Processors vs. Union of India [1996 (88) ELT 12 (SC). I do not find any merit in the above contention as it is a settled law that interest liability is automatically attracted on delay or non-payment of duty. Charging of interest under the



said section is a civil liability and has to be collected for late payment of duty and is in no way related with any wilful or intentional mis-declaration etc. on the part of the appellant. Hence, when the demand sustains, there is no escape from interest. Appellant by failing to pay appropriate central excise duty and service tax are liable to pay the interest under Section 11AA of the CEA, 1944 & under Section 75 of the F.A., 1994, at applicable rate. Their reliance on the decision of the Hon'ble Supreme Court of India in the case of Pratibha Processors vs. Union of India [1996 (88) ELT 12 (SC) is also not applicable, as therein recovery of interest at 18% on duty from 4th March, 1991 till clearance was ordered, although the duty assessed was nil duty, which is not the case here.

**11.** Similarly, I also find that the imposition of penalty under Section 11AC of the CEA, 1944 and under Section 78 of the F.A., 1994 is also justifiable as it provides penalty for suppressing the facts. Hon'ble Supreme Court in case of *Union of India* v/s *Dharamendra Textile Processors* reported in [2008 (231) E.L.T. 3 (S.C.)], considered such provision and came to the conclusion that the section provides for a mandatory penalty and leaves no scope of discretion for imposing lesser penalty. I find that the appellant was a manufacturer but intentionally suppressed the value of dutiable clearances and also failed to discharge correct tax liability under GTA & Legal Services. Hence, such non-payment of central excise duty and service tax undoubtedly brings out the willful mis-statement and fraud with intent to evade payment of duty and tax. If any of the circumstances referred to in proviso to Section 11A(1) of the CEA, 1944 and under Section 73(1) of the F.A., 1994 are established, the person liable to pay duty/tax would also be liable to pay a penalty equal to the duty /tax so determined.

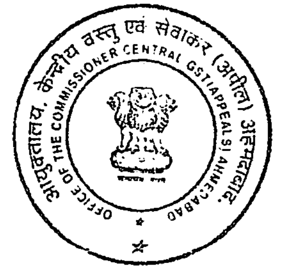
**12.** In view of the above discussion, I uphold the impugned order confirming the central excise duty demand of Rs. 6,43,130/- alongwith interest and penalties. The service tax demand of Rs. 8,982/- alongwith interest and penalty is remanded back to the adjudicating authority as per the discussion held at Para-9 supra. The appeal of the appellant to that extent is partially rejected and partially allowed by way of remand.

**13.** 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.

29 March, 2023

(अखिलेश कुमार)
आयुक्त(अपील्स)

Date: 29.03.2023



Attested

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

**By RPAD/SPEED POST**

To,
M/s. Big Box Containers Pvt. Ltd, - **Appellant**
Survey No. 881/1, Opposite Gallops SEZ,

Near Hotel Kankavati,
Village – Rajoda, Sarkhej Bavla Road,
Ahmedabad-382220

The Additional Commissioner, - **Respondent**
CGST, Ahmedabad North
Ahmedabad

**Copy to:**

1. The Principal Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Deputy Commissioner, CGST, Division-V, Ahmedabad North
4. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
5. Guard File.