



सत्यमेव जयते

::आयुक्त (अपील-II) का कार्यालय,केंद्रीय उत्पाद

शुल्क::

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,
7वीं मंजिल, केंद्रीय उत्पाद शुल्क भवन,
पोलिटैकनिक के पास,
आम्बवाडी, अहमदाबाद : 380015



7th Floor, Central Excise
Building,
Near Polytechnic,
Ambavadi,
Ahmedabad:380015

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(19) 7 /Ahd-II/2015-16 / 2223 to 2227
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-002-16-17
दिनांक (Date): 26.04.2016, जारी करने की तारीख (Date of issue): 03/05/16

श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
Passed by Shri Uma Shanker , Commissioner (Appeals-II)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं _____ दिनांक _____ से सृजित
Arising out of Order-In-Original No. MP/06/Dem/2014-15 Dated: 27/01/2015
issued by: Assistant Commissioner ,Central Excise (Div-V), Ahmedabad-II

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s Pacific Hotel(Ahmedabad Project) 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 या पुनरीक्षण आवेदन प्रस्तुत कर सकता है ।

Any person an 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) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक 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 Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, 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 हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार 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 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 मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है ।



Cont...2

- (c) 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 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।

- (d) 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 दिनांक 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 रुपये या उससे कम हो तो रुपये 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 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 :-

- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

- (ख) 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 ओ-20, न्यू मेटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

- (b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

- (2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। फीस सहायक रेजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।



रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

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 मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.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), के प्रति अपील 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।

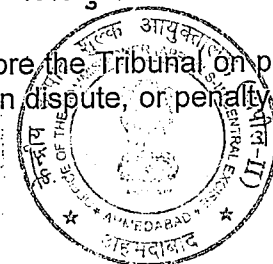
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 सन्दर्भ में 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।

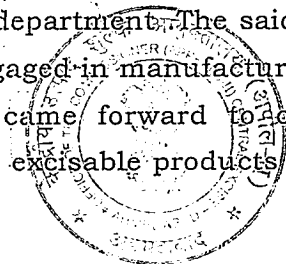
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty where penalty alone is in dispute."



Order in appeal

The subject appeal is filed by M/s. Courtyard by Marriott, Ramdev nagar Cross Roads, Satellite, Near S.G. Highway, Ahmedabad [herein referred as the appellant] against OIO no. MP/06/DEM/2014-15 dated 27-01-15 [herein referred as impugned order] passed by the Assistant Commissioner, Central Excise, Div-V, Ahmedabad-II. They are engaged in the manufacture and clearance of excisable products i.e. Cakes & Pastries under Chapter Sub-Heading No. 19059010 of the Central Excise Tariff Act, 1985, and not registered with Central Excise department.

2. The brief facts of case is that an inquiry was conducted, that the appellant is engaged in manufacture & clearance of Cakes & Pastries from their 'Momo to Go Counter' and may not be discharging Central Excise duty. Therefore, details were called for, The appellant vide letter dated 22.11.2013 submitted the details of machineries involved in manufacturing of Cakes, Pastries and other confectionaries, details of raw material used in production of pastries & other confectionery. Statement of Shri Pawan Jain, Manager [Finance] has been recorded on 20.12.2013; he has stated that the Pacifica Hotel (Ahmedabad Project) Pvt. Ltd. is the licensee of Courtyard by Marriott which involves in providing accommodation, food & lodging, and other activities. The appellant was asked to submit the information of manufacture and clearance value of cakes, pastries, cookies and other bakery products for the period from Dec. 2013 to Jun, 2014. They have supplied the figures of clearance value. Therefore, Central Excise duty payable Rs. 1,72,912/- and Rs. 54,348/- on such clearances value of Rs. 31,89,094/- and 8,79,425/- respectively for the period from February, 2010 to November, 2013 and from Dec, 13 to June 2014, is required to be recovered under proviso to Section 11A of the Central Excise Act, 1944 along with interest. It appeared that, as per the Notification No. 08/ 2003-CE dated 01.03.2003 as amended, definition of Brand name/trade name, the person using the brand name/trade name of other person is not eligible for exemption as provided under said Notification. In the present case the appellant is using the trade mark of Marriot International Licensing Company B.V. ("MILC") . hence, not eligible for exemption of one hundred and fifty lakh rupees as provided under the said notification. Therefore the appellant has to pay the central excise duty on the excisable goods manufactured by them, from the beginning of the financial year for the whole period involved. The appellant have contravened Rule 4 to rule 12 of the Central Excise Rules, 2002, in as much as, they failed to pay the duty leviable on excisable goods and failed to get themselves registered. It further appeared that the appellant has neither submitted any documents / information to the department. The said unit has never informed to the department that they are engaged in manufacture and clearance of excisable goods. The appellant never came forward to obtain Central Excise Registration and to pay the duty on the excisable products being



cleared by them. It therefore appears that all these contraventions have been committed by way of suppression of facts with intent to evade payment of central excise duty and the appellant rendered themselves liable for penal action under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002. Therefore, Show cause notices dated 30.06.2014 and dated 18.11.2014 were issued for recovery of Central Excise duty of Rs.1,72,912/- and Rs.54,348/- same were confirmed with interest, and penalty under Section 11AC of central Excise Act 1944 read with Rule 25 of Central Excise Rules, 2002 .

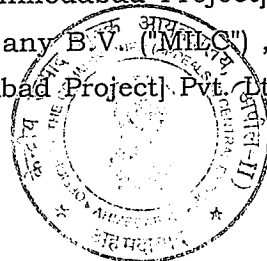
3. Being aggrieved by the impugned order the appellant filed the present appeal on the following main grounds.

That as per the agreement, MILC have assigned exclusive rights to use the brand name/ trade name. Hence SSI Exemption under notification No 08/2003-CE dated 01-03-2003 is available. They rely on case of 1.CCE v. Mel System (2008) 232 ELT 69 (CESTAT) 2. Warkin Equipment's v CCE (2009) 235 ELT 651 (CESTAT) The appellant have showed reasonable diligence in dealing and performing the business operations. The appellant have duly paid required Excise duty applicable with interest thereon but seeks to nullify penalty liability. as per the agreement the appellant have to pay License and Royalty fees on the goods being manufactured/ produced, in this case cakes and pastries products, to the Licensor Company MILC.

By critically understanding rule 25(1)(d), it would only be applied when there is a presence of *mens rea* i.e. an intention to evade duty. It is also justified as per the case CCE v. Modison Ltd 2006 (203) ELT 521 (CESTAT) and Navkar wires v. CCE 2006 (194) ELT 245 (CESTAT).

4. Personal hearing was fixed on 20-01-16, 19-02-16 and on 18-3-16. However, no one attended the PH. The appellant has filed the written submissions earlier. They requested to allow the appeal against the impugned order. I have carefully gone through all case records placed before me in the form of Show Cause Notice, the impugned order and written submissions made by appellant. I find that the issue to decide in the instant appeal pertains to the penalty imposed upon, under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of Central Excise Rules, 2002.

I find that the appellants are functioning under the name of 'Courtyard by Marriott' under the license agreement of Marriott International licensing Company B.V. Telestone, Teleport, Naritaweg, 165, 1043BW, Amsterdam, the Netherlands Cakes and Pastries manufactured by them are being sold under the name of "MOMO to Go", "Java+" and packing of such cakes and pastries shows the logo/symbol of Courtyard Marriott. On going through the License and Royalty Agreement executed on 24.04.2007 between Pacifica Hotel [Ahmedabad Project] Pvt. Ltd. ("Owner") and Marriot International Licensing Company B.V. ("MILC"), it is evident that MILC empowered M/s Pacifica Hotel [Ahmedabad Project] Pvt. Ltd. to



use Courtyard Trademarks, attached with the said agreement, in India. From the definition of "Courtyard Trademark" mentioned in the Agreement; it appears that Momo Cafe is the *service mark / name* being used by the said unit for sale Of cakes & Pastries at "Momo to,,Go" counter, "Momo Cafe" Restaurant & "Momo to You" Room Service. It further appears that the service mark/ name "Momo cafe" is also being used by other units of M/s Courtyard by Marriott located at various places in India. I also find that M/s "Courtyard by Marriott" are functioning all over India in the same name and fashion as being operated in Ahmedabad unit "Courtyard by Marriott" at Ramdevnagar Cross Roads, Satellite. It also appears that Cake & Pastries being manufactured and sold at the appellant's unit under the invoices under the *service mark* "MoMo to Go" at their counter / restaurant/ for room service and in case of packing duly printed the name "MoMo Cafe".

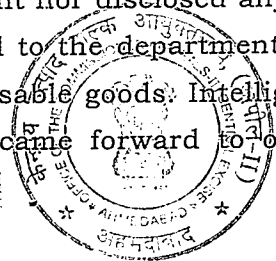
5. I find that, Notification No. 08/2003- CE dated 01.03.2003 as amended, provides for exemption of First clearances up to an aggregate value not exceeding one hundred and fifty lakh rupees made on or after the 1st day of April in any financial year. Para 4 of Notification No 8/2003 CE dated 01/03/2003 states that '*the exemption of first clearances of the specified goods up to the aggregate value of Rs 1.50 cr in any financial year shall not apply to the goods bearing a brand name or trade name, whether registered or not of another person.*'

The phrase "Brand name" has been explained at para 5 of said notification as;

(A) Brand name or trade name as means a brand name or trade name, whether registered or not, that is to say, a name or a mark, such as a symbol, monogram, label, signature or inverted words or any writing which is used in relation to a product, for the purpose of indicating, or so as to indicate, a connection in the course of trade between the product and some person using such name or mark with or without any indication of the identity of that person"

(B) Where the specified goods manufactured by a manufacturer bear a brand name or trade name whether registered or not, of another manufacturer or trader, such specified goods shall not, merely by the reason of fact, be deemed to have been manufactured by such manufacturer or trader;

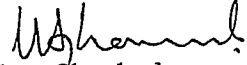
I find that, the person using the brand / trade name of other person is not eligible for exemption as provided under Notification No.08/2003- C.E. dated 01.03.2003. In the present case the appellant is using the trade mark of Marriot International Licensing Company B.V. ("MILC") hence, not eligible for exemption of one hundred and fifty lakh rupees provided under the said notification. Therefore, the appellant has to pay the central excise duty on the excisable goods manufactured by them, from the beginning of the financial year for the whole period involved. In the present case, since the appellant has neither submitted any documents/information to the department nor disclosed any fact relevant to the issue. The appellant has never informed to the department that they are engaged in manufacture and clearance of excisable goods. Intelligence was gathered by the department. The appellant not came forward to obtain



Central Excise Registration and to pay the duty on the excisable products being cleared by them. The appellant have failed to maintain proper stock of the excisable goods manufactured by them and they also failed to account for the production and sales of the said goods in their accounts. It therefore appeared that all these contraventions have been committed by way of suppression of facts with an intent to evade payment of central excise duty, and the appellants have rendered themselves liable for penal action under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

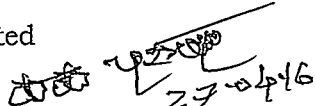
6. In view of the foregoing discussion and findings, I find that appellant had not taken registration with the department and they have clearly suppressed the material facts of the activity of manufacture and clearance of excisable goods. Therefore, I agree with the observations of the adjudicating authority. I hold that the penalty imposed is justified and legal.

7. In view of the above, I uphold the impugned order and reject the appeal.


[Uma Shanker]

Commissioner (Appeals-II)
Central Excise, Ahmedabad

Attested


27-04-16
[K.K.Parimar]

Superintendent (Appeals-II)
Central Excise, Ahmedabad.

By Regd. Post A. D

M/s. Courtyard by Marriott,
Ramdev nagar Cross Roads,
Satellite, Near S.G. Highway,
Ahmedabad-380015.

Copy to :

- 1.The Chief Commissioner, Central Excise, Ahmedabad.
- 2.The Commissioner, Central Excise, Ahmedabad-II.
3. The Asst. Commissioner, Central Excise, Division-V, Ahmedabad-II
4. The Asstt. Commissioner (Systems), Central Excise, Ahmedabad-II.
5. Guard File.
6. PA file

