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

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,

सत्यमेव जयते

7वीं मंजिल, केंद्रीय उत्पाद शुल्क भवन, पोलिटेकनिक 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(64) 19/Ahd-II/Appeals-II/ 2015-16** 8224 to 825

स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 0023 -16-17**

दिनांक (Date): **21.07.2016,** जारी करने की तारीख (Date of issue): 25/07/16

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. **04/REFUND/2015 Dated: 23/02/2015** issued by:Deputy.Commissioner.,Central Excise (Div-IV), Ahmedabad-II

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

**M/s S B J Von Compounders 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 अतत नीचे बताए गए मामलों के बारे में पूवोक्त 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 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।

(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 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 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 मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी 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 न्यायाधिकरणें की गई अपील के विरूद्व 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। की फीस सहायक रजिस्टार के नाम से रेखाकिंत 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।

रेखाकिंत 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. 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 not withstanding 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.

(6) 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. 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**

Subject appeal is filed by M/s. S B J Von Compounders Pvt Ltd, Plot No. 131-132, Shivam Industrial Park, Opp- Sarvodaya Hotel, Vasna Chancharvadi Road, Moraiya, Tal. Sanand, Dist. Ahmedabad (hereinafter referred to as "the appellant]against Order in Original No.04/REFUND/2015 [hereinafter referred to as *'the impugned order*) passed by the Deputy Commissioner, Central Excise,Div-IV,Ahmedabad-II (hereinafter referred to as *'the adjudicating authority'*).they are engaged in the manufacture of exicable goods falling under Chapter 64 of the Central Excise Tariff Act,1985[*hereinafter referred to as CETA, 1985'*] The appellant is availing cenvat credit on various inputs under Cenvat Credit Rules, 2004.

2. Brief facts of the case is that, the appellant manufactured and exported goods to M/s. Reckitt Benckiser (India) Ltd. a 100% EOU during the period October 2013 to October 2014. The goods manufactured by the appellant were entirely cleared to M/s.Reckitt Benckiser (India) Ltd. the accumulated Cenvat credit availed by the appellant on the inputs consumed in the manufacture of such goods could not be utilized. In terms of Rule-5 of the Cenvat Credit Rules, 2004, a manufacturer who cleared a final product for export without payment of duty is eligible for refund of the unutilized cenvat credit availed on inputs utilised in the manufacture of such goods sold without payment of any duty. Accordingly, The appellant filed refund application dated 16.10.2014for Rs.4,76,095/-of unutilized cenvat credit lying accumulated in their account for the said period. Show cause notice dated 20.02.2015 issued and vide above order rejected the refund claim on the ground that the unutilized cenvat credit lying in the appellant's balance was available to the appellant for payment of Central Excise Duty for future duty paid clearances that may be made by the appellant. That the present case was one of deemed export and not one of actual export, and therefore, the benefit of refund was not available to the appellant.

3. Being aggrieved by the impugned order, the present appeal has been filed by the appellant on the following grounds:

The copy of SCN dated20.02.2015 was hand delivered to the appellant for which the appellant were made to sign the acknowledgement of receipt of the show cause notice.

The acknowledgement of receipt also had a pre-printed declaration that the appellant were eligible for refund under Rule-5 of the Cenvat Credit Rules and that the matter may be decided accordingly. A further noting was there that the aforesaid submission may be taken as PH (personal hearing).In utter disregard to the principles of natural justice, the adjudicating authority vide above 010 rejected the refund claim filed by the appellant without affording any opportunity to the appellant to bring on record their submissions to the objection raised in the show cause notice rejecting the subject refund claim. In the said order,it was has held that the clearances made by the appellant cannot be termed as actual exports and therefore, the benefit of refund under Rule-5 was not available to the appellant. that the appellant were a DTA unit, and therefore, the cenvat credit held in their balance was always available to them for clearance of their finished goods in the Domestic Tariff Area.

the adjudicating authority has relied upon the decision of the Appellate Tribunal in the case of M/s. Everest Industries reported in 2013-1I01- 826 - CESTAT- Delhi, 2013 (31) SIR 189 wherein the Appellate Tribunal has taken a view that the benefit of Rule-5 was not available to the transfers from a DTA unit to a SEZ unit.

That the issue whether the benefit of Rule-5 was applicable to transfers made from DTA unit to a 100% ECU had arisen before the Hon'ble Gujarat High Court in various cases like E.I. Dupont India Pvt. Ltd. reported in 2014 (305) ELT 282, Commissioner V/s. N.B.M. Industries reported in 2012 (276) ELT 9 and Commissioner V/s. Shilpa Copper Wire Industries reported in 2011 (269) ELT 17 wherein the Hon'ble High Court has held that refund of unutilized cenvat credit cannot be rejected on clearances made to a 100% ECU on the ground that it was a case of deemed export and refund under Rule-5 was only applicable in the case of physical export.

The department has not raised any dispute in this case that the appellant was not in a position to utilise accumulated Cenvat credit ofRs. 4,76,095/-, but the refund claim is rejected on the ground that Cenvat credit held in balance is always available to the appellant for clearance of finished goods in Domestic Tariff Area, However, this approach is erroneous and illegal because refund claim under Rule-5 of the Cenvat Rules cannot be denied on the basis of a possibility that said credit could be utilised for future clearances .

They rely on the case laws of 1. Hon'able Gujarat High Court has held in case of Commissioner V/s. Anita Synthetic Pvt. Ltd. reported in 2014 (306) ELT 133 (Guj.) that refund under Rule-5 of the Cenvat Credit Rules was permissible as held in case of Shilpa Copper Wire Industries reported in 2011 (269) ELT 17 (Guj.) when the goods were exported, either physical or byway of deemed export, and it was not possible to utilise Cenvat credit of such transactions for payment of duty on any other goods. Now, all these decisions , it is settled legal position that refund claim under Rule-5 of the Cenvat Rules cannot be denied on the ground that the assessee could utilise cenvat credit accumulated against future transactions in DTA.

4. Personal hearing in the matter was held on 04.05.2016, wherein Shri aditya s. tripathi, Advocate, appeared on behalf of the appellant and reiterated the submissions made in their grounds of appeal.he submitted copy of case law 2016[331]ELT[GUJ] Commissioner V Metflow Cast P. LTD. I have carefully gone through the records of the case as well as the written submissions made by the appellant. I find that the appellant has been denied the refund of Cenvat credit. The issue to be decided is the admissibility of Cenvat Credit refund claim filed by the appellant.

I find that, during the period October,2013 to October,2014, the appellant manufactured and exported the goods to M/s. Reckitt Benckiser (India) Ltd., a 100% EOU. The goods manufactured by the appellant were entirely cleared to M/s.Reckitt Benckiser (India) Ltd. the accumulated Cenvat credit availed by the appellant on the inputs consumed in the manufacture of such goods could not be utilized. In terms of Rule-5 of the Cenvat Credit Rules, 2004, a manufacturer who cleared a final product for export without payment of duty is eligible for refund of the unutilized cenvat credit availed on inputs utilised in the manufacture of such goods sold without payment of any duty. Accordingly, The appellant filed refund application dated 16.10.2014 for Rs. 4,76,095/- of unutilized cenvat credit lying accumulated in their account between the said period. Show cause notice dated 20.02.2015, served. vide above order rejected the refund claim on the ground that the unutilized cenvat credit lying in the appellant's balance was available to the appellant for payment of Central Excise Duty for future duty paid clearances that may be made by the appellant. The refund claim was also rejected on the ground that the present case was

one of deemed export and not one of actual export, and therefore, the benefit of refund was not available to the appellant.

5. I find that, Cenvat credit was accumulated because of exports made by the appellant and such Cenvat was not possible to be utilised by the appellant, the refund claim for such unutilized cenvat credit under Rule-5 of the Cenvat Rules was filed by the appellant.I find that,In the impugned order the adjudicating authority has held that appellant being a DTA unit would be in a position to utilise the cenvat credit balance for their future domestic clearances, and therefore, the claim filed by the appellant for refund of utilised credit was not maintainable. However,I find that, there is a error in the aforesaid ground placed by the adjudicating authority because neither the provisions of Rule 5 nor the procedure and conditions prescribed under Notification dated 18.6.2012 provide that the refund claim may not be entertained if the assessee is in a position for utilizing such Cenvat credit for future clearances. As stated herein above, Rule 5 of the said Rules provides for refund of Cenvat credit in terms of the formula provided therein which is to be ascertained by taking into consideration the ratio of export turnover of goods and the total turnover for the relevant period. No restriction has been provided under the said Rules for rejection of refund claim on the ground that such Cenvat credit is utilizable for future clearances. In this case, during the relevant period, there were no domestic clearances and hence, they are entitled to the entire amount of Cenvat credit attributable to the relevant period. Thus,I hold that, the finding in the impugned order that being DTA unit, the appellant was not entitled to the refund of Cenvat credit lying in their balance as the same was available for payment of Central Excise duty for future duty paid clearances is evidently illegal and required to be quashed.

6. I find that, the Department has raised the objection that the present case was one of deemed export and not one of actual export and therefore the benefit of subject Notification was not available in the present case. The aforesaid distinction between "deemed export" and "exports" is clearly arbitrary inasmuch as the nature of exports also includes deemed export as has been held by the Hon'ble Supreme Court in the case of Virlon Textile Mills Ltd. reported in 2007 (211) ELT 353 (SC). It would be relevant to note that this issue whether sales and transfer from DTA units to EOUs being deemed export, could be considered as

export as provided under Rule 5 of the Cenvat Credit Rules has come up for consideration before the Hon'able High Court of Gujarat in the case of Commissioner V/s. Metflow Cast P. LTD ; 2016[331]ELT 355[GUJ] where the Hon'able High Court has held that clearances made to a 100% EOU which are deemed exports are to be treated at par with physical exports for the purpose of entitling refund under Rule 5 of the said Rules. This view has also been followed by the Gujarat High Court in the recent decision in the case of Commissioner V/s. NBM Industries (Supra) and Dupont India Pvt. Ltd. V/s. Union of India (Supra). it is settled legal position that refund claim under Rule-5 of the Cenvat Rules cannot be denied on the ground that the appellant could utilise accumulated cenvat credit against future transactions in DTA.

7. In view of foregoing discussion and findings, the impugned order rejecting the refund claim is set aside. The appeal stands disposed of as above.

(Uma Shanker)
Commissioner (Appeal-II)
Central Excise, Ahmedabad.

Attested

22.07.16

(K.K.Parmar)
Superintendent (Appeal-II)
Central Excise, Ahmedabad

By Regd. Post A.D.

M/s. S B J Von Compounders Pvt Ltd,
Plot No. 131- 132, Shivam Industrial Park,
Opp- Sarvodaya Hotel,
Moraiya, Tal. Sanand,
Dist. Ahmedabad.

Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-II
3. The Dy. Commissioner, Central Excise, Div-IV, Ahmedabad-II
4. The Assistant Commissioner (System), Central Excise, Ahmedabad-II
5. Guard file.
6. PA file.