



सत्यमेव जयते

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

शुल्क::

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,
7th Floor, Central Excise Building,
Near Polytechnic, Ambavadi,
Ahmedabad:380015



रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(37) 34/Ahd-II/Appeals-II/ 2015-16 / 1275 to 1279
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 0030 -16-17

दिनांक (Date): 04.08.2016, जारी करने की तारीख (Date of issue): 08/08/16

श्री उमा शंकर, आयुक्त(अपील-II) द्वारा पारित

Passed by **Shri Uma Shanker** , Commissioner (Appeals-II)

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

मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No.01/ADC/2015/DSN Dated: 11/05/2015

issued by:Additional Commissioner.,Central Excise (Div-IV), Ahmedabad-II

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

M/s Photokina Chemicals 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 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 ।

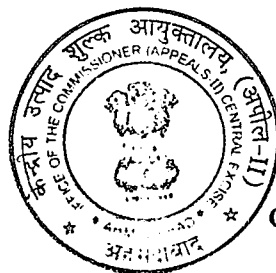
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by 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 ।

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- (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 इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरण 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। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक 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 यथार्थिती 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 Appellate 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 यथार्थिती 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।

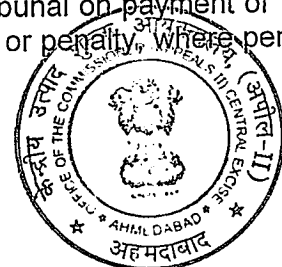
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section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



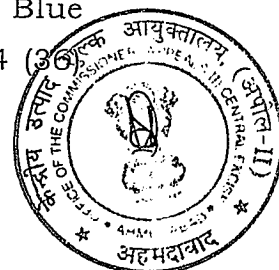
ORDER IN APPEAL

The subject appeal is filed by M/s. Photokina Chemicals Pvt. Ltd., 556/B, Tajpur Road, Sarkhej-Bavla Highway, Changodar, Tal.Sanand, Dist: Ahmedabad, (hereinafter referred to as '*the appellant*') against Order in Original No. 01/ADC/2015/DSN (hereinafter referred to as '*the impugned order*') passed by the Additional Commissioner, Central Excise, Ahmedabad-II (hereinafter referred to as '*the adjudicating authority*'). The appellant is engaged in the manufacture of excisable goods falling under chapter 37, 38 & 39 of the first schedule to the Central Excise Tariff Act, 1985. They are availing the Cenvat credit under the provisions of Cenvat Credit Rules, 2004.

2. The fact in brief of the case is that, the audit of the appellant's factory was conducted by the department; it has been observed that the appellant is engaged in manufacturing of exempted goods as well as trading activities. The appellant has availed Cenvat credit of certain input services i.e. Banking Service, Security Service, Telephone service etc. which are commonly used for manufacturing activities as well as for exempted goods/ trading activities. As per Rule 6(3A) (b) (iii) of Cenvat Credit Rules, 2004, the proportionate Cenvat credit in respect of services commonly used in dutiable goods as well as for exempted goods/ exempted service i.e. trading activities is required to be reversed. The appellant has taken Cenvat Credit of Service Tax Rs. 6,60,561/- during the period from 2009-2010 to 2013-2014 (up to February 2014), and required to be recovered under Rule 14 of Cenvat Credit Rules, 2004 read with Section 11A of Central Excise Act, 1944. SCN was issued and decided vide above order, and reduced the demand of Rs. 82,305/- and confirmed the demand of Rs.5,78,256/- with interest and imposed penalty of Rs. 374492/-.

3. Being aggrieved with the impugned order the appellant has filed the instant appeal, on the following grounds and contended that:

Trading activity is considered as exempted service came to be inserted vide the Notification No. 3/2011-CE (NT) dated 01.03.2011. Thus, prior to 01.03.2011, the provisions made under Rule 6 of the CCR, 2004 cannot be applied in the case of trading activity and no amount is required to be demanded and paid for the period 2009-10 to 2010-11. The Appellant would like to rely upon the decisions in the cases of 1. Blue Star Ltd. 2013 (30) SIR 392 and 2. Clariant Chemicals (I) Ltd. 2014 (30) SIR 885.



The adjudicating authority has failed to correctly quantify the amounts demanded in the years 2012-13 and 2013-14. same proportion CENVAT credit of common input services is required to be demanded and reversed.

The Appellant has made full disclosure of their activities and filed ER-1 returns from time to time giving required information to the department, about availment of credit. The demand for the year 2011-12 to 2012-13, not valid as it has been raised covering the extended period. That only proportionate credit in respect of normal period i.e 2013-14 is to be reversible.

4. Personal hearing was accorded on 08.06.2016, Shri J.T. VYAS advocate appeared on behalf of the appellant and reiterated the submissions made vide their appeal memorandum. He submitted copies of following Orders, 1.No.2015[329]ELT897[TRI.del] CCE Chandigarh v. M/S Punjab tractors ltd.2. 2015[330]ELT561[TRI.ahmd] M/s. dhakad metal corporation v. CCE &ST DAMAN 3. 2016[41]STR577[Bom] M/S.Mercedes Benz India P. Ltd. V. CCE Pune, and requested that appeal be allowed. I have carefully gone through the case records, facts of the case, submission made by the appellant at the time of personal hearing and also filed submission on dated 28-7-16. I find that, the appellant is engaged in manufacturing of exempted goods as well as trading activities. The appellant has availed Cenvat credit of certain input services which are commonly used for manufacturing activities as well as for exempted goods/ trading activities. As per Rule 6(3A) (b) (iii) of Cenvat Credit Rules, 2004, the proportionate Cenvat credit in respect of services commonly used in dutiable goods as well as for exempted goods/ exempted service i.e. trading activities is required to be reversed. I find that, Rule 6(3A) (b) (iii) of Cenvat Credit Rules, 2004 provides that;

"(3A) For determination and payment of amount payable under clause (ii) of sub-rule (3), the manufacturer of goods or the provider of output service shall follow the following procedure and conditions, namely:

(a)

(b) the manufacturer of goods or the provider of output service shall, determine and pay, provisionally, for every month,-

(iii) the amount attributable to input services used in or in relation to manufacture of exempted goods or provision of exempted services (provisional) =



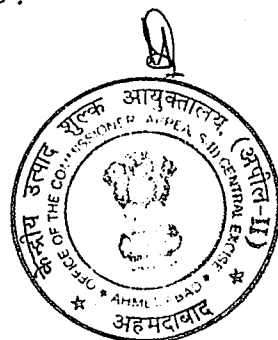
(E/F) multiplied by G, where E denotes total value of exempted services provided plus the total value of exempted goods manufactured and removed during the preceding financial year, F denotes total value of taxable and exempted services provided, and total value of dutiable and exempted goods manufactured and removed, during the preceding financial year, and G denotes total CENVAT credit taken on input services during the month;

5. I find that, the input service credit is allowed only when the said service is used in or in relation to the manufacture of excisable final product. The appellant has taken Cenvat Credit of Service Tax of the said input services which are commonly used in both manufacturing activity and trading activity. Said CENVAT credit was not debited in terms of said Rule during the period from the year 2009-2010 to 2013-2014 (up to February 2014).

6. I find that, trading activity became exempted service from 01.03.2011 vide the Notification No. 3/2011-CE (NT) dated 01.03.2011. Hence, no amount is required to be reversed for the period 2009-10 to 2010-11. I would like to rely upon the decision in the case of M/s. Mercedes Benz India P. Ltd. V. CCE Pune. 2016[41]STR 577[bom].

7. Further, I find that, in view of change in definition of Input Service with effect from 01.04.2011 and change in definition of exempted service under Rule 2 (e), as per Cenvat Credit (Sixth Amendment) Rules, 2012, vide Noti. No. 28/2012-C.X.(NT) dated 20th June, 2012, it is clear that the trading activity is also an exempted service and therefore, credit of the services used in relation to the trading activity is not allowed to the Appellant for the year 20011-12 to 2013-14 (up to February-2014). However, I find that, the appellant has made full disclosure of their activities and filed ER-1 returns from time to time giving required information to the department, about availment of credit. I rely on the case laws in the case of 1. 2015[329]ELT897[TRI.del] CCE Chandigarh v. M/S Punjab Tractors Ltd. 2. 2015[330]ELT 561 [TRI.ahmd] M/s.Dhakad Metal Corporation v.CCE & ST DAMAN, and 3. M/s.Shah Alloys Ltd.v.CCE,Ahmedabad-III in which it was held by the Hon'able Tribunal that;"

Once ER-1 Return is filed, even though it is filed under self-assessment system, the officers are supposed to scrutinize the same it is held that show cause notice which has been issued by the lower authorities demanding reversal of cenvat credit by invoking extended period of limitation is set aside".



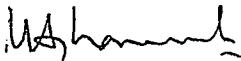
Similarly Hon'able CESTAT Ahmedabad in the case of Asian Tubes Ltd. vs. CCE, Ahmedabad [2011 (263) ELT 707] held that;

"having accepted that the appellant had filed Monthly returnsAt the most it is interpretation of law and hence extended period of limitation cannot be invoked."

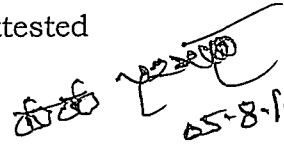
In view of above, I hold that, in this case the demand for the year 2011-12 to 2012-13, is not sustainable.

8. Further, I hold that, only proportionate credit in respect of normal period i.e for the year 2013-14 is to be reversed by the appellant an amount Rs.146673/-along with applicable interest.

9. In view of the foregoing discussion and findings, I modify the impugned order to above extent and allow the appeal. The appeal stands disposed of as above.


[Uma Shanker]
Commissioner (Appeals-II)
Central Excise, Ahmedabad

Attested


[K.K.Parmar]
Superintendent (Appeals-II)
Central excise, Ahmedabad.

By Regd. Post Ad.

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Copy to :

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-II.
3. The Asstt. Commissioner, Central Excise, Div-IV, AhmedabadII
4. The Asstt.Commissioner (Systems), Central Excise, Ahmedabad-II.
5. Guard file.
6. PA file.

