



सत्यमेव जयते

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

**शुल्क::**

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,  
7<sup>th</sup> मंजिल, केंद्रीय उत्पाद शुल्क भवन, 7<sup>th</sup> Floor, Central Excise  
पोलिटेकनिक के पास, Building,  
आम्बवाडी, अहमदाबाद : 380015 Near Polytechnic,  
Ambavadi,  
Ahmedabad:380015



रजिस्टर डाक ए .डी .द्वारा

2044-48

क फाइल संख्या (File No.): V2(32) 43/Ahd-II/Appeals-II/ 2015-16

स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 049 -16-17

दिनांक (Date): 27.09.2016, जारी करने की तारीख (Date of issue): 05/10/16

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

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

ग \_\_\_\_\_ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-III), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं \_\_\_\_\_ दिनांक \_\_\_\_\_ से सृजित

Arising out of Order-In-Original No.07/AC/D/UKG/2015 Dated: 29-04-2015

issued by: Assistant Commissioner.,Central Excise (Div-III), Ahmedabad-II

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

**M/s Trinity Pigment Industries**

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 ।



*A. John*

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 :-

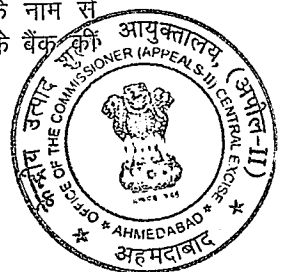
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू गैन्टल 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। की फीस सहायक रजिस्टार 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 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 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 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 .Trinity Pigment Industries, Plot No. 609 & 610, GIDC Kerala,Bavla, Dist Ahmedabad - 382 220 (hereinafter referred to as 'the appellant') against the Order in Original No.07/AC/D/UKG/2015 dated 29-4-15 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise, Division-III, Ahmedabad-II (hereinafter referred to as 'the adjudicating authority'). The appellant is engaged in the manufacture of excisable goods falling under Chapter 32 of the First Schedule to the Central Excise Tariff Act,1985[hereinafter referred as CETA-1985].they are also availing Cenvat credit under the provisions of Cenvat Credit Rules, 2004.

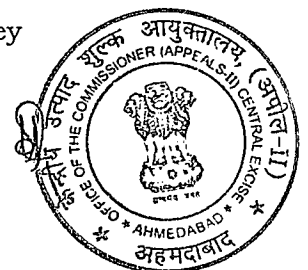
2. The facts in brief of the case is that, during the course of scrutiny of the Excise Records, it was revealed that as per the ER-1 return for the quarter SEPT-2013, the appellant was required to pay Excise duty of Rs. 478328/-. The appellant has submitted details for the default period, the total value of goods cleared by them was Rs.3127400/-and Excise duty comes to Rs. 386547/-.They have failed to pay duty within 30 days. Hence, as per the provisions of Sub-rule 3A of Rule 8 of the CER 2002, the appellant was required to clear the finished goods consignment wise by paying duty from cash account. However, the appellant has discharged duty on monthly basis from Cenvat Account in violation of the provisions of Sub-rule 3A of Rule 8 of the Central Excise Rules, 2002. SCN was issued for recovery of cenvat credit of Rs.386547/ by way of cash payment, under the provisions of Rule 8 (3A) of the CER 2002 with interest. Excisable goods valued at Rs. 3127400/-should be confiscated under the provisions of Rule 25 of the Central Excise Rules, 2002. Vide above OIO confirmed the demand with interest and penalty imposed Rs.386547/-

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

They have paid Rs.386547/-for respective quarter by the specified due date. There was a short payment of Rs.1492/-which was paid by challan dated 13.12.2013, they relied upon judgments: 1. IINDUSAR GLOBAL LTD. V/s UOI cited at 2014 (310)ELT-833(GUJ] 2. UOI V/s. KAMALAKSHI CORPORATION LTD. cited at 1991 (55) ELT-433(SC).

The goods cleared during the default period were not seized, thus the question of confiscation of the goods does not arise. Penalty under Rule 25 of CER cannot be imposed on them in view of the judgment given by the Hon'ble High Court of Gujarat in case of CCE & Cus. V/s. Saurashtra Cement Ltd., cited at 2010 (260) ELT-71 (GUJ)

4. Personal hearing was granted to them on 19-8-16, Shri A.K.Samriya, account Manager attended on behalf of the appellant. They requested to consider the submission made in their grounds of appeal, and submission on 19-6-2015. They placed reliance on relevant decisions and accordingly requested to allow the appeal.



5. I have carefully gone through the records of the case as well as the written submissions made by the appellant. I find that, the issue to decide is the default of payment of excise duty by the prescribed due date and its consequential penalty and payment of interest. I have gone through the case records and submissions. I find that, from the facts of the case, it is evident that the appellant has paid their duty of excise beyond 30 days of the stipulated date of payment as prescribed under Rule 8 ibid. the duty was paid by utilizing cenvat credit. I find that, provisions of sub-rule (1), (3) and 3(A) of said Rule 8 ibid, which read as under:

*Rule 8. Manner of payment. — (1) The duty on the goods removed from, the factory or the warehouse during a month shall be paid by the 6th day of the following month, if the duty is paid electronically through internet banking and by the 5th day of the following month, in any other case: for the period starting with the first day after due date till the date of actual payment of the outstanding amount (34) ([the assessee defaults in payment of duty beyond thirty days from the due date, as prescribed in sub-rule (1), then notwithstanding anything contained in said sub-rule (1) and sub-rule (4) of rule 3 of CENVAT Credit Rules, 2004, the assessee shall, pay excise duty for each consignment at the time of removal, without utilizing the CENVAT credit till the date the assessee pays the outstanding amount including interest thereon; and in the event of any failure, it shall be deemed that such goods have been cleared without payment of duty and the consequences and penalties as provided in these rules shall follow.*

Thus, it is evident from the above provisions of Rule 8, that once the assessee defaults in payment of duty beyond thirty days from the due dates, the assessee is liable to pay excise duty for each consignment at the time of removal, without utilizing the cenvat credit till the date the assessee pays the outstanding amount including interest thereon.

6. In the instant case, I find that, the appellant has failed to pay the Excise duty within stipulated time limit and even failed to pay the duty within thirty days from due date of 5th day of following month. They have also utilized cenvat credit for payment of central excise duty paid after 30 days period and thereby contravened the provisions of Rule 8(3) (A) ibid. the appellant has defaulted in payment of duty of excise for the said period. The appellant was liable to pay excise duty from Account Current for each consignment at the time of removal of excisable goods. However, they have failed to remove excisable goods on payment of central excise duty by debit from their account current on consignment wise as required under Rule 8(3)(A) of Central Excise Rules, 2002. I find that, since duty liability for the period of default was discharged from cenvat account, the same has been construed as violation of Rule 8(3A) of CER.2004.

7. I find that, the Hon'able high court of Gujarat in the case of Indusr Global Ltd. Vs. Union of India [2014 (310) E.L.T. 833 (guj) the portion 'without utilising the cenvat credit' of the sub-rule (3A) of Rule 8 of Central Excise Rules, 2002 has

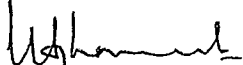


*[Handwritten signature]*

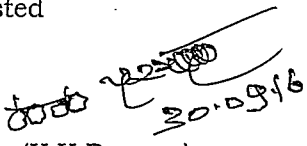
been held *ultra vires* to the Constitution of India, and in case of Malladi Drugs & Pharmaceuticals Ltd. Vs. Union of India [2015 (323) E.L.T. 489 (Mad.)], it has been held that there being no case of availing wrong / irregular credit, right to utilize such credit in paying duty cannot be taken away. It has also been held that Rule 8(3A) being procedural, prescribing manner and method of payment of duty only, cannot infringe substantive rights provided in Cenvat Credit Rules, 2004.

I find that adjudicating authority has not at all discussed any of the judicial pronouncements and routinely confirmed the SCN, which is not proper and tenable. In the fitment of the matter, the case should be remanded to the original authority.

8. In view of foregoing discussion and findings, I set aside the impugned order and allow the appeal filed by the appellant by way of remand. The appeal stands disposed of as above.

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

Attested

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

By Regd. Post A.D.

M/s. Trinity Pigment Industries,  
Plot No- 609 & 610,  
Kerala GIDC,  
Ta-Bavla,  
Dist. Ahmedabad-382 220.

Copy to:

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

