



सत्यमेव जयते

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

शुल्क::

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



रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(29) 1/EA-2/Ahd-II / 2015-16 / 2790-2794
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 059 -16-17
दिनांक (Date): 28.10.2016, जारी करने की तारीख (Date of issue): 08/11/16

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

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-I), अहमदाबाद- II, आयुक्तालय द्वारा जारी
मूल आदेश सं _____ दिनांक _____ से सृजित
Arising out of Order-In-Original No. 52/ADC/2014/DSN Dated: 10/20/2014
issued by: Additional Commissioner.,Central Excise (Div-I), Ahmedabad-II

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

M/s Refnol Resins & Chemicals 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 प्रक्रिया 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 दिनोंक 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 और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहाँ रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और 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 और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहाँ 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 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 the department under section 35(2) of Central Excise Act, 1944, against OI No. 52/ADC/2014/DSN, dated 20.10.2014, passed by the Additional Commissioner, Central Excise, Ahmedabad II, In The Case of M/s. Refinol Resins & Chemicals Ltd. Plot No. 23, Phase III, GIDC, Naroda, Ahmedabad, [hereinafter referred as 'the respondent'] engaged in the manufacture of Organic Chemicals and Dyes falling under CH- 29 and 32 of the Central Excise Tariff Act, 1985 [CETA-1985]. They are availing Cenvat Credit under the provisions of Cenvat Credit Rules, 2004 (hereinafter referred to as the CCR, 2004).

2. Briefly stated the facts of the case is, during the course of audit, it was observed that the respondent had availed the services of Foreign Commission Agents for procuring orders for sale of their finished goods and Availed Cenvat credit Rs. 5,78,109/- for the period from June' 2011 to August' 2013. It appeared that the said services were performed beyond the factory gate and were not "Input Services" as defined in Rule 2(1) of the Cenvat Credit Rules, 2004. Show Cause Notice was issued for recovery of Cenvat Credit under Rule 14 of the Cenvat Credit Rules, 2004 along with interest and penalty. Same was decided vide above order and dropped the demand.

3. Being aggrieved with the said impugned order the appellant preferred this appeal on the following main grounds.

The returns prescribed under sub Rule (7) of Rule 9 of the Cenvat Credit Rules, 2004 does not have any column prescribing disclosure of the category of service on which the credit was taken. The sub Rule (6) of Rule 9 of Cenvat Credit Rules, 2004 casts the onus on the person taking the credit in so far as the admissibility is concerned.

Further, in case of M/s. Vikram (spat Vs CCE, Raigad - 2009 (16) S.T.R. 19I and it has been clearly held by the Hon'ble H.C. of Gujarat in case of M/s. Cadila Healthcare Ltd. (Supra) that the service of commission agent is related to sales and not advertisement or sales promotion .

In the present case Hon'ble Gujarat High Court decision in the case of M/s. Cadila Healthcare Ltd. (Supra) is contrary to the clarification given in Board's Circular No. 943/4/2011-CX, dated 29.04.2011 and it is not stayed or set aside by the Hon'ble Supreme Court, so it is equally binding on the department and the respondent.

In the present case the fact of irregular availment of CENVAT was suppressed by the respondent in as much as, the fact of irregular availment was not ascertainable from the periodical returns as the returns were showing only quantum of CENVAT credit availed, therefore the period under which wrongful credit is availed extends from April-2009 to June-2013, instead of normal period as per Section 11 A (5) of Central Excise Act, 1944.

4. The respondent also submitted written submissions dated 27-7-16 and contended that; Vide Board's circular No 943/04/2011 Cx. dt.29-4-2011, it has been clarified that Credit is admissible on the service of sale of dutiable goods on commission basis. Hence services are eligible as Input service and amounts to sales promotion.

The judgment of Hon'able Gujarat High Court in the case of *Cadila Healthcare Ltd-2013(30)STR.3(Guj)* which was followed in cases like *Astik Dyestuff Pvt. Ltd.* that the said case law could not be applied for past period and applicable only prospectively.

That Hon'able Supreme Court in the case of *Bombay Tyre International-1983 (14) ELT. 1896 (SC)* held that selling and marketing expenses were also a part of manufacturing cost and hence were manufacturing activity. Tribunal in cases like *Bhilai Auxilian Industries-2009 (92) RLT.97* held that cenvat credit of service tax paid by commission agents was also available. Judgment of Hon'ble Bombay High Court in case of *Coca Cola India Pvt. Ltd-2009 (15) STR. 657 (Bom)* held that commission agents service were in the nature of activities related to business and therefore covered under rule 2[1] of CCR 2004. They relied on case laws 1. *Abhishek Industries Ltd-2008 (9) STR.562*, 2. *Metro Shoes Pvt.Ltd-2007 (8) STR.502 (Tri)*. That there had not been any suppression of facts and that they had disclosed all the details of availment of such credit in their cenvat credit register and periodical returns. The invocation of extended period of limitation was illegal. That there were decisions in case of *Ambica Overseas-2012 (25) STR.348 (P&H)*. They relied upon the decisions of 1. *Tata Tin Industries-1994 (70) ELT.731 (Tr)*, 2. *Bony Rubber Co.Pvt. Ltd-1996(84) ELT.58*, 3. *Padmini Products-1989 (43) ELT.195 (SC)*, *Chemphar Drugs Liniments-1989 (40) ELT.276 (SC)*, Therefore no penalty would be justified.

5. Personal hearing in the matter was held on 03.8.2016, wherein shri Sudhanshu and A.P. Dave Advocates, appeared on behalf of the appellant and reiterated the submissions made on 27-7-16. I have carefully gone through the records of the case as well as the written submissions filed. I find that the respondent has been allowed the Cenvat credit during the period from feb-2009 to june-2013, on service tax paid to Sales Commission agents. The issue to be decided is the admissibility of Cenvat Credit availed by the respondent is correct or not.

I find that, Hon'ble High Court of Gujarat in case of *CCE Ahmedabad-II V/s. M/s. Cadila Health Care Ltd., 2013 -TIOL-12-HC-AHM-ST* dated 18.10.2012 & 07.11.12 has held that,

"commission agent is directly concerned with the sales rather than sales promotion and as such the service provided by such commission agent would not fall within the purview of the main or inclusive part of the definition of input service as laid down in rule 2(l) of the Cenvat Credit Rules 2004".

6. I find that, the respondent relying on various decisions has argued that the ratio of decision of Gujarat High Court in case of *M/s. Cadila Healthcare Ltd.* can only be applied prospectively and not for past period. They have also argued that prior to the deviating stand taken by the Hon'ble Gujarat High Court, various judicial authorities including Hon'ble Punjab & Haryana High Court has already held the cenvat credit of service tax paid on commission paid to such commission agent as



admissible. Relying upon various decisions they have argued that once some benefit was allowed to them, change in view for denying such benefit can be enforced prospectively only. As regards charges of suppression and invocation of extended period, they have argued that their action of availing cenvat credit at the relevant time was in accordance with such circular and case laws. There was no suppression of facts or any willful misstatement or any such illintention based on which they had taken cenvat credit at that time and as such extended period cannot be invoked in their case. I find force in the arguments put forth by the respondent with regard to invoking the extended period, It is evident that till the contradictory view was taken by Hon'ble Gujarat High Court in case of M/s. Cadila Healthcare Ltd. (supra) the admissibility of cenvat credit on service tax paid on commission paid to such sales agents were ruled in favour of the trade by various Tribunals and also Hon'ble Punjab and Haryana High Court. It is also evident that, CBEC in Circular No. 943/4/2011-CX dated 29.04.2011 has also clarified that the cenvat credit was admissible on services of commission agents. therefore; I hold that there was not any suppression of facts or willful misstatement on part of the respondent. Therefore, penalty is not sustainable.

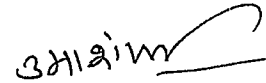
7. I find that, the Cenvat credit for the year 2009-10 & 2010-11 was taken on dated 30-8-11, before the decision of Gujarat High Court in case of M/s. Cadila Healthcare Ltd. they have not taken any credit during the year 2012-13 and 13-14. Therefore, I hold that the respondent is eligible for said Cenvat Credit.

8. Regarding the issue of penalty, I find that the action of respondent, availing cenvat credit at the relevant time was in accordance with such circulars and case laws. There appears no suppression of facts or any willful misstatement, based on which they had taken cenvat credit at that time and as such extended period cannot be invoked in this case. Therefore, penalty is not imposable.

9. In view of foregoing discussion and findings, I uphold the impugned order and disallow the appeal filed by the department. .

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

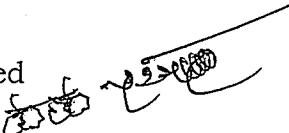
The appeal filed by the appellant stand disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

Attested


(K.K.Parmar)

Superintendent (Appeal-II)
Central Excise, Ahmedabad

By Regd. Post A.D.

M/s. Refnol Resins & Chemicals Ltd.,

Plot No. 23, PHASE-III,

GIDC, Naroda,

Ahmedabad-382330.

Copy to:

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

