



सत्यमेव जयते

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

शुल्क::

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,
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(24)52/Ahd-II/Appeals-II/ 2015-16 / 4648 to 4652
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 079-16-17
दिनांक (Date): 23.12.2016, जारी करने की तारीख (Date of issue): 31/01/17

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 . V/27*100/Chewing Tob/Bagbhan/2012*13

Dated: 30/06/2015

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 Bagbhan Packers P: 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

(□) 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 :-

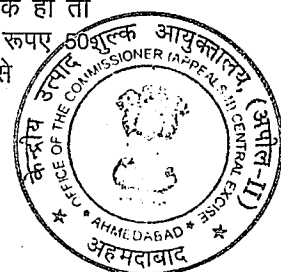
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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 मैन्टल हास्पिटल 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 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 वहां 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 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।

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 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

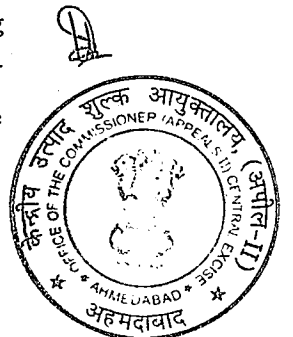
The subject appeal is filed by M/s.Bagbhan Packers P. Ltd.S.no.396,new ahmedabad Ind.Estate,moraiya,Ta-Sanand,Dist-Ahmedabad (hereinafter referred to as *'the appellant'*) against Order No.V/27-100/chewing Tob/bagbhan/2012-13 dated 30.06.2015 (hereinafter referred to as *'the impugned order'*), passed by the Deputy Commissioner, Central Excise,DIV-IV, Ahmedabad-II (hereinafter referred to as *'the adjudicating authority'*). They are Manufacturer of Jarda Scented Tobacco under Chapter 24 of the Central Excise Tariff Act1985 (hereinafter referred to as *'CETA1985'*).

2. Brief facts of the case is that, the appellants vide letter dated 18.05.2015 filed declaration in Form1 to operate one Pouch Packing Machine (PPM) for packing of Jarda Scented Tobacco and requested the Deputy Commissioner for de sealing and installing one PPM in the mid night of 31.05.2015 with effect from 01.06.2015. The appellants deposited the duty amounting to Rs.8885000/- the intimation in Form 2 was submitted on dated 05.06.2015. Team of officers of the department, with Government approved Chartered Engineer, videographers and two panchas visited their factory premises on 02.06.2015. The said team counted the number of pouches packed on the said PPM, and it was observed that during first attempt, the number of pouches was 189 per minute, while in the second attempt it was 188 pouches per minute. The Chartered Engineer informed that the maximum speed is 250 pouches as per HMI; that he would give his findings in his report. Thereafter *the adjudicating authority* vide letter F. No. no.V/27-100/chewing Tob/bagbhan/2012-13dated30.06.2015informed the appellant that the installed machine can operate with maximum speed of above 300 pouches per minute and directed the appellants to pay the duty as per second slab of Notification No. 25/2015-CE, dated 30.04.2015 and directed to pay differential duty along with interest.

3. Having been aggrieved by the impugned order, the appellants submitted this appeal on the following main grounds. That they have requested for early hearing vide letter dated 18-03-16.on the ground that, entire manufacturing activity has been discontinued from May 2015. the appellants have not been heard in this matter.

The appellant has requested to determine the ACP on the basis of report that the said PPM can operate with maximum speed of 250 pouches per minute. that the speed of the said PPM may be got verified.the direction of the deputy Commissioner, to pay duty as per second slab of Notification No. 25/2015-CE, is without any basis and evidence on record and it is contrary to the factual position which was ascertained in presence of independent Panchas.

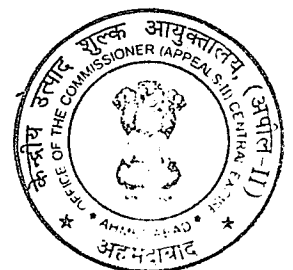
That any order adverse to the appellants could be passed only after allowing reasonable opportunity of being heard. The impugned order not based on any evidence is legally not sustainable. The Deputy Commissioner should have quantified the correct ACP and the duty liability as per the the rules, if



there is any short payment of duty, it was obligatory on the part of the Deputy Commissioner to have issued a notice for recovery of short paid duty under section 11A of the Central Excise Act 1944. To grant the appellants all the documents and reports as requested by them. To determine the ACP as per the prevailing statutory provisions, after following the principles of natural justice and passing a speaking Order and to consider the abatement application in view of the correctly quantified ACP duty liability for the period under reference.

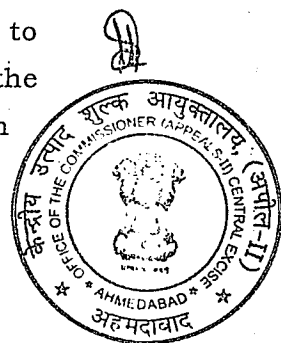
4. Personal hearing in the above matter was granted on 16-11-2016 as requested for early hearing vide their letter dated 18-03-16. Shri N.K.Tiwari Consultant on behalf of The Appellant Appeared for Personal Hearing. he requested to consider the written grounds of appeal and referred to the Comm'r [Appeals] order in the identical case of Thakkar Tobacco Products P.Ltd.. I have gone through all records, the impugned order and written submissions as well as submissions made during personal hearing by the appellants. I find that the issue to be decided in this case is the order issued vide letter F. No. No.V/27-100/Chewing Tob/bagbhan/2012-13 dated 30.06.2015 by the adjudicating authority, directing the appellants to pay differential duty in terms of second slab of Notification No. 25/2015-CE, dated 30.04.2015 is legally correct or not. I find that the appellant vide letter dated 18.05.2015 filed declaration in Form 1, to operate one Pouch Packing Machine (PPM) for packing of Jarda Scented Tobacco and requested the adjudicating authority for de sealing and installing one PPM in the mid night of 31.05.2015 with effect from 01.06.2015. The appellant has deposited duty amounting to Rs.8885000/ and the intimation in Form 2 was submitted vide letter dated 05.06.2015. Officers of the department with Government approved Chartered Engineer, videographers and two panchas visited their factory premises on 02.06.2015. The team of officers counted the number of pouches packed on the said PPM, three times and it was observed that the number of pouches was 189 per minute, while in the second attempt it was 188 pouches per minute. the Chartered Engineer informed that maximum speed is 250 pouches as per HMI, that he would give his findings in his report. Thereafter, the adjudicating authority vide said letter informed the appellant that the installed machine can operate with maximum speed of above 300 pouches per minute and directed the appellants to pay the duty as per second slab of Notification No. 25/2015-CE, dated 30.04.2015. The range Superintendent, vide letter dated 08.07.2015 requested the appellants to pay duty in terms of second slab of Notification No. 25/2015-CE, dated 30.04.2015.

5. I find that, the appellant have contended that, on all the attempts the maximum packing speed of said machine was found to be less than 300 pouches per minute. the direction of the deputy Commissioner by considering the maximum packing speed of the said pouch packing machine as above 300 pouches per minute, to pay duty as per second slab of said Notification. On perusal of



the impugned communications, the Annual Production Capacity of the appellant's factory has been determined without following the procedure as provided under sub-rule (2) of rule 6 of the Pan Masala Rules. The impugned communications are therefore, violative of the provisions of said Rules, Another important aspect of the matter is that the appellant has been directed to pay the differential duty in relation to the month of June 2015 in respect of which, Form-1 submitted and accepted and the duty had already been paid. The Deputy Commissioner should have quantified the correct ACP and the duty liability as per the requirement of the rules and thereafter if there is any short payment of duty, it was mandatory on the part of the Deputy Commissioner to have issued a notice for recovery of short paid duty under section 11A of the Central Excise Act 1944.

6. I find that, the provisions of section 11A of the Central Excise Act, 1944, which provides for "Recovery of duties not levied or not paid or short-levied or short-paid or erroneously refunded" the Central Excise Officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty which has not been so levied or paid or which has been so short-levied or short-paid or to whom the refund has erroneously been made, requiring him to show cause as to why he should not pay the amount specified in the notice. Sub-section (1) of section 11A of the Act provides that the Central Excise Officer shall, after allowing the concerned person an opportunity of being heard, and after considering the representation, if any, made by such person, determine the amount of duty of excise due from such person not being in excess of the amount specified in the notice. Thus, in case the duty paid by the appellants for the month of June 2015 was short-paid, the adjudicating authority was required to resort to the provisions of section 11A of the Central Excise Act and without following the procedure as prescribed there under, could not have sought to recover the differential rate of duty by the impugned communications. In fact, the impugned communications do not refer to any provision of law under which the same have been issued. Whereas the subject under which the impugned communications have been issued is fixation of Annual Production Capacity of the Pouch Packing Machines. By the impugned communications, the appellant has been directed to pay the differential duty for the month of June 2015. In the present case, I agree with the contention of appellants. I rely on the decision in the identical case of m/s.Vishnu Pouch Packaging Pvt. Ltd. V UOI, in SCA No.12154/2015 of Hon.HighCourt of Gujarat. I find that the impugned communications are not justified, in as much as, the same are in breach of the principles of natural justice as no opportunity of hearing has been given to the appellant prior to revising the Annual Production Capacity of the appellant, due procedure as prescribed under sub-rule (2) of rule 6 of the Pan



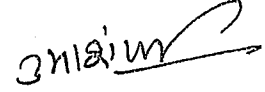
Masala Rules has not been followed for the purpose of re-determining the Annual Production Capacity of the appellant's Pouch Packing Machines; the procedure as prescribed under section 11A of the Central Excise Act has not been followed while seeking to recover the differential amount of duty by the impugned order. Therefore, the impugned order deserves to be quashed and set aside.

7. In view of the foregoing discussion and findings, I order to the lower authority to determine the ACP as per the prevailing statutory provisions, after following the principles of natural justice and passing a speaking Order. The impugned communications are hereby quashed and set aside. However, setting aside of the impugned order would not prevent the department from re-determining the Annual Production Capacity of the appellant's Pouch Packing Machines in accordance with law, nor are the department barred from taking suitable action under section 11A of the Central Excise Act, 1944 as well as under sub-rule (2) of rule 6 of the Pan Masala Rules, seeking to recover the differential amount of duty from the appellant.

8. Therefore, I set aside the impugned order and allow the appeal filed by the appellant.

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

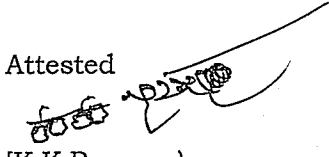
The appeal filed by the appellant stand disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - II)

Attested


[K.K.Parmar]

Superintendent (Appeals-II)
Central excise, Ahmedabad

By Regd. Post A. D

M/s. Bagbhan Packers P.Ltd.

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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, Division-III, Ahmedabad-II
4. The Asstt. Commissioner (Systems),Central Excise, Ahmedabad-II.
5. Guard file.
6. PA file.



