



सत्यमेव जयते

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

शुल्क::

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,  
7वीं मंजिल, केंद्रीय उत्पाद शुल्क भवन,  
पोलिटिकनिक के पास,  
आम्बवाडी, अहमदाबाद : 380015



7<sup>th</sup> Floor, Central Excise  
Building,  
Near Polytechnic,  
Ambavadi,  
Ahmedabad:380015

रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(21)80,81,82&83 /Ahd-II/Appeals-II/ 2016-17 /303 to 310  
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 087-088-089-090-16-17

दिनांक (Date): 17.02.2017 जारी करने की तारीख (Date of issue): 21/02/17

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's . 55-56-57-58/Refund/2016 Dated: 09/08/16

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 Vishnu Pouch Packaging 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:

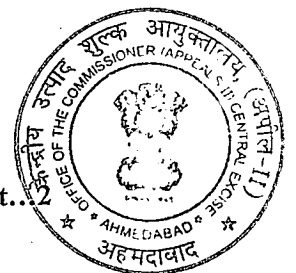
(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो ।

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 :-

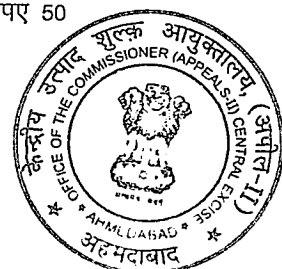
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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 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 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 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 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

The subject appeals are filed by M/s. Vishnu Pouch Packaging Pvt. Ltd., having their four units at village-Moraiya, Ahmedabad (hereinafter referred to as 'The Appellants') against the Order in Original No.55 to 58/Refund/2016 all dated 08-9-16 (hereinafter referred to as 'the impugned orders') passed by the Asstt. Commissioner, Central Excise, Div-IV, Ahmedabad-II (hereinafter referred to as 'the adjudicating authority'). The appellants herein are engaged in the manufacture of Pan Masala falling under Chapter 21 of the First Schedule to the Central Excise Tariff Act, 1985. The appellant is paying duty on the goods in terms of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 (hereinafter referred to as the PMPM Rules).

2. Brief facts of the case is that the appellants had filed four refund claims on dated 1. 13-5-16 for Rs.5916516/- 2. 10-5-16 for Rs. 56600903/-3. 10-5-16 for Rs.4809935/-and 4. on 13-5-16 for Rs.2008645/- said refunds of proportionate duty for 02 to 6 days i.e. from 18.05.2015 to 23.05.2015, during that period for which various PPMs were sealed and seized by the Officers of DGCEI, DZU, New Delhi. They had requested for de-sealing of said PPMs for operating pouches. The proportionate duty amount as mentioned above was claimed as refund, with regards to the refund of duty already deposited by the appellants. The refund was claimed mainly on the ground that during the said days, they could not conduct any manufacturing activity, as those PPMs were sealed and seized by the DGCEI Officers. The appellants were issued four show cause notices and vide said orders; the adjudicating authority has rejected all refund claims.

3. Being aggrieved with the impugned orders, the appellants preferred these appeals on the following main grounds.

That the total amount involved in the refund claims is around Rs.7 crores taking into consideration the high amount involved in the case, an out of turn early hearing is requested to be considered.

That the said refund claims are not in terms of Rule 10 of the PMPM Rules; that as a result of seizure of the PPMs, the possession of all the said PPMs was with the Central Government and therefore, for the said period, no duty is to be paid. The appellants relied upon the decision of the Hon'ble Tribunal in the case of Dhariwal Industries Ltd. and Rajat Industries P. Ltd.

That the adjudicating authority has committed error in considering and calculating the refund claim filed. It was to be examined in light of the statutory provision under Rule 10 of the PMPM Rules. That the said Rule 10 of the PMPM Rules provides for abatement in case of non-production of goods subject to the conditions mentioned in the said Rules. In the present case, the issue before the adjudicating authority was with regards to the refund of amount of duty already



deposited by the appellant and subsequent to the deposit of duty, the appellant were not allowed to manufacture the notified goods by way of sealing and seizure of the PPMs by the officers of DGCEI. The word "abated" has not been defined in the statute and therefore the ordinary meaning assigned to the said word has to be considered. The word abatement means to reduce, whereas, in the present case issue was of refund of duty already deposited. The impugned order is legally not sustainable.

The adjudicating authority has examined the provisions of Rule 16 of the PMPM Rules and has held that the said Rule 16 deals with the permanent closure of the factory and the refund claim could not be associated as it was on totally different circumstances. The appellants in support of applicability of Rule 16 of the PMPM Rules had relied on the decision of the Hon'ble Tribunal in the case of Dhariwal Industries Ltd. vs. Commissioner of CE &ST. The Hon'ble Tribunal held that 'the provisions of Rule 16 would apply in case a manufacturer closed down his factory in respect of all the machines installed in the factory.' Thus, for the period for which they could not use the installed PPMs, no duty is required to be paid, and the amount of duty deposited in advance is required to be refunded. The said decision of the Tribunal was binding on the adjudicating authority.

The adjudicating authority in para 14 of the impugned order has opined that no duty of excise is required to be paid by the appellant for the period when its PPMs were sealed and seized by the DGCEI officers. The appellants refers to the provisions of Rule 18 of the PMPM Rules. The said Rule 18 is reproduced below:

*"Provisions to apply mutatis-mutandis - Except as herein provided, all provisions of the Act and Central Excise Rules, 2002, including those relating to maintenance of daily stock account, removal of goods on invoices, filing of returns and recovery of dues shall apply mutatis-mutandis".*

Rule 18 of the PMPM Rules, provides for the applicability of the provisions of Central Excise Act and Rules mutatis-mutandis. The impugned order having been passed without considering the PMPM Rules is legally not sustainable.

In the present case, the appellants did not intend to discontinue the manufacturing activity at any stage, but it was the department which had sealed and seized the PPMs resulting in total closure of the factory of the appellant. Therefore, there was no reason to deny the refund claim for the period when all the machines were sealed and seized by the department.

The appellants had relied upon the decision of the High Court of Punjab and Haryana in the case of Godwin Steels (P) Ltd., wherein, it was held that Central Excise duty is Section 3 of the Central Excise Act is the main charging section and thus if no goods are manufactured or produced, the manufacturer is not required to pay duty. As such, the impugned orders are legally not



sustainable.

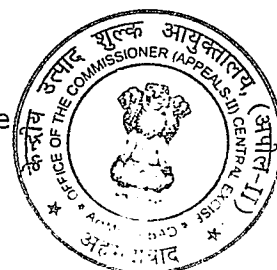
4. Personal hearing was fixed on dated 06.1.2017, Shri N.K.Tiwari, Advocate, appeared on behalf of the appellants and reiterated the submissions made vide their appeal memorandum. He cited the Orders of 1. Godwin Steels [P] Ltd. Vs. CCE, Chandigarh 2010[254]ELT 202 [P&H] 2.Dhariwal Industries Ltd. Vs. Commissioner of CE &ST, Vadodara-I 2015[330] ELT 639 [Tri,Ahmd] and submitted that following the same ratio, that no duty of excise is required to be paid by the appellant for the period when its PPMs were sealed and seized by the DGCEI officers. Appeals be allowed. I have carefully gone through the case records, OIO's, submissions made by the appellants and the case laws cited by the appellants.

5. I find that, that the said refund claims are not filed in terms of Rule 10 of the PMPM Rules; that as a result of seizure of the PPMs, the possession of all the said PPMs was with the Government and therefore, the appellant have claimed that for the relevant period, no duty is required to be paid. Therefore, The impugned orders being unreasoned should be quashed and set aside.

6. I find that the adjudicating authority has considered the refund claims filed, in the light of the statutory provision under Rule 10 of the PMPM Rules. The said Rule 10 of the PMPM Rules provides for abatement in case of non-production of goods subject to the conditions mentioned in the said Rules. In the present case, the issue before the adjudicating authority was with regards to the refund of amount of duty already deposited by the appellant and subsequent to the deposit of duty, the appellants were not allowed to manufacture the notified goods by way of sealing and seizure of the PPMs by the officers of DGCEI, New Delhi. It was submitted by the appellants that the present refund claims filed, it was not under the provisions of Rule 10 of the PMPM Rules. Rule 10 of the PMPM Rules stipulates that in case a manufacturer did not produce notified goods for a continuous period of 15 days or more, the duty on proportionate basis shall be abated. Whereas, in the present case the issue is refund of duty already deposited. Therefore, said impugned orders are not sustainable.

7. Further, I find that the adjudicating authority has examined the provisions of Rule 16 of the PMPM Rules and has held that the said Rule 16 deals with the permanent closure of the factory and the refund claim could not be associated as it was on totally different circumstances. The appellant in support of its contention of applicability of Rule 16 of the PMPM Rules had relied on the decision of the Hon'ble Tribunal in the case of Dhariwal Industries Ltd. vs. Commissioner of CE &ST, 2015 (330) E.L.T., 639 (Tri. - Ahmd.);

Hon'ble Tribunal while making a distinction between Rule 10 and Rule



16 of the said Rules had held that

*"the Refund - Excise duty paid for period of non-production - Closure of factory due to Ministry of Environment and Forest Notification and subsequent reopening of factory upon direction of Supreme Court - Rejection of claim as being contrary to Rule 10 of Pan Masala (Packing Machine Capacity Determination and Collection of Duty) Rules, 2008 - HELD : Refund claim to be covered under Rule 16 ibid - No bar in impugned Rules on reopening factory once declaration of permanently ceasing to work made by manufacturer - Clear intimation of factory closure provided in letter dated 8-2-2011 as required under Rules, to imply surrender of registration - Assessee not to be penalized by rejecting refund claims, for reopening factory - Such reading of provision, to be totally unjust, improper and against all canons of natural justice and fair play - Assessee entitled to refund of duty - Impugned order liable to be set aside - Section 11B of Central Excise Act, 1944. [paras 13, 14]*

*Interpretation of statutes - Rule 10 viz-a-viz Rule 16 of Pan Masala (Packing Machine Capacity Determination and Collection of Duty) Rules, 2008 - Rule 10 ibid extends abatement in case of non-production of goods for certain period - Rule 16 ibid applicable where manufacturer closes factory in respect of all machines installed in factory. [para 9]"*

8. Further, I find that the adjudicating authority has examined the provisions of Rule 16 of the PMPM Rules and has held that the said Rule 16 deals with the permanent closure of the factory and the refund claim could not be associated as it was on totally different circumstances. The appellant in support of its contention of applicability of Rule 16 of the PMPM Rules had relied on the decision of the Hon'ble Tribunal in the case of Dhariwal Industries Ltd. vs. Commissioner of CE &ST, Hon'ble Tribunal while making a distinction between Rule 10 and Rule 16 of the said Rules had held that the expression "a manufacturer permanently ceases to work with respect of all the machines installed in the factory" in Rule 16 of the PMPM Rules had a wide amplitude and should be read with a comprehensive meaning to cover the situation other than that provided under Rule 10 of the PMPM Rules. The Hon'ble Tribunal held that 'the provisions of Rule 16 would apply in case a manufacturer closed down his factory in respect of all the machines installed in the factory.' In the present case, the appellant did not intend to close down its factory, but by an action of the department all the operational PPMs were sealed and seized under Section 110 of the Customs Act, 1962 as made applicable to the Central Excise matters. Therefore, the appellant could not manufacture the notified goods because of the sealing and seizure of all the installed PPMs and the entire factory was closed by an action of the department. Therefore, for the relevant period for which the appellants could not use the installed PPMs, no duty is required to be paid and the amount of duty deposited in advance is required to be refunded.

9. Further, I find that, the judicial discipline demands that an order passed by the higher appellate forum is binding on all the lower authorities. In the present case, the Hon'able Tribunal in the case of Dhariwal Industries Ltd.,



having held that

*"Excisability - Pan masala - For period before commencement of production in assessee unit - No Excise duty can be imposed under Rule 9 of Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008 - These Rules are framed under Section 3A of Central Excise Act, 1944 with object of prevention of evasion of Excise duty, but that does not mean Excise duty can be charged for period prior to commencement of production - Excise duty is on production or manufactured of goods - Sections 2(f) and 3 of Central Excise Act, 1944. [para 10]"*

The provisions of Rule 16 of the PMPM Rules are of all the machines installed in the factory. The said decision of the Tribunal was binding on the adjudicating authority. The impugned Orders having been passed in contravention, to the judicial discipline is illegal and as such, same deserves to be quashed and set aside.

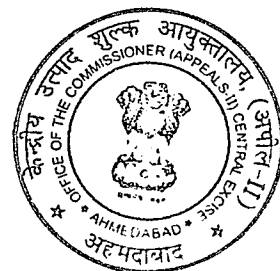
10. Further, I find that, The adjudicating authority in para 14 of the impugned order has relied on the decision of the Hon'ble Tribunal in the case of **Rajat Industries Pvt. Ltd.**, reported at 2012 (284) E.L.T.581 (Tri.Delhi), that no duty of excise was required to be paid by the appellant for the period when its PPMs were sealed and seized by the DGCEI officers:-

*" 9. The issue involved in this appeal is whether the revenue with the aid of Rule 9 of PMPM Rules, 2008 framed under Section 3A of the Central Excise Act, 1944 can levy and charge excise duty from the assessee for the period before the commencement of production in the unit?"*

*10. In order to find answer to this question it would be useful to have a look on the relevant provisions of the Central Excise Act, relating to levy and collection of excise duty. Section 3 of the Excise Act is the main charging section which provides that there shall be levied and collected excise duty on excisable goods which are produced or manufactured in India. From this, it is evident that excise duty is an incidence of tax on production or manufactured of the goods. That being the case, it is difficult to sustain the plea that the appellant assessee can be charged excise duty for the period during which his unit had not even commenced the production. The department is seeking to justify the impugned order under Rule 9 of PMPM Rules of 2008 framed under Section 3A of the Central Excise Act. Section 3A confers power on the Central Government to charge excise duty on the basis of capacity of production in respect of notified goods. The basic object of conferring such power on the Central Government is to prevent evasion of excise duty in respect of certain excisable goods with a view to safeguard the interest of revenue. This, does not mean that Section 3A confer power on the Government to frame the rules to charge excise duty for the period prior to the commencement of production. Therefore, in our view the impugned order confirming demand for first three days of May 2009 when the production had not even commenced cannot be sustained."*

However, I find that the duty, which is not required to be paid but paid falls under the category of "Deposit" as per catena of decisions and required to be refunded. GOI (Revision authority) in case of **MARAL OVERSEAS LTD** as reported in 2012 (277) E.L.T. 412 (G.O.I.) has held that

*"The said duty which was not required to be paid can only be treated as deposit and is to be refunded back in the manner it was paid either from cenvat credit or cash."*





Again the same position is reiterated by GOI ( Revision authority) in case of **DUKE CONSUMER CARE LTD** reported in 2012 (285) E.L.T. 475 (G.O.I.) has held that:-

*"Clearance on payment of duty was not required - Rebate not admissible - However duty paid without authority of law cannot be treated as duty but it has to be treated as deposit made with Government on his own volition - Applicant allowed to take re-credit of said amount in their Cenvat credit account."*

I find that, the relevant provisions of Rule 18 of the PMPM Rules are reproduced below;

*"Provisions to apply mutatis-mutandis - Except as herein provided, all provisions of the Act and Central Excise Rules, 2002, including those relating to maintenance of daily stock account, removal of goods on invoices, filing of returns and recovery of dues shall apply mutatis-mutandis".*

○ I find that in para 14 of the impugned order, although, original authority hold that:

*"during the period of seizure PPMs could not have been used by the said assessee for manufacture of their final products. It is well settled that the duty of excise is on the goods manufactured. Since the good could not have been manufactured because of the PPMs being under seizure, therefore to levy and collect duty for the period when the said 27 PPMs were sealed & seized, would be against the basic tenets of charging of duty of excise."*

but has erred in holding that there is no provision in the PMPM Rules to deal with such situation. I find that, Rule 18 of the PMPM Rules, provides for the applicability of the provisions of Central Excise Act and Rules mutatis-mutandis. The impugned order having been passed without considering the PMPM Rules is legally not sustainable.

11. Further, I find that, the adjudicating authority has tried to distinguish the binding decision of the Hon'ble Tribunal by observing that the facts in both the cases are different. In the case of the **Dhariwal Industries Ltd.** before the Hon'ble Tribunal, the issue was with regards the refund claim for 6 days when the factory was closed by the said manufacturer. In the said case, the said manufacturer on its own volition had closed the factory and thereafter after six days restarted the manufacturing activity and it was for the six days when the entire factory was closed, the said manufacturer had claimed the refund of duty paid. In the present case, the appellants did not intend to discontinue the manufacturing activity at any stage, but it was the department which had sealed and seized the PPMs resulting in total closure of the factory of the appellant. In the present case, the action of the officers of DGCEI in sealing and seizing the operational PPMs, had led to the closure of the entire factory of the appellants, and therefore, there was no reason to deny the refund claims for the period when all the machines were sealed and seized by the department.



12. I rely upon the decision of the High Court of Punjab and Haryana in the case of **Godwin Steels (P) Ltd.** reported in 2010[254] ELT 202 [P&H] wherein, it was held that

*"Production capacity based duty - Factory starting production for first time from middle of month - Duty payable whether for whole month - Assessee opting to pay duty under compounded levy scheme from 17-11-1997, duty imposed for entire month - HELD : Wholly unjust for Department to recover duty for whole month during which factory not commenced production - No liability to pay duty during period of non-production-erstwhile Section 3A of Central Excise Act, 1944 read with Rule 96ZP(2) of erstwhile Central Excise Rules, 1944.[paras 2, 3]"*

13. I rely upon the decision of the High Court of Punjab and Haryana in the case of Godwin Steels (P) Ltd. reported in 2010[254] ELT 202 [P&H] wherein, it was held that 'Central Excise duty is Section 3 of the Central Excise Act is the main charging section and thus if no goods are manufactured or produced, the manufacturer is not required to pay duty. Section 3A of the said Act only provide a method of collecting duty, without changing the basis of charging duty i.e. duty is to be charged on the goods manufactured.' I find that, the adjudicating authority has ignored the above binding decision of the Hon'able High Court. Therefore, the impugned orders are not sustainable.

14. Further, I find that, the said refund claims are not in terms of Rule 10 of the PMPM Rules; but as a result of seizure of the PPMs, the possession of the said PPMs was with the Central Government and therefore, for the relevant period, no duty is required to be paid by the appellants. I rely upon the decisions of the Hon'ble Tribunal in the case of Dhariwal Industries Ltd. reported at 2015[330] ELT 639 [Tri,Ahmd] and Rajat Industries P. Ltd. 2012[284]ELT581[Tri.Del]. Which are squarely applicable to this case. Therefore, I hold that the said refund claims are admissible to the appellants.

15. In view of the foregoing discussion and findings, I Set-aside impugned Orders and allows all the appeals filed by the appellants.

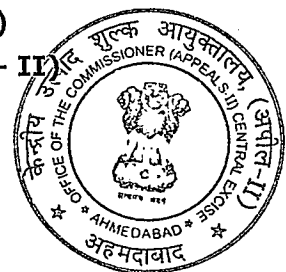
16. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

The appeals filed by the appellants stand disposed off in above terms.

*उमा शंकर*

(उमा शंकर)

आयुक्त (अपील्स - II)



Attested

(K.K.Parmar )

Superintendent (Appeals-II)  
Central excise, Ahmedabad.

By Regd. Post A. D

1. M/s. Vishnu Pouch Packaging Pvt. Ltd.,  
Plotno.4RS,no.431/p/7/p, Rachana Estate,  
village-Moraiya,Ahmedabad.
2. M/s. Vishnu Pouch Packaging Pvt. Ltd.,  
Plot no. 49-50,Mahagujarat Estate,  
village-Moraiya,Ahmedabad.
3. M/s. Vishnu Pouch Packaging Pvt. Ltd.,  
Plot no. 4,Ahmedabad Ind. Estate,  
village-Moraiya,Ahmedabad.
4. M/s. Vishnu Pouch Packaging Pvt. Ltd.,  
Survey no. 431. Sub plot no. 31,  
village-Moraiya,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 Asstt. Commissioner (Systems), Central Excise, Ahmedabad-II.
5. P.A. file.
6. Guard file.



