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

O/O THE COMMISSIONER (APPEALS-II), CENTRAL EXCISE,

सत्यमेव जयते

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(21)3 /Ahd-II/Appeals-II/ 2016-17**/1234 to 1238

स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 099-16-17**

दिनांक (Date): **27.03.2017** , जारी करने की तारीख (Date of issue): 31/03/17

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 . **04/Ref/16** **Dated: 09/02/16**

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

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

M/s Acme Diet Care 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 अंतत 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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Contd.2

केन्द्रीय उत्पाद शुल्क आयुक्तालय (अपील-II) OFFICE OF THE COMMISSIONER (APPEALS) CENTRAL EXCISE AHMEDABAD अहमदाबाद

(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 केडिट 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 दिनाँक 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 रूपये या उससे कम हो तो रूपये 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 अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

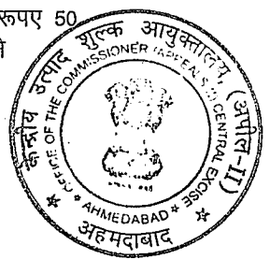
(क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

(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, मेघाणी 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 न्यायाधिकरणें की गई अपील के विरूद्व 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।

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. Registar 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 ओदश 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 हैं।

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 not withstanding 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 अनुसूचि–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 in 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.

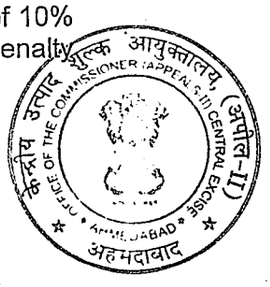
⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .

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

M/s Acme Diet Care Pvt Ltd, 14/1, Panchratna Industrial Estate, Sarkej-Bavla Road, Changodar, Ahmedabad (hereinafter referred to as "the Appellant"), has filed the present appeal against the Order-in-Original No 04/Ref/16 dated 09.02.2016 *(hereinafter referred to as 'impugned orders')* passed by the Assistant Commissioners of Central Excise, Division-IV, Ahmedabad-II, Ahmedabad *(hereinafter referred to as 'adjudicating authority').*

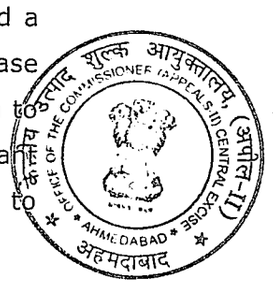
2. The facts of the case, in brief, the appellant are register with the Central Excise Department having registration no. ADCA2848NXM001 and engaged in Miscellaneous Edible Preparation falling under chapter 21 of Central Excise Traiff Act, 1985. The Appellant have surender the Central Excise Registration on 10.08.2011 and on the same day it was acknowledged through e-recipt. The following amount is lying in their accounts-:

(i) ₹ 11,068/- lying in the Personal Ledger Accounts.

(ii) ₹ 17,33,253/- lying in the Cenvat Credit Accounts (Input).

(iii) ₹ 96,547/- lying in Cenvat Credit Accounts (Capital Goods).

The appellant after surrendering the registration filed a refund claim in Sept 2011 for the first time which was adjudicated vide OIO No MP/168/Refund/2012 dated 29.02.2012 in which the amount lying in the PLA was sanctioned by way of cheque and the remaining amount lying in the cenvat input/capital good was rejected on the ground that origional copy of relevent record not submitted. Form A not submitted. Details of stock of input/capital goods was not submitted to the jurisdictional range officer. The appellant filed appeal against the said OIO. The appellate authority vide OIA No 241/2012 dated 28.09.2012 remanded back the matter to adjudicating authoriy with a direction to verify the documents and quantify the refund claim. As per the direction given in the OIA the the adjudicating authority vide OIO No 79/Refund/2013 dated 30.08.2013 decided the case and rejected the refund on the ground that still the appellant had not submitted the relevent documents for quantification. Central Excise Law does not permit any refund of balance cenvat credit at the time of clouser of the factory. If the accumlation is due to export under Bond/UT-1 then sanctioning of such refund have limitation, condition and procedure under Notification No 5/2006. Appellant failed to refer the Rule 5 of Cenvat Credit Rules. The export under bond was done in 2009-10. After that there was no export. Therefore the refund of accumlated credit is hit by limitaton as it was filed 19.09.2011and the time limit for such reund end in march,2011. They have not fulfilled the condition no 4 of Notification No 5/2006-(NT) issued under Rule 5 of cenvat credit Rules 2004. The appellant again filed a appeal befor the Commissiomer(A). The Commissioner(A) remand back the case vide OIA No AHM-ExCUS-002-APP-271-13-14 dated 17.01.2014 with a direction to grant personal hearing to the appellant and consider all the ground. The appella was granted personal hearing however they submitted that they are unable to



attend the same. They requested the department that the credit which is lying unutilised and in dispute since August,2011, they may be granted permission to use the same under Rule 10 of cenvat credit rules 2004, in their factory having Central Excise registration ADCA2848NXM003. They relied on various judgements in their submission. They further submitted that it is extraeous to statutory provision that no need to tranfer the stock along with the unutilised credit. No formal permission is required for the use of unutilised cenvat credit under Rule 10 of cenvat credit rules 2004. The appellant further submitted that they did not take suo moto credit under rule 10 of cenvat credit rules 2004 at the time of shifing the factory to chattral. They further shifted the factory from Chattral to Changodar, therefore they are eligible for such credit. On 02.07.2015 the appellant submitted a letter in this regard to the department. They further submitted order issued by the higher forum should be followed by the subordinate authority. The adudicating authority vide impugned order rejected the refund claim under rule 5 of cenvat credit rules 2004 read with section 11 B of Central Excise Act,1944.

3. Being aggrieved with the impugned order, the appellant has filed the present appeal on the ground that a directive issued in both the OIA was not followed by the adjudicating authority. They further submitted that the cenvat credit accumulated due to huge amount of duty paid in PLA. Huge quantity of goods cleared under export under Bond/UT-1. When there was no dispute of receipt & utilization of cenvatable input and availing credit on such input, then left over balance of Cenvat credit lying is bonafide balance. No query was ever received for statutory obligation either from the range officer or from audit wing. Lying of credit in the accounts was certified by the Charted Accountant also. The appellant relied upon the judgment in the case of 2008(223) ELT A.170 (SC) in the case UOI Vs Slovak India Trading Co. Pvt Ltd.

4. Personal hearing in the case was granted on 04.01.2017 which was not attended by the appellant. Second hearing in the matter was granted on 28.02.2017 which was attended by Appellant representative. Written submission was also submitted at the time of personal hearing.

5. I have carefully gone through the facts of the case on records, grounds of the appeal, put forth by the appellant. Looking to the facts of the case, I proceed to decide the case on merits.

6. In the instant case, I observe that the refund claim was filed by the appellant, as they were not in position to utilize the credit due to closure of their unit. The contention of the adjudicating authority since there is no specific provision under Rule 5 for refund of unutilized Cenvat Credit due to closure of unit.

Amended Rule 5 of CCR with effect from 17.03.2012 stipulates that –

"A manufacturer who clears a final product or an intermediate product for export without payment of duty under bond or letter of undertaking, or a service provider

who provides an output service which is exported without payment of service tax, shall be allowed refund of Cenvat credit as determined by the following formula subject to procedure, safeguards, conditions and limitations, as may be specified by the Board by notification.."

$$\text{Refund amount} = \frac{\text{(Export turnover of goods + Export turnover of services)}}{\text{Total turn over}} \times \text{Net Cenvat Credit}$$

Prior to 17.03.2012, the said Rule enumerates that where any input or input service used in the manufacture of final products/used in providing output service which is exported, the Cenvat credit in respect of input or input service so used shall be allowed to be utilized by the manufacture or provider of output service towards (i) duty of excise of any final products cleared for home consumption or for export on payment of duty; or (ii) service tax on output service, and where for any reason such adjustment is not possible, the manufacturer or the provider of output service shall be allowed refund of such amount subject to such safeguard, conditions and limitation as specified. From the above, it is very clear that the provisions of amended rule 5 *ibid* allows refund of Cenvat Credit when final/intermediate products cleared for export without payment of duty or output service exported without payment of service tax only. In other words, refund of Cenvat credit in any other circumstances mentioned therein the Rule *ibid* is not admissible. I further observe that prior to 17.03.2012; Rule 5 expressly allows refund only when "adjustment" is not possible to utilize Cenvat credit for clearing goods for home consumption or for export on payment of duty. However, after amendment, the said rule, only enumerates that refund of cenvat credit shall be allowed, where any input or input service used in the manufacture of final products/used in providing output service which is exported.

Thus, the provisions of Rule 5 convey only that **refund of unutilized credit is only permissible in case of export of goods and not for any other reason**. Further, I observe that under Rule 5, the refund of unutilized Cenvat credit allows subject to such safeguards, conditions and limitations as may be specified by the Central Government by Notification. Notification 5/2006-CE (NT) dated 14-3-2006, issued under Rule *ibid* prescribes the conditions and limitations for availing such refund. The basis of determining the refund amount is the export clearances of the final products as mentioned in the formula. The Notification provides for submission of various documents such as shipping bills etc. Rule 5 clearly states that refund shall be allowed subject to fulfilment of conditions prescribed. In the present case, the appellant has not filed the refund claim subject to conditions as prescribed; therefore, refund in such cases of closure of factory is not admissible as it is not provided under the statute. The appellant has mainly argued that the issue involved in the instant case is decided by the Hon'ble High Court of Karnartaka in the case of M/s Stovec India Trading, reported at 2006(201) ELT 599, which was upheld by the Hon'ble Supreme Court of India-2008(223) ELT A 170 and also decided by Hon'ble

Tribunal in the case of Century Rayon-Twisting unit, reported at 2015 (325) ELT 205; that in the judgments, it has been held that refund of untilized Cenvat credit in light of closure of factory is admissible.

7. I find that the decision of Hon'ble High Court of Karnataka has been distinguished in the judgments pronounced by Hon'ble Tribunal Delhi and Mumbai. In the case of M/s Modipon Ltd, reported at 2015 (324) ELT 718, it has been held by Delhi CESTAT in the relevant para that:

> *"**6.** We have considered the submissions from both the sides and perused the records. There is no dispute that the appellant's factory stopped production sometime in June, 2007 and at that time there was Cenvat credit balance of Rs. 2,35,86,612/- in their RG 23A Part-I and RT-23C pt. II account. In the appellants' application dated 27-11-2007, cash refund of the above Cenvat credit is sought by invoking Section 11B(2)(C). In our view, Section 11B is only for the refund of the duty paid either through cash or through Cenvat credit or of the Cenvat credit wrongly reversed which refund of duty paid either through cash or through Cenvat credit account is subject to the bar of unjust enrichment, the refund of wrongly reversed Cenvat credit is not subject to the bar or unjust enrichment. But this section cannot be invoked for cash refund of the unutilized Cenvat credit lying in the Cenvat credit account of a manufacturer at the time of closure of the factory. In fact, other than Rule 5 of the Cenvat Credit Rules, 2004, there is no provision either in Central Excise Act, 1944 or in any Rules made thereunder for cash refund of accumulated Cenvat Credit Rules, 2004. When a factory closes down, the Cenvat credit lying unutilized in its Cenvat credit account would lapse, unless the factory resumes production. In the event of the factory being taken over by another person, and resuming production, Rule 10 permits the transfer of Cenvat credit to the new owner subject to certain conditions. But there is no provision for cash refund of such unutilized credit.*
>
> ***7.** Rule 5 of the Cenvat credit rules permits cash refund of accumulated Cenvat credit only in the following circumstances :-*
>
> *(1) The Cenvat credit which has accumulated and whose cash refund is sought is in respect of inputs/input services used in the manufacture of finished goods which have been exported out of India under bond or letter of undertaking or used in intermediate products cleared for export.*
>
> *(2) The assessee is not in a position to utilize the Cenvat credit for payment of duty on finished goods cleared for home consumption or cleared for export under rebate claim.*
>
> *(3) The exports have not been made by claiming drawback or input duty rebate.*
>
> ***8.** In the present case, none of the above conditions are satisfied. Therefore, the Commissioner (Appeals) has rightly upheld the rejection of the cash refund of the accumulated credit. We are supported in our view of the Larger Bench judgment of the Tribunal in the case of Steel Strips (supra).*

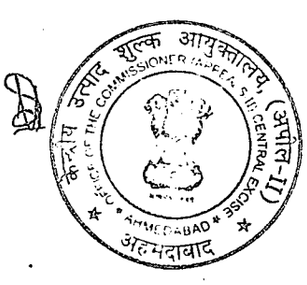
केन्द्रीय उत्पाद शुल्क आयुक्तालय (अपील-II) OFFICE OF THE COMMISSIONER (APPEALS) CENTRAL EXCISE AHMEDABAD अहमदाबाद

By considering the said decision of M/s Solvak India Tradint Co. Ltd, the Hon'ble Tribunal, Mumbai in the case of M/s Phonix Industries Pvt, reported at 2015 (330) ELT 303 has held that :-

> *"7.1 The ld. Counsel states that Rule 5 enumerates 3 categories under which refund of unutilized Cenvat credit may be allowed i.e. (a) where the final product is exported, (b) where the final product is cleared for home consumption, (c) where for any reason such adjustments are not possible refund may also be allowed. Their case would be covered under (c) according to learned counsel. We do not agree with this reading of Rule 5. Rule 5 categorically states that where any inputs are used in the final products which are cleared for export under bond or letter of undertaking, then the credit shall be allowed to be utilized by the manufacturer towards payment of duty of excise on any final products cleared for home consumption or for export on payment of duty and where for any reason such adjustment is not possible, the manufacturer shall be allowed refund of such amount subject to such safeguards, conditions and limitations as may be specified by the Central Govt. by notification. The words "such adjustment" have to be read in context of the whole sentence. The words "where for any reason such adjustment is not possible" can only imply that refund in cash may be granted only when the Cenvat credit cannot be adjusted against duty on final products cleared for home consumption or for export on payment of duty. Any other interpretation would be against the scheme of Cenvat credit which is to prevent cascading in taxation. If the appellants' contention that refund may be granted on closure of factory is held to be valid, then there may be cases when the inputs are not even used in manufacture of the final product. Grant of refund in such cases would lead to an illogical result - that is, the duty paid on inputs is being refunded without their use in the manufacture of final products. This will amount to refund of Central Excise duty paid which has no basis in law.*
>
> ***7.2** The appellants have argued that there is no express provision in terms of Rule 5 which bars refund on closure of factory. We find that Rule 5 expressly allows refund only when "adjustment" is not possible to utilize Cenvat credit for clearing goods for home consumption or for export on payment of duty. There cannot be any other reasonable interpretation in the manner of reading this Rule. The Rule starts with the phrase "where any inputs are used in the final products which are cleared for export.." Thus the first condition is that the final products must be exported. The general principle of construction in canons of law is that a legislative instrument has to be read as a whole. The phrases in a sentence have to be read in their cognate sense. That is, Rule 5 has to be read as a whole and not in parts. The whole conveys only one sense i.e. refund of unutilized credit is only permissible in case of export of goods and not for any other reason."*

The Hon'ble Tribunal in para 7.6 and 7.7 of above referred order further held that:

> ***"7.6** We have also read the pronouncement of Hon'ble Supreme Court in the case of M/s. Jain Vanguard Polybutlene Ltd. in SLP 10805/2011 dated 12-7-2011. It reads "We find no reason to interfere in the impugned order in exercise of our jurisdiction under Act 136 of the Constitution. The Special Petition is accordingly, dismissed leaving the question of law open." Thus the judicial orders on the issue have not attained finality".*
>
> ***7.7** In Hariprasad Shivshankar Shukla v. A.D. Divikar - 2002-TIOL-447-SC-MISC-CB case the Hon'ble Supreme*



Court considered the use of the phrase for any reason whatsoever, occurring in Section 25 of the Industrial Disputes Act, 1947. The issue being considered was whether retrenchment compensation would have to be given on the termination of workman arising from the closure of the business. The Hon'ble Apex Court considered the definitions of retrenchment and the provisions of Section 25F ibid and came to the conclusion that compensation may not be granted in situation of bona fide closure of the business. It held that -

"In the absence of any compelling words to indicate that the intention was even to include a bona fide closure of the whole business, it would, we think, be divorcing the expression altogether from its context to give it such a wide meaning as is contended for by learned counsel for the respondents. What is being defined is retrenchment, and that is the context of the definition. It is true that an artificial definition may include a meaning different from or in excess of the ordinary acceptation of the word which is the subject of definition; but there must then be compelling words to show that such a meaning different from or in excess of the ordinary meaning is intended. Where, within the framework of the ordinary acceptation of the word, every single requirement of the definition clause is fulfilled, it would be wrong to take the definition as destroying the essential meaning of the word defined."

We may, therefore, with due respect to High Court's observation in the matter, in the case of the appellants and after detailed analysis have come to the conclusion that the refund claim does not have sanction of law."

Regarding second plea of the appellant that refund may be given by way of re-credit under Rule 10 of Cenvat Credit Rules, 2004, as they have shifted their manufacturing unit from Chattral to Changodar again. They requested to settle the long pending issue, I Find that Rule 10 is applicable only if a manufacturer of the final products shifts his factory to another site or the factory is transferred on account of change in ownership or on account of sale, merger, amalgamation, lease or transfer of the factory to a joint venture with the specific provision for transfer of liabilities of such factory, then, the manufacturer shall be allowed to transfer the cenvat credit lying unutilized in his accounts to such transferred, sold, merged, leased or amalgamated factory. The transfer of the cenvat credit under sub-rules (1) shall be allowed only if the stock of inputs as such or in process, or the capital goods is also transferred along with the factory or business premises to the new site or ownership and the inputs, or capital goods, on which credit has been availed of are duly accounted for to the satisfaction of the Deputy Commissioner of Central Excise or, as the case may be, the Assistant Commissioner of Central Excise. Here the appellant have surrendered the Central Excise Registration. Therefore this will not be applicable in this matter.

In view of above discussion and applying ratio of the decisions cited in above para, I uphold the decision of the adjudicating authority. Therefore, I reject the appeal filed by the appellant. The appeal stands disposed of in above terms.

केन्द्रीय उत्पाद शुल्क आयुक्तालय (अपील-II) OFFICE OF THE COMMISSIONER (APPEALS-II) CENTRAL EXCISE AHMEDABAD अहमदाबाद

8. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

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

(उमा शंकर)
आयुक्त (अपील्स - **II**)
CENTRAL EXCISE, AHMEDABAD.

ATTESTED

30/3/2017
(S.S Chowhan)
SUPERINTENDENT (APPEAL-II),
CENTRAL EXCISE, AHMEDABAD.

To,
M/s Acme Diet Care Pvt Ltd,
14/1, Panchratna Industrial Estate,
Sarkej-Bavla Road, Changodar, Ahmedabad

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad zone, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-II, Ahmedabad.
3. The Dy. /Assistant Commissioner, Central Excise Division-IV, Ahmedabad-II, Ahmedabad.
4. The Assistant Commissioner(Systems), Central Excise, Ahmedabad-II, Ahmedabad
5. Guard File.
6. P.A. File.