



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
पोलिटेकनिक के पास, Building,
आम्बवाडी, अहमदाबाद : 380015 Near Polytechnic,
Ambavadi,
Ahmedabad:380015



रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(84)80/Ahd-II/Appeals-II/ 2015-16 / 2319 to 2323
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP- 01-17-18

दिनांक (Date): 25.05.2017 जारी करने की तारीख (Date of issue): 02/06/17

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

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

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-II), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No . MP/17-18-19/Dem/AC/2015/PKS Dated: 09-

03-2015

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

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

M/s Lubi Submersibles Limited(Unit-I)

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 ।

C. P. J.



- (c) In case of goods exported outside India export to Nepa 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 नूल-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 अपील 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 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. Lubi Submersibles Ltd. (Unit-I), Near Kalyan Mills, Naroda Road, Ahmedabad (hereinafter referred to as '*the appellant*') against the Order in Original No. mp/17-18-19//AC/2015/pks (hereinafter referred to as '*the impugned order*') passed by the Asstt. Commissioner, Central Excise, div-II, Ahmedabad-II (hereinafter referred to as the '*the adjudicating authority*'). The appellant is engaged in the manufacture of P. D. Pumps under Chapter 84 of Central Excise Tariff Act, 1985 [hereinafter referred to as CETA-1985].

2. The brief facts of the case are that ,appellant had recovered Rs.8324369/- as handling, packing and forwarding charges and Rs.3905828/- as pre-delivery Inspection Charges[PDI] from their buyers during april-2010 to march-2012. The appellant has not included the above said charges in the assessable value, hence, they have short paid the duty. it appeared that the Inspection charges were actually PRE-DELIVERY INSPECTION (PDI) amount collected from buyers and were not included in the assessable value. Such amounts form price-cum-duty under the provision of Section 4 of Central Excise Act'1944. Duty involved in handling charges amounting Rs. 377633/- and PDI charges duty Rs.185868/- total duty comes to Rs. 563501/-. Show cause notice issued for demanding Excise duty with interest and Penalty. The said SCN was decided vide above OIO and confirmed the demand with interest and penalty.

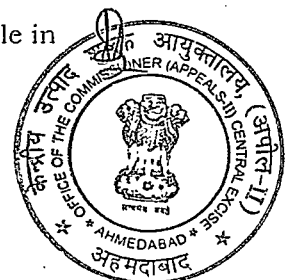
3. Being aggrieved with the impugned order the appellant has filed the instant appeal on following grounds.

that the amount recovered at the rate of 0.5% of the value was the recovery for elements like storage, packing, handling and forwarding indicated in invoices as "freight and handling" which is not includible in the assessable value of the goods;

That the said recoveries not includible in the value of the goods for assessing excise duties thereon; that in view of settled legal position that freight, insurance handling etc. are activities not forming part of the assessable value.

that they placed reliance on the following case laws, wherein Supreme Court and Tribunals have held that charges for transportation of goods though not on actual basis and recoveries for other elements like handling, insurance etc. were not includible in the value of excisable goods.1. 2009(235) ELT-581 (S.C.), CCE, V/s. Accurate Meters Ltd. 2. 2009(243) ELT- 307 CCE, V/s. Guwahati Carbon Limited. 3. 2004(172) ELT-493 CCE, V/s. West Coast Paper Mills Ltd.

That the amounts recovered at the rate of 0.5% of the value was not includible in the assessable value of the excisable goods because this recovery made on equalized basis was for those elements which were not forming part of the value of the excisable goods for assessing excise duties. That PDI charges were paid by them to the outside inspecting agency on behalf of the concerned Government customers who reimbursed to them and this inspection being optional/additional and therefore this amount was not includible in the assessable value.



that in number of cases like Commissioner Vs. Maruti Udkyog Ltd-2006 (201) ELT A. 28 (SC), Siddharth Tubes-2006 (194) ELT 144 (MP), Shree Pipes-1995 (59) ELT 462 Bhaskar Ispat Pvt. Ltd.-2004 (167) ELT 189 etc. it is held by Hon'ble Court as well as Appellate Tribunals that cost of inspection made at the option of the buyer was not includible in the value of excisable goods.

That the extended period of limitation invoked is illegal. Collection of freight and handling charges has been shown in ER-4 returns, in books of account, balance sheets and therefore there was no suppression of the same.

4. Personal hearing was granted on 05.01.2017. Shri Paritosh Gupta, Advocate appeared on behalf of the appellant. He reiterated submissions made in their GOA and also submitted citations of PDI issue settled in their favour. I have carefully gone through the case records, facts of the case, submissions made by the appellant and the case laws cited. I find that the impugned orders has been issued with respect to the show cause notices issued periodically, The main issue to be decided is whether Handling Charges and PDI Charges are includible in the assessable value, and whether the appellant is liable to pay Excise duty on said Charges.

5. I find that the first issue relating to PDI charges, has been decided by the Commissioner (Appeals-III), Central Excise, Ahmedabad vide OIA No.17/2007(Ahd-II)/Central Excise/Raju/Commr (A) dated 27.02.2007 in favour of the appellants. I also find that, Hon'ble CESTAT,Ahmd, has decided the said issue vide order dated 16-6-14, in favour of the appellants .I also rely on the case law 2015 [337] ELT 179 [Guj] LUBY IND. LLP V. UOI to apply the ratio of Lubi Industries ,supra, to the Present Case.

6. In respect of Second issue, I find that the appellant has collected 0.5% of the total invoice value as freight handling charges from their buyers. The contention of the appellant that they had collected 0.5% of the total Freight Handling Charges against the freight paid by them which is nominal and equalized amount is not convincing. I find that by way of collecting freight handling charges from their buyers, the appellant has recovered additional amount under the head of "Freight and Handling Charges", shown separately in invoices, which are includible in assessable value in terms of Section 4 of Central Excise Act'1944.

7. Looking to the facts of the case, prima-facie it is revealed that the appellant have not made out a strong case in their favour as far as Handling Charges are concerned. I find that the appellant has collected an amount @ 0.5% of the total invoice value plus Central Excise and C.S.T. and not on the freight charges paid by them to the transporter. It may not be considered as equalized freight. Collection of such freight@ 0.5% of the total invoice value is additional consideration. In the guise of Freight and handling charges, the appellant has collected Outward Handling Charges which are not included in assessable value collected by them. And this value addition can not be considered as averaged freight in terms of section 4(3)(d) of the CEA, 1944, which is reproduced as under;

*SECTION 4. Valuation of excisable goods for purposes of charging of duty of excise. - (1)
Where under this Act, the duty of excise is chargeable on any excisable goods with*



reference to their value, then, on each removal of the goods, such value shall - (3) For the purpose of this section,-

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

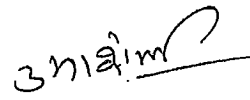
In this case, it is undisputed fact that the additional amount recovered is nothing but "Freight and handling charges" which is required to be included in assessable value in terms of Section 4 of Central Excise Act, 1944. I rely upon the decision of the Hon'ble Supreme Court in the case of *CCE, Bhubaneswar-II v. IFGL Refractories Ltd.* (supra). It is held that such benefit can be said to be additional consideration under the Valuation Rules. now the amended Section 4 of the Central Excise Act also provides that the actual price paid by the buyer plus the money value of additional consideration flowing directly or indirectly from the buyer to the seller in connection with the sale of goods, shall be deemed to be included in the duty payable on such goods. Hence, the demand is correct. I also find that, the issue regarding invoking the extended period would be available to the Department, as the details of the appellant's contract with the buyers were never disclosed to the Department.

8. I find that, the appellant's conduct also justifies the allegation that material facts were suppressed with intent to evade payment of duty justifying demand for the extended period as permitted under proviso to Section 11A(1). Consequentially, the demand of duty along with interest and penalty is justified and sustainable with respect to handling charges. I find that the case laws cited by the appellant are not applicable in the facts and circumstances of the present case.

9. In view of above discussion and findings, I find that the demand of duty for handling charges is sustainable. Therefore, I uphold the OIO to that extent. Further, I set aside the demand of duty on PDI charges and proportionate penalty and allow the appeal of the appellant.

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

10. 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. Lubi Submersibles Ltd. (Unit-I),

Near Kalyan Mills,

Naroda Road,

Ahmedabad - 380 025.

Copy to :

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Commissioner, Central Excise, Ahmedabad-II.
3. The Asstt. Commissioner, Central Excise, Div-II, AhmedabadII
4. The Asstt. Commissioner (Systems), Central Excise, Ahmedabad-II.
5. Guard file.
6. PA file.

