केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

सत्यमेव जयते

केंद्रीय उत्पाद शुल्क भवन,
सातवीं मंज़िल, पोलिटेकनिक के पास,
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क फाइल संख्या (File No.) : **V2 (87)86&97/Ahd-II/Appeals-II/ 2016-17** /1698 to 1642

स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP-104-105-17-18**

दिनांक (Date): **28.09.2017,** जारी करने की तारीख (Date of issue): 12-10-17

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

Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय वस्तु एंव सेवा कर, (मंडल-IV), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No.(I) **42/DC/D/2016/RK Dated: 15.09.2016** .

(II) **60/DC/D/2016/RK Dated: 23.11.2016**

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

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

(i) M/s Vaibhav Auto Industries

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 पूवोक्त 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 |

Cont...2

(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 डयूटी 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

The subject appeals are filed by M/s. Vaibhav Auto Industries,41,New Ahmedabad Ind. Estate, Moraiya, Ta-Sanand, Dist-Ahmedabad, against Order in Original No.42&60/DC/D/2016/RK [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 appellant is engaged in the manufacture of Chakkado Rickshaw falling under Chapter 87 of the Central Excise Tariff Act,1985, *(hereinafter also referred to as CETA, 1985).*

2. Brief facts of the case is, Officers from DGCEI, Ahmedabad, conducted search and verification of the appellant's Office and factory premises, and also the premises of the agent M/s Manish Auto,Keshod. The Department booked case against the appellant charging undervaluation of "three-wheeled transport vehicles "manufactured and cleared by them during the period from December 2005 to sept- 2013. On completion of investigation, Show Cause Notices issued for recovery of duty short paid. It is seen that even after the detection, the appellant has continued with the practice of not declaring the proper value and not paying appropriate duty on the excisable goods cleared .All these notices have been adjudicated, upholding the duty demand. In the present case, the period from oct- 2014 To august- 2016 is involved .The Asstt. Commissioner Central Excise,DIV-IV, Ahmedabad -II, has issued two SCN's for recovery of duty Rs.377488+ Rs.305146/- under Section 11 A (4) of the said Act; penalty under Rule 25 of the CER, 2002 and interest under Section 11AB of the said Act. The adjudicating authority vide above orders confirmed the demand and imposed penalties under section 11AC and under Rule 25 of the CER, 2002.

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

a. The adjudicating authority in the impugned orders has held that the advance booking amount as collected by M/s Manish Auto, Keshod was not included in the assessable value. The adjudicating authority had proceeded on an incorrect appreciation of fact that the costing in all cases of one Chakkdo Rickshaw was Rs. 67,275/, whereas the value as shown in the ER 1 returns was Rs. 61,000/. The appellant in his statement stated the cost of manufacturing of one Chakkdo Rickshaw and the same depended upon the type of Diesel Engine, Gear Box and the accessories used. Therefore, it cannot be inferred that in all cases the cost of production of one Chakkdo Rickshaw would be Rs. 67,275/. The impugned order is legally not tenable..

b. The adjudicating authority has proceeded on the basis that as the cost of raw material and labour is increasing every day and therefore, it is not possible to sell

the finished goods at the prices prevailing in 2009. It is submitted that the prices of raw materials have not changed substantially and to be competitive in the market, the margin of profit had to be curtailed. In absence of any evidence to support the above findings of the adjudicating authority, the entire proceedings are vitiated on the grounds of no evidence. In the present proceedings, no evidence either direct or indirect has been brought on record that the appellant had collected an amount over and in excess to what had been reflected in the invoices on which the duty of excise was paid.

c. The adjudicating authority has grossly erred in holding that the booking amount was collected directly or by agents is nothing but advance payments made by buyers and the same is required to be included in the assessable value. The appellant submits that no evidence of any sort has been adduced to show that it had collected directly any booking amount from the buyers. The appellant submits that Section 4 of the said Act, it makes clear that the assessable value will be the price at which the goods are sold by the manufacturer and it does not include any sales tax, excise duty or any other tax. In support of above contention, the appellant relied on these decisions; in the case of 1. CCE Surat V Baba Synthetics, reported at 2012 (278) ELT113 (Tri.-Ahd). 2. Sterlite Industries (I) Ltd reported at 2005 (189)ELT 329 (T), 3. Eon Polymers 2011 [263]ELT 545[TRI. Del].

d. That separate penalty on the proprietor is not imposable and interest is also not payable.

4. Personal hearing was fixed on dated 13-09-2017. Shri N.K.Tiwari Consultant, attended Personal hearing on behalf of the appellant and reiterated written submissions of GOA . I have carefully gone through all case records placed before me in the form of Show Cause Notices, the impugned orders and written submissions made by appellant. I find that the issue to decide in these appeals pertains to the differential duty demanded and penalties imposed. I find that it has been contended by the appellant that in terms of Section 4, transaction value will be the price at which the goods are sold by the manufacturer without including duties and taxes .The case of CCE, Surat Vs Baba Synthetics, reported at 2012 (278) ELT 113 was cited in this regard. I find that, even in the year 2016, the cost of various input/raw materials and labour required for manufacture of one "three wheeled transport vehicle" was quantified as Rs 67,275/- as stated by the proprietor, with cost of materials and labour increasing with each day, it is not possible for a manufacturer to sell the final products in the year 2015-16, by having a transaction value equal to the cost price that prevailed in 2009. Therefore, this in itself is the best evidence to conclude that the value shown in the invoice does not reflect the correct price. Since on every vehicle, a profit of Rs 7000/- was earned and a minimum body work was required for presenting the vehicle for RTO inspection, the selling

price of vehicle was admitted by the appellant to be Rs.80,000/- plus taxes during the DGCEI investigation. It is also on record that since the entire value was not shown in the invoices, the balance amount was collected in cash through booking agents appointed by the appellant who worked as financiers and RTO/ Insurance agents. The facts disclosed during the investigations have not been disowned by the appellant.

Further, there is no attempt made to explain how they could afford to sell the vehicles at the price declared in the invoices when the same is less than even the cost of inputs. Therefore, there is clear evidence to conclude that the value shown in the invoice is not the correct price and extra amount was collected from the buyers. In the present case, quantification of duty is not based on any documents recovered from others premises. There is also no dispute about the number of vehicles manufactured and cleared by the assessee. Cost of materials and labour required for manufacture of the final product is also on record, and not disputed. The facts involved being different the case law does not help the appellant.

5. I find that, the appellant has cited the case of Sterlite Industries (I) Ltd reported at 2005 (189)ELT 329 (T), in support of the contention, that additional consideration for valuation cannot be proved by taking average value of all clearances and the burden of proof lies on the revenue and it cannot be said that the assessee did not produce necessary documents. I find the case cited involved valuation of Copper Cathods and Copper rods wherein, for some clearances the price Circular issued by the said Company was not followed and lower price was charged.In the present Case, since all "three wheeled transport vehicles" manufactured by the appellant being identical, the appellant themselves have declared value average Rs. 67,000/- per vehicle in the ER-1 returns during the entire period. Further, by showing that declared value is less than even the cost price of the goods sold, department has discharged initial burden. Therefore, the case law involved different issue and the submission made is not acceptable.

6. I find that, the appellant has contended that where the duty demanded subsequent to the sale of goods, it is to be abated from the cum-duty received. In support, they cited the case of Eon Polymers 2011 [263]ELT 545[TRI. DEL]. I find that Hon.Supreme court in the case of M/s Amrit Agro Industries Vs CCE, Gaziabad, has held that,*'unless it is shown by the manufacturer that the price of the goods includes excise duty* payable *by him, no question of exclusion of duty element from the price for determination of value under section 4(4)(d)(ii) will arise*" an Order passed by the Supreme Court is the last word on a given subject.therfore, The case laws cited by the appellant would not help the case of the appellant.

7. With regard to the issue of penalty under Rule 25 of Central Excise Rules, 2002, I find that, the sub rule (1) of rule 25 of Central Excise Rule, 2002 deals with confiscation and penalty. It reads as follows:

RULE 25. (1) Subject to the provisions of section 11AC of the Act, if any producer. manufacturer, registered person of a warehouse or a registered dealer, -

(a) removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; or

(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) engages in the manufacture, production or storage of any excisable goods without having applied for the registration certificate required under section 6 of the Act; or

(d) contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty,

then, all such goods shall be liable to confiscation and the producer or manufacturer or regisered person of the warehouse or a registered dealer, as the case may be, ***shall be liable to a penalty*** *not exceeding the duty on the excisable goods in respect of which any contravention of the nature referred to in clause (a) or clause (b) o clause* (c) *or clause (d) has been committed, or [two thousand rupees], whichever is greater.*

In this case, I find that the appellant has willfully not disclosed the entire value towards the sale of excisable goods in their excise invoices nor paid the proper duty. Therefore, I hold that the penalty imposed on the appellant is justified and legal.

8. With reference to the imposition of penalties under Section11AC and Rule 25 of the CER 2002, I find that the appellant has submitted that separate penalty on the proprietor is not imposable when the firm is penalized. I find that, the appellant has cleared excisable goods by not including the entire amount collected from the buyers in the assessable value and there is a short payment of duty. I find that, the appellant is making repeated references to the term "transaction value" but they fail to understand that any payment towards the value received in connection with the sale of the excisable goods would be a part of the transaction value even if the same is not reflected in any invoice/bill. In view of the above, I find that the appellant has willfully not disclosed the entire value towards the sale of excisable goods in their excise invoices nor paid the proper duty. It appeared that all these contraventions have been committed by way of suppression of facts with intent to evade payment of central excise duty. Therefore, the appellants have rendered themselves liable for penal action under Section 11AC of the CEA 1944 read with Rule 25 of the CER 2002.

9. In view of the foregoing discussions, I fully agree with the observations of the adjudicating authority. Therefore, I hold that the penalties imposed on the appellant are justified and legal.

10. In view of above, I uphold the impugned orders and reject all the appeals.

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

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

(उमा शंकर)
आयुक्त (अपील्स)

Attested

[K.K.Parmar)
Superintendent (Appeals)
Central tax, Ahmedabad.

By Regd. Post A. D

M/s. Vaibhav Auto Industries,

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Vill- Moraiya,

Ta-Sanand,

Dist-Ahmedabad,

Copy to :

1 The Chief Commissioner, Central Excise, Ahmedabad.

2 The Commissioner, Central Excise, Ahmedabad-II.

3. The Asst. Commissioner, Central Excise, Division-IV, Ahmedabad-II

4. The Asstt. Commissioner (Systems), Central Excise, Ahmedabad-II.

5. Guard file.

6. PA file.