



रजिस्टर डाक ए.डी.द्वारा

क फाइल संख्या (File No.): V2(32)101 & 102/Ahd-II/Appeals-II/2016-17 / 6022 to 6027

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-147-148-17-18

दिनांक (Date): 16.10.2017 जारी करने की तारीख (Date of issue): 12-11-17

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker, Commissioner (Appeals)

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. 21/ADC/2016/RMG Dated: 08.11.2016 issued by: Additional Commissioner Central Excise (Div-IV), Ahmedabad-II

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

**M/s Photokina Chemicals 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 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:**

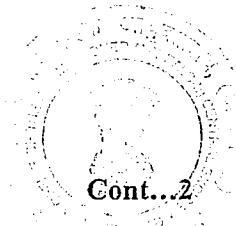
(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धारा अंतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए।

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।



- (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 :-

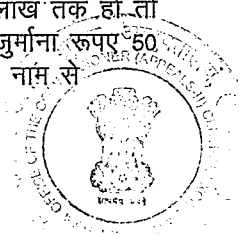
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिकां वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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 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।

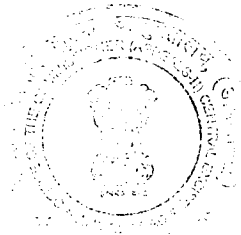
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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**

Two appeals have been filed as mentioned below against OIO No. 21/ADC/2016/RMG dated 8.11.2016, passed by the Additional Commissioner, of the erstwhile Central Excise Ahmedabad-II Commissionerate[for short - '*adjudicating authority*']:

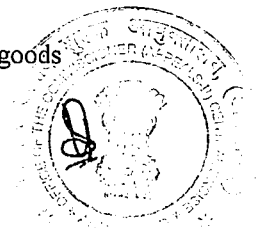
Sr. No.	Name of the appellant(s)	Appeal No.
1	M/s. Photokina Chemicals Private Limited, 556-B, Tajpur Road, Opposite M N Desai Petrol Pump, Changodar, Taluka Sanand, Ahmedabad.	101/Ahd-II/Appl-II/2016-17
2	Shri Jagdish M Sheth, Managing Director, M/s. Photokina Chemicals Private Limited, 556-B, Tajpur Road, Opposite M N Desai Petrol Pump, Changodar, Taluka Sanand, Ahmedabad.	102/Ahd-II/Appl-II/2016-17

2. Briefly, the facts are that a search was carried out simultaneously at the appellants place and at M/s. Gopal Enterprises on 26.3.2015, which revealed that goods valued at Rs. 2.28 crores were lying in a ready to dispatch condition at the appellant's premises, which was not entered in their daily stock account. The said goods were therefore, seized on a reasonable belief that the same was not accounted for with the intention to clear it without payment of Central Excise duty. Consequently, the appellant vide his letters dated 1.4.2015 and 10.4.2015, informed the department that the seized goods involved trading goods valued at Rs. 1.41 crores and the excisable goods valued at Rs. 86.95 lacs. On completion of investigation, a show cause notice dated 23.9.2015, was issued to the appellant *inter alia* alleging that the appellant had failed to maintain daily stock account for the period from 1.3.2015 to 26.3.2015 and suppressed the production, with the intention to evade payment of Central Excise duty. The notice therefore, proposed confiscation of excisable goods of Rs 86,95,401/-; demanded duty of Rs. 10,86,925/- along with interest and further proposed penalty on the appellant under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. Penalty under Rule 26 was also proposed on the appellant mentioned at Sr. No. 2 of the table, *supra*.

3. This notice was adjudicated vide the impugned OIO dated 8.11.2016, wherein the adjudicating authority, confiscated the seized goods but granted the appellant an option to redeem the goods on payment of redemption fine of Rs. 21,73,850/-; imposed penalty of Rs. 10,86,925/- on the appellant mentioned at Sr. No. 1 and a penalty of Rs. 2.50 lacs on the appellant mentioned at Sr. No. 2, of the table above.

4. Feeling aggrieved, both the aforementioned appellants have filed the appeal raising the following averments:

- the adjudicating authority's observation that the appellant had wrongly availed benefit of exemption notification no. 8/2003, was totally erroneous;
- that the wooden stretch boxes were supplied by M/s. Gopal Enterprises under proper invoices and hence cannot be said to have been unaccounted for in any manner;
- that the production slips were presented and it did contain the amount of excise duty;
- that no evidence has been produced that any clandestine removal has taken place or that the goods were attempted to be removed without payment of duty;
- that confirmation of demand of duty and levy of fine and penalty is totally unjustified;



- that the goods which were manufactured between 1.3.2015 to 26.3.2015 were not entered in the stock account because of absence of employee; that this was explained by the Managing Director of the appellant;
- that imposition of huge fine is unjustified;
- that merely on the basis of non entry of goods in the stock account, it cannot be held that there was non-payment or any attempt was made to evade payment of duty;
- that the impugned order has been passed on the basis of assumptions and presumption;
- that since there was no intention to remove the goods clandestinely the confiscation of the goods and imposition of penalty is totally erroneous;
- penalty under section 11AC(c) of the Central Excise Act, 1944, has been wrongly imposed since the appellant had no intention to evade payment of duty;
- that since no separate role has been attributed to the appellant mentioned at Sr. No. 2 of table above, no penalty is imposable on him;
- that they would like to rely on the following case laws Tirupati Granites [1995(78) ELT 301] and Lakshmi Packaging [1998(98) ELT 91].

5. Personal hearing in the matter was held on 14.9.2017, wherein Shri Parthiv Salot, CA appeared on behalf of the appellant wherein he reiterated the grounds of appeal and submitted that their production slip and their details were maintained batch wise and that it was also available during the search; that daily stock account was not maintained but the material issue voucher matched with the clearance invoices which clearly depicted that final clearances matched with their internal documents. Since a complete matching of all the documents was needed for the disputed period, the appellant was again granted a hearing on 21.9.2017

5.1 Shri Parthiv Salot, CA along with Arvind Gupta, Consultant appeared before me on 21.9.2017 and submitted a written submission along with details in two box files. He also submitted two charts viz. (i) quantity reconciliation with panchnama and excise invoices and (ii) material issue voucher and reconciliation with sales/excise invoices mentioning batch number. It was further informed that the show cause notice had taken figures from their system. In the additional written submissions, the appellants raised the following arguments:

- that no proof has been produced that the entry in daily stock account was not made with an intent to evade payment of duty;
- that the production records were maintained in the books which contained the details regarding product name, unit, quantity, batch no and remarks;
- that the quantitative reconciliation is more than enough to justify the honest intention of the appellant;
- that there was neither shortage/excess of inputs;
- that revenue has not produced any evidence to show that the goods not entered in the daily stock account were meant for clandestine removal;
- that the impugned order may be set aside and the fine and penalties imposed on appellants mentioned at Sr. No. 1 and 2 of the table supra, be dropped.

6. Before proceeding any further, the undisputed facts in this case is enumerated below:

- the panchnama drawn on the date of search and the notice clearly mentions that the daily stock account was not maintained for the period from 1.3.2015 to 26.3.2015;
- the Managing Director [appellant mentioned at Sr. No. 2, supra] confessed in his statement dated 23.4.2015, that the daily stock account was not maintained for the period mentioned above;
- in the letter dated 1.4.2015, the appellant in para 4 [not numbered] clearly stated that due to unavailability of excise personnel, they could not complete the daily stock account for the month of March 2015;
- the allegation of non maintenance of the daily stock account is accepted even in the grounds of appeal at para (f);
- that the appellant subsequently accounted the seized goods, in the daily stock account and thereafter cleared the same on payment of appropriate Central Excise duty.



7. I find that since the appellant had cleared the seized goods, which were released provisionally, on payment of appropriate central excise duty, the adjudicating authority did not confirm the demand [para 20 of the impugned OIO]. Thus the prima facie fear of the Revenue that the non recording of the finished excisable goods were to be clandestinely removed, has been taken care of, albeit after the departmental action of search and seizure.

8. In view of these facts, now the primary question to be decided in these appeals are whether the appellant is liable for [a] redemption fine subsequent to confiscation of goods; [b] penalty on appellant 1 of the table above; and [c] whether penalty imposed on the Managing Director is maintainable.

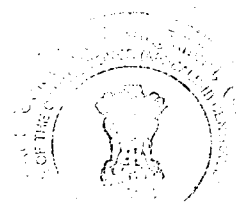
9. The appellant surprisingly in the grounds of appeal has claimed that the demand stands confirmed, which I find is not factually correct. Since duty is not in dispute and the department itself has not confirmed the duty on the grounds that the seized goods were subsequently cleared by the appellant on provisional release, on payment of duty, the question of going through the reconciliation, submitted during the personal hearing, would not serve any purpose.

10. I will therefore, first deal with the confiscation portion. In para 6, I have already mentioned facts, which are undisputed. While the department's allegation is that daily stock register was not maintained from 1.3.2015 to 26.3.2015, I find that the appellant has accepted this allegation not once but [a] during his statement, [b] subsequently in the letter for provisional release and [c] thereafter even in the grounds of appeal. Hence, it is an undisputed and accepted fact that the daily stock register was not maintained during the said period, be it for whatever reason. To this allegation, the appellant's averment is that they had maintained production slip/records which contain all the details. Though, RG-1 as a statutory record was dispensed with vide Circular no. 536/32/2000-Cx dated 30.6.2000, in paras, reproduced below, the Circular, further stated as follows:

*7. Non-maintenance of daily stock account as contemplated under Rule 53 or other information mentioned in other rules mentioned above by the assessee in his private records will mean contravention of specified rules attracting appropriate penal action. If such non-maintenance of records are with intent to evade payment of Central Excise duty, the more stringent penal provisions of the Central Excise Act and Central Excise Rules shall be attracted. Trade and industry should therefore be advised to ensure that the requisite information as required under amended rules is scrupulously maintained in their identified private records to avoid any penal action.*

*8. It is emphasised that the private records of the assessee maintained in compliance with the provisions of the Central Excise Rules, shall necessarily be kept in the factory to which they pertain.*

10.1 Thereafter, vide the Central Excise Rules, 2002, the Government made it mandatory for the assessee's to maintain Daily Stock Account. The relevant extract of the said rule, is reproduced below for ease of reference:



**RULE 10. Daily stock account.** — (1) Every assessee shall maintain proper records, on a daily basis, in a legible manner indicating the particulars regarding description of the goods produced or manufactured, opening balance, quantity produced or manufactured, inventory of goods, quantity removed, assessable value, the amount of duty payable and particulars regarding amount of duty actually paid.

(2) The first page and the last page of each such account book shall be duly authenticated by the producer or the manufacturer or his authorised agent.

(3) All such records shall be preserved for a period of five years immediately after the financial year to which such records pertain.

[(4) The records under this rule may be preserved in electronic form and every page of the record so preserved shall be authenticated by means of a digital signature.

(5) The Board may, by notification, specify the conditions, safeguards and procedure to be followed by an assessee preserving digitally signed records.]

10.2 Thus, the argument of the appellant that since the production slip contained the details, it was equivalent to daily stock account is not a tenable argument. The details needed to be maintained in a daily stock account is clearly spelt out in Rule 10(1), *supra*. If the argument of the appellant is accepted, that since everything was mentioned in the production slip/records, it is not understood as to why the appellant was then maintaining a separate daily stock account, both before and after the disputed period?. However, I find that the production slip would contain the details of production of a particular date/batch only. For the entire stock, it was all the more necessary that they maintain the daily stock account, which under the Central Excise Rules, 2002 was mandatory on part of the appellant. But after having said so, for confiscation of the goods, it is imperative that the requirements under Rule 25 of the Central Excise Rules, 2002, need to be fulfilled. I find that the adjudicating authority has confiscated the goods under Rule 25, *ibid*, which for ease of reference states as follows: [relevant extracts]

**RULE 25. Confiscation and penalty.** — (1) Subject to the provisions of section 11AC of the Act, if any producer, manufacturer, registered person of a warehouse [or an importer who issues an invoice on which CENVAT credit can be taken] or a registered dealer, -

(a) .....; or

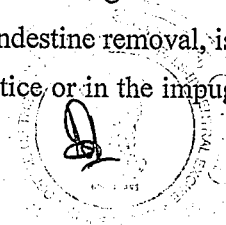
(b) does not account for any excisable goods produced or manufactured or stored by him; or

(c) .....; or

(d) .....

then, all such goods shall be liable to confiscation and the producer or manufacturer or registered person of the warehouse [or an importer who issues an invoice on which CENVAT credit can be taken] 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) or clause (c) or clause (d) has been committed, or [five thousand rupees], whichever is greater.

10.3 I find that the rule clearly states that if a manufacturer fails to account for any excisable goods produced/manufactured by him, then all such goods, shall be liable for confiscation and shall be liable to penalty..... However, what is significant is that invocation of the said Rule is subject to the provisions of Section 11AC of the Central Excise Act, 1944. Now, Section 11AC of the Central Excise Act, 1944, clearly deals with penalty for short levy or non levy of duty, in certain cases. It is a fact that the disputed goods [seized and provisionally released] were subsequently removed on payment of duty; that there was no short payment or non levy of duty in respect of these goods. The departmental assumption that the goods in ready to dispatch condition, not entered in the daily stock account, were for clandestine removal, is not supported any reasoning or facts. There is nothing in the show cause notice, or in the impugned



order which proves that the appellant had in the past made any clandestine clearances. In-fact on going through the statement of dated 23.4.2014 of appellant mentioned at Sr. No. 2 of the first para supra, I find that on being asked as to why the daily stock account was not updated from 1.3.2015 to 26.3.2015, he stated that the daily stock account was maintained in computer; that though they could not maintain daily stock account during the said period, all the manufacturing figures were available with them; that they had cleared all goods during the said period on payment of duty; that there were no illicit clearances. Therefore, the appellant's contention, that since the department has not brought on record any evidence to prove that they intended to clandestinely remove the goods which were not accounted for in the daily stock account, the goods were not liable for confiscation and penalty, is a legally tenable argument. I find that the Hon'ble Tribunal in the case of Garden Silk Mills [1991(51) ELT 373] has held that when goods were still within the factory premises and were not attempted to be clandestinely removed, confiscation cannot be sustained. Therefore, in view of the fact that [a] the goods were never removed; [b] that these goods were subsequent to seizure and provisional release were cleared on payment of duty; and [c] that there is no evidence on record to support the assumption of the department that the appellant intended to clandestinely remove the non accounted goods, I set aside the confiscation of the goods ordered by the adjudicating authority under Rule 25 of the Central Excise Rules, 2002.

11. Since the goods have not been held liable for confiscation, the question of redemption fine does not arise. The redemption fine imposed on the appellant is therefore set aside.

12. Now coming to the second point of imposition of penalty on the appellant mentioned at Sr. No. 1 of the table supra, I find that a penalty of Rs. 10,86,925/- is imposed under Section 11AC(1)(c) of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

**SECTION 11AC. Penalty for short-levy or non-levy of duty in certain cases. — (1) The amount of penalty for non-levy or short-levy or non-payment or short-payment or erroneous refund shall be as follows :-**

(a)..... :

(b).....;

(c) where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud or collusion or any wilful mis-statement or suppression of facts, or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to the duty so determined :

Now penalty under Section 11AC, can be imposed only where any duty of excise has not been levied or paid or has been short levied or short paid, etc., by reason of fraud or collusion or any willful mis statement or suppression of facts, or contravention of any of the provisions of this Act or the Rules, with intent to evade payment of duty. Since no duty stands confirmed, neither does the impugned OIO give a clear finding that there was fraud, collusion, willful misstatement, suppression of facts, etc., and since the clearances were made on payment of duty, no penalty can be imposed under Section 11AC of the Central Excise Act, 1944. Since the confiscation under



Rule 25 is already set aside being non sustainable, the question of imposing penalty under Rule 25 of the Central Excise Rule, 2002 also does not arise.

13. Now coming to the last question to be decided as to whether the adjudicating authority was correct in imposing penalty on the Managing Director. Appellant no. 2 in the table supra, has stated that no separate role is attributed to him in the show cause notice. I find that the allegation made is that the appellant mentioned at Sr. No. 2 was aware or had reasons to believe that the goods which were lying unaccounted were liable for confiscation. However, since I have set aside the confiscation of the goods, the question of imposing penalty on the Managing Director does not arise. Therefore, the penalty imposed on Shri Jagdish M Sheth, Managing Director, is set aside.

14. After having said so, it is a fact that the daily stock account in terms of Rule 10 of the Central Excise, Rules, 2002, was not maintained by the appellant for the period from 1.3.2015 to 26.3.2015. Therefore, for this contravention, I impose a general penalty of Rs. 5,000/- on appellant at Sr. no. (1) of the table in para (1), supra, in terms of Rule 27 of the Central Excise Rules, 2002. While imposing this penalty, I draw support from the order of the Hon'ble Tribunal in the case of Indian Steel & Wire Product Limited [1995(78) ELT 298], wherein it was held that non mention of Rule 226 in the show cause notice is no impediment to modify the penalty imposed under Rule 173Q of the Central Excise Rules, 1944. In view of the foregoing, I pass the following orders:

[a] since the confiscation of the goods is set aside being non maintainable, the question of imposing redemption fine does not arise;

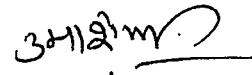
[b] the penalty of Rs. 10,86,925/- imposed on M/s. Photokina Chemicals Private Limited, under Section 11AC(1)(c) of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002, is set aside;

[c] penalty of Rs. 2,50,000/- on Shri Jagdish M Sheth, Managing Director of the appellant no. 1 under Rule 26 of the Central Excise Rules, 2002 is set aside;

[d] penalty of Rs. 5,000/- is imposed under Rule 27 of the Central Excise Rules, 2002 on M/s. Photokina Chemicals Private Limited .

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

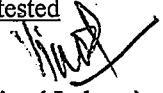
15. The appeal filed by the appellant(s) stands disposed of in above terms.

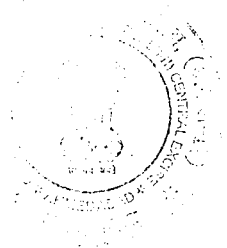
  
(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date : .10.2017

Attested

  
(Vinod Lukose)  
Superintendent,  
Central Tax(Appeals),  
Ahmedabad.



V2(32)101/Ahd-II/Appeal-II/2016-17  
V2(32)102/Ahd-II/Appeal-II/2016-17

By RPAD.

To,

M/s. Photokina Chemicals Private Limited, 556-B, Tajpur Road, Opposite M N Desai Petrol Pump, Changodar, Taluka Sanand, Ahmedabad.	Shri Jagdish M Sheth, Managing Director, M/s. Photokina Chemicals Private Limited, 556-B, Tajpur Road, Opposite M N Desai Petrol Pump, Changodar, Taluka Sanand, Ahmedabad.
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Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad North Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division IV, Ahmedabad North.
4. The Additional Commissioner, System, Central Tax, Ahmedabad North Commissionerate.
5. Guard File.
6. P.A.