

केंद्रीय कर आयुक्त (अपील)	
O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,	
सत्यमेव जयते	केंद्रीय उत्पाद शुल्क भवन, 7 th Floor, Central Excise Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
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रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.): V2(58)104 /Ahd-II/Appeals-II/ 2016-17 / 6039 to 6049

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-150-17-18

दिनांक (Date): 26.10.2017 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-III), अहमदाबाद- II, आयुक्तालय द्वारा जारी

मूल आदेश सं----- दिनांक -----से सृजित

Arising out of Order-In-Original No. 944/REB/I/16-17 Dated: 18.11.2016 issued by:
Assistant Commissioner Central Excise (Div-III), Ahmedabad-II

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

M/s Modern Terry Towels Limited

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 प्रक्रिया 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 हों।

- (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 दिनोंक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

- (2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

- (1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

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

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

- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

- (ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल 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 वहाँ 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 वहाँ 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 भाँग 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

This order arises out of an appeal filed by M/s. Modern Terry Towels Ltd., P.O. Box No.16, Village Nidhrad, Sanand-Kadi Road, Sanand-382110, Distt. Ahmedabad (in short 'appellant') against Order – in - Original No. 944/REB/II/16-17 dated 18.11.2016(in short 'impugned order') passed by the then Assistant Commissioner, Central Excise, Division-III, Ahmedabad-II (in short 'adjudicating authority').

2. Briefly stated that the rebate claim of Rs. 98.085/- filed by the appellant for goods exported under Rule 18 of the Central Excise Rules, 2002 was rejected by the adjudicating authority vide impugned order on the ground that the appellant had claimed duty drawback under the category of 'Cenavt facility has not been availed' (which is at higher rate) whereas in fact they are availing cenvat facility on capital goods.

3. Aggrieved with the impugned order, the appellant filed the present appeal wherein, *interalia*, they submitted that:

- (a) the adjudicating authority has rejected the refund claim without considering the vital fact that the expression "when venvat facility has not been availed" has been amply elaborated at Para no.13 of Notifn. No.110/2015-Cus(NT).
- (b) they have taken cenvat credit on capital goods and not inputs or input services and the same has been acknowledged by the department at para 8(a) of SCN.
- (c) under Rule 18 of the CER, 2002 read with Notifn. No.19/2004-CE(NT), nowhere it is stipulated that the rebate shall not be admissible if the exporter has availed of facility of duty drawback under Column A of the Drawback schedule.
- (d) proviso to Rule 3 of the Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 is in tandem with the meaning of the expression "when cenvat facility has not been availed" in as much as it speaks of tax paid rebated/refunded in respect of imported/excisable materials or input services. The reference is only regarding availment of cenvat credit and subsequent rebate of duty paid on inputs or input services. The said rule does not make any provision whatsoever for deduction of the duty rebated/refunded in respect of capital goods. The said provision in Rule 3 is one-way provision and does not stipulates any vice-versa provisions. Thus, if at all the charges in the SCN bear any credence, the legal remedy was deduction of drawback of the amount of duty rebated and not rejection of the rebate claim.
- (e) the adjudicating authority has ignored the clarification issued under Para 8 of Circular No.42/2011-Cus. Dated 22.09.2011 which clearly indicates that rebate and duty drawback are simultaneously admissible if cenvat credit is not availed on inputs or input services.
- (f) the ratio of decision in case of M/s. Trident Ltd. reported at 2014(312)ELT-0934(GOI) is squarely applicable to the facts of the present case.
- (g) the impugned order is bad in law in as much as the same has merely relied upon the case law reported at 2016(334)ELT-584(Mad) in case of M/s. Ragav Industries Ltd. vs. UOI. In absence of any violation of the relevant provisions of law, the department is not free to act on its own whims and fancies. In the present case, no evidence or any cogent reason has been forwarded so as to demonstrate that the refund was not proper and legal.
- (h) penalty imposed under Rule 27 of the CER, 2002 is not justifiable since they have not suppressed any material facts. In fact, SCN itself mentions at para 8(a)

that scrutiny of ARE-1 reveal that they have availed the facility of cenvat credit on capital goods.

4. Personal hearing in the matter was held on 12.10.2017. Shri Archit Kotwal, Authorised Representative, appeared on behalf of the appellant and re-iterated the grounds of appeal; that they have not availed CENVAT on input as shown in SCN(Para 6A); that as per Circular No.42/2011 (Para-8) states that if input credit not taken, drawback and rebate are allowed.

5. I have carefully gone through the records of the case, submissions made in the appeal memorandum, personal hearing and evidences available on records. I find that main issue to be decided is whether appellant can claim drawback under the category of 'Drawback when Cenvat facility has not been availed' when they have availed cenvat facility on capital goods. Accordingly, I proceed to decide the case on merits.

6. In this regard, I find that duty drawback is an export promotion scheme underwhich two rates are prescribed viz (1) Drawback when cenvat facility has not been availed (underwhich drawback @ 5% of FOB value is allowed with value cap of Rs.34/- per kg.) and (2) Drawback when cenvat facility has been availed (underwhich drawback @1.6% of FOB value is allowed with value cap of Rs.10.90 per kg.). I find that the appellant has cleared the goods for export under ARE-1 no.1/15-16 dated 10.02.2016 and paid central excise duty of Rs.98,085/- vide entry no.36 dated 29.02.2016 from duty credit on Capital goods account maintained and accordingly filed rebate claim. During the course of scrutiny of subject rebate claim, it is noticed that the appellant has also claimed drawback @5% of FOB value in S/B No.5801748 dated 11.02.2016 under the category of 'Drawback when Cenvat facility has not been availed' which comes to Rs.81,738/-. In this regard, I find that Notification No.110/2015-Customs(NT) dated 16.11.2015 provides for conditions underwhich drawback shall be allowed. Notes and condition no. 7 clearly provides that "Drawback when cenvat facility has not been availed" refers to total drawback(Customs, Central Excise and Service Tax component put together) allowable whereas "Drawback when cenvat facility has been availed" refers to drawback allowable under the customs components. Similarly, Condition no. 13 provides clearly elaborates the expression 'when cenvat facility has not been availed' used in the Drawback Schedule. It further provides that the exporter shall declare and if necessary establish to the satisfaction of the Asstt. Commissioner of Central Excise that "no cenvat facility has been availed for any of the inputs or input services used in the manufacture of the export product". I find that the appellant has paid duty of Rs.98,095/- on goods cleared said Are-1 No.001/15-16 dated 10.02.2016 vide entry no.36 dated 29.02.2016 from records maintained for 'Duty credit on Capital Goods' for the month of February-2016. So, it is ample clear that when the appellant has availed cenvat facility, exporter is not eligible drawback at higher rate under the category of 'Drawback when cenvat facility has not been availed'. My view is also supported by the following case laws:



(a) Raghav Industries Ltd. reported in 2016(334)ELT-700(GOI)

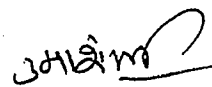
"Export rebate-Higher rate of duty drawback at 9.5% comprising Customs and Central Excise portion having been claimed in respect of export goods, rebate of duty paid on exported goods not admissible under Rule 18 of the Central Excise Rules, 2002 read with Notifn. No.19/2004-CE(NT) dated 06.09.2004 as it would amount to double benefit[para 9,10,12]"

(b) Padam Fashion reported in 2016(344)ELT-782(GOI)

"Export rebate claim-Goods exported through merchant exporter-Duty drawback availed by merchant-exporter which includes Customs, Central Excise and Service Tax duties-Rebate of duty paid on exported goods not admissible under Rule 18 of the Central Excise Rules, 2002 read with Notifn. No.19/2004-CE(NT) dated 06.09.2004 as it would amount to double benefit, applicant having failed to prove that duty drawback availed of Customs portion only in respect of exported goods[para 12,13]"

7. In view of the above discussion and findings, I reject the appeal filed by the appellant and uphold the impugned order.

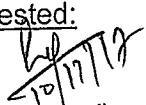
8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested:


(B.A. Patel)
Superintendent(Appeals),
Central Tax, Ahmedabad.

BY SPEED POST TO:

M/s. Modern Terry Towels Ltd.,
P.O. Box No.16, Village Nidhrad,
Sanand-Kadi Road,
Sanand-382110.

Copy to:

- (1) The Chief Commissioner, Central Tax, Ahmedabad Zone.
- (2) The Commissioner, Central Tax, Ahmedabad(North)(RRA Sec.).
- (3) The Assistant Commissioner, Central Tax Division-III, Sanand.
- (4) The Asstt. Commissioner(System), Central Tax HQ, Ahmedabad(North).
(for uploading the OIA on website)
- (5) Guard file
- (6) P.A. file.