केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

केंद्रीय उत्पाद शुल्क भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, Central Excise Building,
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रजिस्टर डाक ए .डी .द्वारा

क फाइल संख्या (File No.) : **V2(72)108/Ahd-II/Appeals-II/ 2016-17/ 495-99**

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 272-17-18**

दिनांक (Date): **16.01.2018** जारी करने की तारीख (Date of issue): **24/01/18**

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-I), अहमदाबाद- II, आयुक्तालय द्वारा जारी मूल आदेश सं---------- दिनांक _----------से सृजित

Arising out of Order-In-Original No .**15/AC/DEMAND/16-17** **Dated: 06.12.2016** issued by: Assistant Commissioner Central Excise (Div-I), Ahmedabad-II

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

M/s Madhusudan Special Sections Pvt. Ltd.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है |

Any person an aggrieved by this Order-in-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way:

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India:

(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अ्तत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अ्धीन 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 Gcvernment 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 n 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 warehcuse

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है |

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(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए,हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

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

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

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

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

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

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

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

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

(ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ–20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद–380016.

(b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए–3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणें की गई अपील के विरूद्व अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से

रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

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

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस सन्दर्भ में ,इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

M/s Madhusudan Special section Private Limited, Near Naroda Railway station, Naroda, Ahmedabad (hereinafter referred to as 'the appellant') is holding Central Excise registration No. AABCD2018FXM001 and manufacturing Angle shaped Section of non-alloy steel falling under CTH 72 of the First Schedule to the Central Excise Tariff Act, 1985 (CETA, 1985) and was paying duty on production based capacity determined under erstwhile Section 3A of the Central Excise Act, 1944 (hereinafter 'CEA, 1944) read with Rule 96ZP of erstwhile Central Excise Rules, 1944 (hereinafter 'CER, 1944'). The appellant was availing CENVAT credit under the Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004').

2. Briefly stated, the facts of the case are that the then Commissioner of Central Excise, Ahmedabad-I had fixed the Production Capacity of the factory of the appellant for the period of 1998-99 at **11735 M.Tons per annum** and the pro rata production for one month was **997.92N.tons** in respect of hot re-rolled products of non-alloy steel falling under CTH 72 of CETA, 1985 and monthly duty payable was **Rs.2,93,376/-**.This was communicated to the appellant *vide* letter F.No. IV/16-539/MP/97.P dated 28/12/98 by the Assistant commissioner (Technical), Central Excise HQ, Ahmedabad-I. However, the appellant had paid Central Excise duty @ Rs.2,27,185/- per month instead of Rs.2,93,376/- for the **period April-1998 to March-1999**. Thus the appellant had **short paid Central Excise duty** amounting to **Rs.7,94,292/-**. Therefore, a **Show Cause Notice F.No. V.72/3-52/98 dated 18/03/1999** (hereinafter 'the SCN') was issued for recovery of Rs.7,94,292/- under Rule 96ZP of erstwhile CER, 1944 read with Section 11A of CEA, 1944 along with interest under Rule 96ZP(3)(i) ibid and proposing to impose penalty on the appellant under Rule 96ZP(3)(ii) ibid. This Show Cause Notice was adjudicated by the Deputy Commissioner, Central Excise, Division-I, Ahmedabad-II *vide* **O.I.O. No. 85/Dem/2000 dated 31/10/2000** where the demand for duty and interest were confirmed and penalty was left open awaiting final judgment of Supreme court in Civil appeal No.5203/1998 in case of U.O.I. vs Supreme Steels & General Mills. Later on corrigendum was issued imposing penalty of Rs.7,94,292/- on the appellant under Rule 96ZP(3) of erstwhile CER, 1944 subject to condition that same could be realized subject the said decision by Supreme Court. The appellant preferred an appeal with Commissioner (Appeals), Ahmedabad who issued Order-in-Appeal No. 312/2003/(312-A-II)CE/Commr(A-III) dated 11/11/2003 holding that the dispute pertained to determination of Annual Production Capacity (APC) determined by Commissioner whereas under Section 35 of CEA, 1944 Commissioner (Appeals) was empowered to entertain and decide appeals arising out of decisions taken by an authority below the rank of Commissioner. Thus the appeal was not entertained by Commissioner (Appeals). The appellant filed an appeal with CESTAT, WZB, Ahmedabad, which was decided *vide* Order No. A/1447A/WZB/AHD/2007 dated 18/06/2007 remanding the matter back to Commissioner (Appeals) for decision. The Commissioner (Appeals) *vide* Order-in-Appeal No.164/2007(Ahd-II)CE/RAJU/Commr(A) dated 27/11/2007 set aside

the Order-in-Original of the D.C. and remanded the matter back for finalization of demand after determination of APC through an appealable order taking into consideration the decisions of superior Courts. Being aggrieved, department filed an appeal with the Tribunal that was disposed of upholding the Order-in-Appeal No.164/2007(Ahd-II)CE/RAJU/Commr(A) dated 27/11/2007 for remand. The department preferred Tax Appeal No. 1263/2008 challenging the Tribunal decision in Hon'ble High Court of Gujarat that was dismissed *vide* Order dated 27/02/2015 on the ground that in view of instruction dated 17/08/2011, Tax Appeal below Rs. 10 Lakhs was not maintainable. Thereafter, the appellant applied for refund of duty of Rs.7,94,292/- and interest of Rs.34,079/- (totaling of Rs.8,28,371/-) paid on 06/04/1999 and 13/04/1999 respectively, which was sanctioned by department *vide* Order-in-original No. 2833/AC/15-16/Ref dated 03/02/2016. Thereafter, the Commissioner of Central Excise, Ahmedabad-II refixed / determined APC vide order-in-original No. AHM-EXCUSE-002-COMMR-01(TECH)/2016-17 dated 01/04/2016, whereby the annual APC was fixed at **11735 M.Tons** per annum (12 calendar months) and the *pro rata* for one month at **977.92MTs** under Section 3A of CEA,1944 read with Rule 96ZP of erstwhile CER, 1944 for the year 1998-99. Thereafter, in accordance with remand order in Order-in-Appeal No.164/2007(Ahd-II)CE/RAJU/Comm-(A) dated 27/11/2007, **Order-in-original No. 15AC/DEMAND/16-17 dated 06/12/2016 was issued by the Assistant Commissioner, Central Excise, Division-I, Ahmedabad-II** confirming the demand for Central Excise duty of **Rs.7,94,292/-** under section 11A of CEA, 1944 read with under Rule 96ZP of erstwhile CER, 1944 and under section 38A of CEA, 1944 along with interest under Rule 96ZP(3)(i) ibid read with section 38A of CEA, 1944 and imposing penalty of **Rs.7,94,292/-** on the appellant under Rule 96ZP(3)(ii) ibid read with section 38A of CEA, 1944.

3. Being aggrieved by Order-in-original No. 15AC/DEMAND/16-17 dated 06/12/2016 (hereinafter 'the impugned order') passed by Assistant Commissioner, Central Excise, Division-I, Ahmedabad-II (hereinafter 'the adjudicating authority'), the appellant has preferred the instant appeal mainly on the following grounds:

i. The appellant submits that the adjudicating authority has not discussed and considered merits of the decision of Hon'ble High Court of Gujarat in the case of Krishna Processors vs. U.O.I. – 2012 (280) ELT 186 (Guj.) and not given any finding regarding not following the said judgment relied upon by the reply dated 13/05/2016 and 22/11/2016 submitted before the adjudicating authority. Hon'ble High court of Gujarat in the aforesaid decision had clearly held that the SCN issued for recovery under Rule 96ZP of erstwhile CER, 1944 prior to the omission of said Rule and Section 3A of CEA, 1944 and not concluded prior to the omission of Section 3A of CEA, 1944 i.e. upto 11th May, 2001, there was no power to proceed further and conclude the same and such order would automatically lapse. Under the circumstances, any action taken under rules 96ZO, 96ZP and 96ZQ of the Rules which were omitted *vide* Notification dated 01/03/2001 without saving clause and after Section 3A of the Act came to be omitted on 11/05/2001 from the Statute book without any saving clause, would be without authority of law and would be *non est* as such no order can be issued under Rule 96ZP of erstwhile CER, 1944 omitted vide Notification dated 01/03/2001 and after the omission of Section 3A of the Act without saving clause. Even though the SCN demancing recovery of Excise duty under Rule 96ZP of erstwhile CER, 1944 omitted *vide* Notification dated 01/03/2001was issued on 18/03/1999 that was also prior to the omission of Section 3A of CEA, 1944 on 11/05/2001, the SCN was concluded on 06/12/2016 (date of impugned order), which is

after the omission of Rule 96ZP of erstwhile CER, 1944 and Section 3A of CEA, 1944. Hon'ble High court had clearly held that the charging provision is section 3A of the Act and Rules ibid etc. are merely machinery provisions. Thus, any liability which accrues is under section 3A of the Act. Accordingly, when the charging Section itself is deleted without any saving clause, no recovery under the said Section can be made by resorting to Rule 96ZP of erstwhile CER, 1944. Further, it was held that after omission of section 3A of CEA, 1944, proceedings initiated under Rule 96ZP would not survive and any proceeding pending after the omission of Rule 96ZP and also after omission of Section 3A without saving clause would automatically lapse and no order could have been issued. Therefore, the appellant submits that the impugned order passed by the adjudicating authority confirming the demand under Rule 96ZP of erstwhile CER, 1944 is not legal, without any authority and *non est* n terms of the order of the Hon'ble High Court of Gujarat. The Order No.AHM-EXCUS-002-COMMR-01(TECH)/2016-17 dated 01/04/2016 issued by the Commissioner of Central Excise, Ahmedabad-II had re-fixed APC for the year 1998-99 under section 3A of CEA, 1944 read with Rule 96ZP of CER, 1944 is itself without any authority and not legal in view of the said Hon'ble High Court order as such no proceeding can be initiated under Section 3A of CEA, 1944 read with Rule 96ZP of CER, 1944. In view of the High court order, no proceeding for demanding and recovery of duty can be initiated or no order can be issued for recovery of duty under Rule 96ZP of CER, 1944 even in cases which were initiated prior to omission of Rule 96ZP and not concluded prior to omission of Section 3A and therefore, order issued by adjudicating authority is not legal and without any authority. The Hon'ble High Court of Gujarat has clearly held that ***"all proceedings which were pending as on 11/5/2001 even if initiated prior to omission of rules ibid, would thereafter automatically lapse and no orders could have been passed if they were not concluded at time of omission of Section 3A ibid."*** The adjudicating authority has erred by contending that the argument of the appellant to the effect that no fresh proceeding can be initiated under Section 3A was not tenable in as much as proceeding in this case was already initiated *vide* the SCN dated 18/03/1999 i.e. prior to omission of Rule 96ZP of ibid on 01/03/2001. The decision of Hon'ble High Court of Gujarat in the matter of Krishna Processors vs. U.O.I. – 2012 (280) ELT 186 (Guj.) was approved by Hon'ble Supreme Court of India in the case of Shree Bhagwati Steel rolling Mills vs CCE – 2015 (326) ELT 209 (SC). Various judgments in the cases of Mahamaya Steel Industries Ltd. vs CCE & ST, Raipur –2014 (307) ELT 356 (Tri.-Del.); Shiv Surendra Steel Rolling Engg. Mills vs CCE, Ludhiana – 2014 (303) ELT 559 (Tri.-Del.); CCE, Jaipur vs Alwar Processors Pvt. Ltd. – 2014 (308) ELT 720 (Tri.-Del.) and Shree Rajeshwari Steel Rolling Mills vs CCE, Ahmedabad – 2013 (290) ELT 257 (Tri.Ahmd). Hon'ble Supreme Court decision in the case of Kamalakshi Finance Corporation – 1991 (55) ELT 433 (SC) ordered the department to pay utmost regard to judicial discipline and give effect to orders of higher appellate authorities which are binding on them. However, in the present case the adjudicating authority had violated the judicial discipline by not following the order of jurisdictional High Court of Gujarat and Supreme Court of India and therefore, the impugned order is required to be set aside in the interest of justice legally available to the appellant.

4. Personal hearing in the appeal was held on 12/10/2017 that was attended by Shri Valjibhai Patel, Manager of the appellant. Shri Patel reiterated the grounds of appeal. He also submitted additional written submissions. In the additional submissions, the appellant has reiterated the grounds of appeal challenging the re-determination of APC by the Commissioner and the confirmation of duty and the imposition of penalty holding that the same were against the ratio of the judgments of Hon'ble Gujarat High Court and Hon'ble Supreme Court.

5. I have carefully gone through the facts of the case on records and submissions made by the appellant in the grounds of appeal. The present appeal is pursuant to the remand proceedings as ordered in Order-in-Appeal No.164/2007(Ahd-II)CE/RAJU/Commr (A) dated 27/11/2007 issued by Commissioner (Appeals), Central Excise, Ahmedabad, directing the department to finalize the demand after determination of Annual Production Capacity (APC) through an appealable order taking into consideration the decisions of superior Courts. The departmental appeal against this

O.I.A. was rejected by Hon'ble CESTAT, WZB, Ahmedabad *vide* Order No. A/787/WZB/AHD/08 dated 23/04/2008 in the following terms:

> "4. We do not find infirmity in the above view of the Commissioner (Appeals) in as much as it is settled law that APC disputed by the assessee by way of filing representation, it was the duty of the Commissioner to pass an appealable order. We have seen the APC fixation letter communicated by the Assistant Commissioner, which is not in appealable form. As such, we are of the view that the appellate authority has rightly remanded the matter to commissioner for re-fixation of APC first and then decide the assessee's duty liability. In view of the above, we reject the revenue's appeal. Stay petition also gets disposed off."

The department again preferred an appeal against the above Tribunal order that was dismissed by Hon'ble High Court of Gujarat. Accordingly, as part of the remand proceedings in accordance with the O.I.A., the determination of APC was ordered *vide* an appealable order **No.AHM-EXCUS-002-COMMR-01 (TECH)/2016-17 dated 01/04/2016** passed by Commissioner, Central Excise, Ahmedabad-II. Thereafter, the remand adjudication proceedings were carried out and **Order-in-original No. 15/AC/DEMAND/16-17 dated 06/12/2016** was issued by the Assistant Commissioner, Central Excise, Division-I, Ahmedabad. The appellant has challenged the redetermination of APC purely on the ground that as per the ratio of the judgment of Hon'ble High Court of Gujarat in the case of Krishna Processors vs. U.O.I. – 2012 (280) ELT 186 (Guj.), the determination of APC under Section 3A of CEA, 1944 read with Rule 96ZP of erstwhile CER, 1944 vide order dated 01/04/2016 was without authority because Section 3A of CEA, 1944 was omitted on 11/05/2001. Similarly, the appellant has challenged the confirmation of demand for duty, interest and imposition of penalty in **Order-in-original No. 15/AC/DEMAND/16-17 dated 06/12/2016** on the ground that Rules 96ZO, 96ZP and 96ZQ of the erstwhile CER, 1944 were omitted w.e.f. 01/03/2001. It is germane to the matter of the instant appeal that the only contention of the appellant for setting aside the order determining APC Order dated 01/04/2016 as well as the O.I.O. dated 06/12/2016 is that as per the ratio of the decision of Hon'ble High Court of Gujarat in the case of Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj.), even though the action was initiated before the omission of Rules 96ZO, 96ZP and 96ZQ of the erstwhile CER, 1944 w.e.f. **01/03/2001** as well as before the omission of Section 3A of CEA, 1944 on **11/05/2001**, the conclusion of the actions vide APC order dated 01/04/2016 and O.I.O. dated 06/12/2016 was without authority because on these dates, neither Rules 96ZO, 96ZP and 96ZQ of the erstwhile CER, 1944 nor Section 3A of CEA, 1944 were in existence. The appellant has contended that both determination of APC and the proceedings in the O.I.O. were in violation of the settled law as per the judgment of Hon'ble High Court of Gujarat in the case of Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj).

6. On studying the case law in Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj.), it is seen that Hon'ble High Court of Gujarat had held that the saving clause under Section 38 A of CEA, 1944 operates only in respect of amendment, repeal, supersession or rescinding of any rule, notification or order whereas Rule 96ZQ was not

amended, repealed, superseded or rescinded but was omitted and as a necessary corollary it follows that Rules96ZQ, 96ZP and 96ZO of the erstwhile Rules having been omitted *vide* Notification dated March, 2001, any liability or obligation acquired, accrued or incurred thereunder would not be saved under Section 38A *ibid.* In the light of this ratio, the appellant claims that the actions pertaining to determining the APC and the confirmation of demand, both in the remand proceedings, are without authority and are liable to be set aside. This contention of the appellant is devoid of merit for the reason that it is based on misconstrued facts. The fact remains that the determination of APC had been concluded by the Commissioner and communicated by the Assistant Commissioner on **28/01/1998.** As the communication dated 28/01/1998 was held by Commissioner (Appeals) to be non-speaking in nature, the *de novo* order dated **06/12/2016** was issued by the Commissioner in remand proceedings. In other words, the process of determining APC was concluded on 28/01/1998 but in accordance with the remand orders, a speaking order was issued on 06/12/2016. It is erroneous to interpret that the action for determination of capacity was not concluded prior to repeal of Section 3A of CEA, 1944 because the action was actually completed on 28/01/1998. Similarly, the actions initiated vide Show Cause Notice F.No. V.72/3-52/98 dated **18/03/1999** was concluded on **31/10/2000** *vide* O.I.O. No. 85/Dem/2000 dated 31/10/2000. However, consequent to the remand orders of Commissioner (Appeals) as upheld by Hon'ble Tribunal and Hon'ble High Court, the *de novo* Order-in-original No. 15/AC/DEMAND/16-17 dated 06/12/2016 was issued by the Assistant Commissioner in the remand proceedings. It is reiterated that by the issuance of APC order communicated on 28/01/1998 and O.I.O. dated 31/10/2000, the respective actions had attained conclusion by the concerned authorities. This fact is also forthcoming from the remand order issued by Commissioner (Appeals) that was upheld by Hon'ble Tribunal and Hon'ble High court of Gujarat. Had there been any legal inadequacy as claimed by the appellant, Hon'ble Tribunal and Hon'ble High Court would never have upheld the remand proceedings to be carried out under the erstwhile Rule 96ZQ and erstwhile Section 3A. The Commissioner and the Assistant Commissioner in the present case have acted under the legal sanctity accorded to the remand proceedings by Hon'ble Tribunal and Hon'ble High Court. Therefore there is no merit in the contention of the appellant that the impugned orders were in violation of judicial discipline as the ratio laid down in the matter of Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj.) was not followed. Both the said orders were issued following judicial discipline in accordance with the remand orders upheld by CESTAT, Ahmedabad and consequent to the dismissal of the Revenue appeal by Hon'ble Gujarat High Court. The reliance placed by the appellant on the Apex Court decision in the case of Kamalakshi Finance Corporation – 1991 (55) ELT 433 (SC) to contend judicial indiscipline is misplaced and irrelevant to the facts of the present case.

7. Further, the order of Hon'ble Gujarat High Court in the case of Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj.), to the extent that Section 38A of

CEA, 1944 governs only repeal, amendment etc. and is not applicable to omitted provisions, has been overruled by Hon'ble Supreme Court in the case of Shree Bhagwati Steel Rolling Mills vs CCE – 2015 (326) ELT 209 (SC) in the following terms:

> **"14.** On a conjoint reading of the three expressions "delete", "omit", and "repeal", it becomes clear that "delete" and "omit" are used interchangeably, so that **when the expression "repeal" refers to "delete" it would necessarily take within its ken an omission as well.** This being the case, we do not find any substance in the argument that a "repeal" amounts to an obliteration from the very beginning, whereas an "omission" is only *in futuro*. If the expression "delete" would amount to a "repeal", which the appellant's counsel does not deny, it is clear that a conjoint reading of Halsbury's Laws of England and the Legal Thesaurus cited hereinabove both lead to the same result, namely that **an "omission" being tantamount to a "deletion" is a form of repeal."**

Further, the case law in Rayala Corporation (P) Ltd. v. Director of Enforcement –(1969) 2 SCC 412 that was relied upon by Hon'ble Gujarat High Court in Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj.) to hold that saving clause applies only to repeal and not to omissions, has been distinguished by Hon'ble Supreme Court in Shree Bhagwati Steel Rolling Mills vs CCE – 2015 (326) ELT 209 (SC), holding that in view of the fact that the distinction between repeal and omission having been subsequently done away with by the Supreme court order in the case of Fibre Boards (P) Ltd. v Commissioner of Income Tax – (2015) 376 ITR 596 (SC), the law in *Rayala Corporation* was no longer the law declared by the Supreme Court. Paragraph 22 of the case law Shree Bhagwati Steel Rolling Mills vs CCE – 2015 (326) ELT 209 (SC) is reproduced for ready reference as follows:

> **"22.** It is settled law that Parliament is presumed to know the law when it enacts a particular piece of legislation. The Prevention of Corruption Act was passed in the year 1988, that is long after 1969 when the Constitution Bench decision in *Rayala Corporation* had been delivered. It is, therefore, presumed that Parliament enacted Section 31 knowing that the decision in *Rayala Corporation* had stated that an omission would not amount to a repeal and it is for this reason that Section 31 was enacted. This again does not take us further as this statement of the law in *Rayala Corporation* is no longer the law declared by the Supreme Court after the decision in the *Fibre Board's* case. This reason therefore, again cannot avail the appellant."

Further, Hon'ble Supreme Court has emphasized that their decision in *Fibre Board's* case being recent when compared to decision in *Rayala Corporation,* the standpoint that omission would amount to repeal as ordered in *Fibre Board's* case would prevail. The relevant extract is as follows:

> **"24.** *Fibre Board's* case is a recent judgment which, as has correctly been argued by Shri Radhakrishnan, learned senior counsel on behalf of the revenue, clarifies the law in holding **that an omission would amount to a repeal**. The converse view of the law has led to an omitted provision being treated as if it never existed, as Section 6 of the General Clauses Act would not then apply to allow the previous operation of the provision so omitted or anything duly done or suffered thereunder. Nor may a legal proceeding in respect of any right or liability be instituted, continued or enforced in respect of rights and liabilities acquired or incurred under the enactment so omitted. In the vast majority of cases, this would cause great public mischief, and **the decision of *Fibre Board's* case is therefore, clearly delivered by this Court for the public good, being, at the very least a reasonably possible view**. Also, no aspect of the question at hand has remained unnoticed. For this reason also we decline to accept Shri Aggarwal's persuasive plea to reconsider the judgment in *Fibre Board's* case. This being the case, it is clear that on point one the present appeal would have to be dismissed as being concluded by the decision in the *Fibre Board's* case."

In view of the above position settled by Hon'ble Supreme Court, the appeal by the appellant, relying on the order of Hon'ble High court of Gujarat in the case of Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj.), for setting aside the APC order issued by the Commissioner and the confirmation of duty in O.I.O. issued by the Assistant Commissioner, both in remand proceedings, is not sustainable and is hereby rejected. The appellant has not challenged the quantum of APC decided by Commissioner. There is no other ground adduced other than the ratio of the order of Hon'ble High Court of Gujarat in the case of Krishna Processors vs U.O.I. – 2012 (280) E.L.T. 186 (Guj.) to challenge the confirmation of duty in the remand O.I.O. dated 06/12/2016. Therefore, the demand of duty confirmed in the remand O.I.O. on the basis of the APC determined by the Commissioner is sustainable and is hereby upheld as legally valid.

8. On considering the levy of interest confirmed in the impugned order under erstwhile Rule 96ZP(3)(i) read with section 38A of CEA, 1944, it is seen that the Hon'ble Supreme Court has given the ruling in favor of the appellant in the afore cited case of Shree Bhagwati Steel Rolling Mills vs CCE – 2015 (326) ELT 209 (SC). The contents of the ruling regarding levy of interest as contained in paragraph 31 of this case law is reproduced as follows:

> **"31.** Applying the Constitution Bench decision stated above, **it will have to be declared that since Section 3A which provides for a separate scheme for availing facilities under a compound levy scheme does not itself provide for the levying of interest, Rules 96ZO, 96ZP and 96ZQ cannot do so and therefore, on this ground the appellant in Shree Bhagwati Steel Rolling Mills has to succeed.** On this ground alone therefore, the impugned judgment is set aside. That none of the other provisions of the Central Excise Act can come to the aid of the Revenue in cases like these has been laid down by this Court in *Hans Steel Rolling Mill* v. *CCE*, (2011) 3 SCC 748 = 2011 (265) E.L.T. 321 (S.C.) as follows :
>
> > "13. On going through the records it is clearly established that the appellants are availing the facilities under the compound levy scheme, which they themselves opted for and filed declarations furnishing details about the annual capacity of production and duty payable on such capacity of production. It has to be taken into consideration that the compounded levy scheme for collection of duty based on annual capacity of production under Section 3 of the Act and the 1997 Rules is a separate scheme from the normal scheme for collection of Central excise duty on goods manufactured in the country. Under the same, Rule 96-ZP of the Central Excise Rules stipulate the method of payment and Rule 96-ZP contains detailed provision regarding time and manner of payment and it also contains provisions relating to payment of interest and penalty in event of delay in payment or non-payment of dues. Thus, this is a comprehensive scheme in itself and general provisions in the Act and the Rules are excluded." (at page 751)"

Relying on the above ratio, I hold that the levy of interest confirmed in the remand O.I.O. is not sustainable and the same is set aside.

9. On considering the issue regarding imposition of penalty, it is seen that penalty equivalent to duty confirmed has been imposed in the remand O.I.O. under Rule 96ZP(3)(ii) ibid read with section 38A of CEA, 1944. In the case of Shree Bhagwati Steel Rolling Mills vs CCE – 2015 (326) ELT 209 (SC), Hon'ble Supreme Court has upheld the view of Hon'ble High Court of Gujarat striking down equivalent penalty under 96ZP(3) of the erstwhile Rules to be *ultra vires* the Act and as being arbitrary and unreasonable, violative of Article 14 and 19(1)(g) of the Constitution. The relevant portion is reproduced as follows:

"**32.** We now come to the other appeals which concern themselves with penalties that are leviable under Rules 96ZO, 96ZP and 96ZQ. Since the lead judgment is a detailed judgment by a Division Bench of the Gujarat High Court reported in *Krishna Processors* v. *Union of India,* 2012 (280) E.L.T. 186 (Guj.) and followed by other High Courts, we will refer only to this decision.

33. On the facts before the Gujarat High Court, there were three civil applications each of which challenged the constitutional validity of the aforesaid rules insofar as they prescribed the imposition of a penalty equal to the amount of duty outstanding without any discretion to reduce the same depending upon the time taken to deposit the duty. The Gujarat High Court struck down the aforesaid Rules on the basis that not only were they *ultra vires* the Act but they were arbitrary and unreasonable and therefore, violative of Articles 14 and 19(1)(g) of the Constitution.

34. Shri Radhakrishnan, learned senior advocate appearing on behalf of the revenue found it extremely difficult to argue that the aforesaid judgment was wrong. He therefore, asked us to limit the effect of the judgment when it further held that after omission of the aforesaid Rules with effect from 1-3-2001 no proceedings could have been initiated thereunder. In this submission he is correct for the simple reason that the Gujarat High Court followed *Rayala Corporation* in holding that "omissions" would not amount to "repeals", which this Court has now clarified is not the correct legal position.

35. However, insofar the reasoning of the High Court is concerned on the aspects stated hereinabove, we find that on all three counts it is unexceptionable. First and foremost, a delay of even one day would straightaway, without more, attract a penalty of an equivalent amount of duty, which may be in crores of rupees. It is clear that as has been held by this Court, penalty imposable under the aforesaid three Rules is inflexible and mandatory in nature. **The High Court is, therefore, correct in saying that an assessee who pays the delayed amount of duty after 100 days is to be on the same footing as an assessee who pays the duty only after one day's delay and that therefore, such rule treats unequals as equals and would, therefore, violate Article 14 of the Constitution of India.** It is also correct in saying that there may be circumstances of force majeure which may prevent a *bona fide* assessee from paying the duty in time, and on certain given factual circumstances, despite there being no fault on the part of the assessee in making the deposit of duty in time, a mandatory penalty of an equivalent amount of duty would be compulsorily leviable and recoverable from such assessee. This would be extremely arbitrary and violative of Article 14 for this reason as well. **Further, we agree with the High Court in stating that this would also be violative of the appellant's fundamental rights under Article 19(1)(g) and would not be saved by Article 19(6), being an unreasonable restriction on the right to carry on trade or business.** Clearly the levy of penalty in these cases of a mandatory nature for even one day's delay, which may be beyond the control of the assessee, would be arbitrary and excessive."

The above standpoint on penalty has been followed by Hon'ble High Court of Madras in the case of CCE, Chennai-II vs Arun Vyapar Udyog Ltd. – 2017 (345) E.L.T. 331 (Mad.) as follows:

"**10.** Two issues are involved in the present appeals. One relates to penalty. The Tribunal, while directing the Commissioner to fix the ACP, has set aside the penalty also. Penalty, as such, cannot be imposed, in the light of the decision of the Hon'ble Supreme Court in *Shree Bhagwati Steel Rolling Mills* v. *Commissioner of Central Excise* reported in 2015 (326) E.L.T. 209 (S.C.), wherein, the issue, which came up for consideration before the Hon'ble Supreme Court, was to the correctness of the judgments of High Courts, which struck down Rules 96ZO, 96ZP and 96ZQ of the Central Excise Rules, 1944, relating to penalty, as *ultra vires* of a parent Act and violative of Articles 14 and 19(1)(g) of the Constitution of India. Insofar as penalty is concerned, the Hon'ble Apex Court held that it is *ultra vires*. In other respects, the Apex Court upheld the scheme. In the light of the above reported decision, the case of the revenue, regarding penalty, has to fail."

Similarly, in the case of CCE, Thane-I vs Khemee Dyeing & Bleaching Works – 2017 (347) E.L.T. 410 (Bom.), Hon'ble Bombay High Court dismissed the Revenue appeal following the aforesaid Supreme Court decision in Shree Bhagwati Steel Rolling Mills vs CCE – 2015 (326) ELT 209 (SC) in the following terms:

"**4.** The penalty levied under Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944 cannot survive once the Rule itself has been struck down by the Hon'ble Supreme Court of India. It is conceded,

therefore, that the Revenue's appeal would have to be dismissed in the light of this authoritative pronouncement. It is accordingly dismissed by answering all questions in terms of the Supreme Court's judgment."

Further, Hon'ble High Court of Punjab and Haryana in the case of Avdesh Tracks Pvt. Ltd. vs U.O.I. – 2017 (347) E.L.T. 416 (P&H) has followed the same Apex court order to set aside interest and penalty as reproduced below:

"10. After hearing learned counsel for the parties and considering the judgment of Hon'ble the Supreme Court in *Shree Bhagwati Steel Rolling Mills's* case (supra), wherein, the provisions of Rules 96ZO, 96ZP and 96ZQ of the Rules have been held to be *ultra vires* with reference to levy of interest and penalty only, in our view, interest and penalty levied on the appellant under the aforesaid provisions, cannot be sustained."

From the above citations, it is clear that the settled law in respect of assessees who had opted for compounded levy scheme in terms of erstwhile Section 3A under erstwhile Rule 96ZP(3) is that the duty demand as per the APC determined is sustainable whereas the demand for interest and the imposition of penalty are liable to be set aside. Therefore, following the above citations, I set aside the penalty imposed on the appellant in the remand O.I.O.

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

The appeal filed by the appellant stands disposed of in the above terms.

(उमा शंकर)
आयुक्त (अपील्स-१)

Date: /-/-2018

Attested

(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.

To
M/s Madhusudan Special Section Pvt. Ltd.,
Near Naroda Railway Station,
Naroda, Ahmedabad.

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad-III.
3. The Additional Commissioner, C.G.S.T.(System), Ahmedabad-III.
4. The Deputy Commissioner, C.G.S.T. Division: I, Ahmedabad.
5. Guard File.
6. P.A.