केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise Building,

सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,

आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

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रजिस्टर डाक ए .डी .द्वारा

9687/972

क फाइल संख्या (File No.) : **V2(84)148/Ahd-II/Appeals-II/ 2016-17 &**
V2(84)13 /Ahd-II/Appeals-II/ 2017-18

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 277-278-17-18**

दिनांक (Date): **19.01.2018** जारी करने की तारीख (Date of issue): 14/2/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

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

Arising out of Order-In-Original No ._**MP/01/Dem/AC/2017/PKS__Dated: 23.01.2017 & MP/03/Dem/AC/2017/PKS__Dated: 20.02.2017** issued by: Assistant Commissioner Central Excise (Div-II), Ahmedabad-II

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

M/s Lubi Industries LLP

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

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

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

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

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid:

(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की प्रकिया के दौरान हुई हो |

In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

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

Cont...2

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो 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 लगायां गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/– फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/– फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से

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

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

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

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

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

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

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

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

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

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

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

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

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

Under Central Excise and Service Tax, "Duty demanded" shall include:

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

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

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

F.NO.V2[84]148/Ahd-II/16-17
F.NO.V2[84]13/Ahd-II/17-18

ORDER IN APPEAL

The subject two appeals are filed by M/s. Lubi Industries LLP,Near Kalyan Mills, Naroda Road, Ahmedabad (hereinafter referred to as *'the appellant'*) against the Order in Original No. MP/01 & 03 /DEM/AC/2017/PKS (hereinafter referred to as *'the impugned orders'*) passed by the Asstt. Commissioner, Central Excise, Div-II,Ahmedabad-II (hereinafter referred to as the *'the adjudicating authority'*). The appellant is engaged in the manufacture of P. D. Pumps/parts and Submersible Motors under Chapter 84 of Central Excise Tariff Act, 1985. [hereinafter referred as CETA-1985].

2. The brief facts of the case are that, the appellant had recovered Rs.33712924/- as freight handling charges from their buyers during april-2011 to feb-2016.,and Rs.5355707/-during march-2012 to march-2016.The appellant has not included the above said charges in the their assessable value; hence, they have short paid the excise duty. Such amounts collected form price-cum-duty under the provisions of Section 4 of Central Excise Act'1944. The Duty involved in freight handling charges comes to Rs. 4109629/-and Rs. 329106/- for the above period. Two Show cause notice were issued for demanding Excise duty with interest and Penalty. Said SCN'S were decided vide above OIO's and confirmed the demands with interest and penalty.

3. Being aggrieved with the impugned orders the appellant has filed the instant appeals on following grounds.

a. That the amount recovered at the rate of 0.5% of the value was the recovery for elements like storage, packing, handling and forwarding indicated in invoices as "freight and handling" which is not includible in the assessable value of the finish goods; they cited Cir. no.999/6/2015-cx dated 28-2-15.

b. That any recovery made from the byres by way of separate agreement was not to be considered as a part of transaction value. All expenses beyond factory gate are excludible from transaction value.

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

d . That they placed reliance on the following case laws, wherein Supreme Court and Tribunals have held that charges for transportation of goods though not on actual basis and recoveries for other elements like handling, insurance etc. were not includible in the value of excisable goods. They relied on the caselaws of 1. 2009(235) ELT-581 (S.C.), CCE, V. Accurate Meters Ltd.

2. 2009(243) ELT- 307 CCE, V/s. Guwahati Carbon Limited. 3. 2004(172) ELT-493 CCE, V/s. West Coast Paper Mills Ltd.

e. That the amounts recovered at the rate of 0.5% of the value was not includible in the assessable value of the excisable goods because this recovery made on equalized basis was for those elements which were not forming part of the value of the excisable goods for assessing excise duties. Therefore, this amount was not includible in the assessable value. they relied on the case laws of. 1. Ispat Ind. Ltd. 2015(324) ElT-670 (Sc)2. Goyal M.G. Gases P. Ltd. 2016(342) ELT-A223 (SC] 3.Escort Jcb Ltd. 2002(146) ELT-31 (SC[

f. That the extended period of limitation invoked is illegal. Collection of freight handling charges has been shown in ER returns, in the books of account, balance sheet and therefore there was no suppression of the same. There was no evasion of duty, no penalty imposable. They relied on the case laws of. 1. the Hon'ble Supreme Court in the cases of Padmini Products and 2. Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively. 3.Continental Foundation Jt. Venture V/s CCE, Chandigarh reported in 2007 (216) ELT 177 (SC), 4.Cona industries 2017(352) ELT-12 (Bom.)

4. Personal hearing was granted on 01.12.2017; Smt.Shilpa P. Dave, Advocate appeared on behalf of the appellant. She reiterated submissions made in their GOA and also submitted additional submission. Overlapping period with earlier SCN. I have carefully gone through the case records, facts of the case, submissions made by the appellant and the case laws cited. I find that the impugned orders has been issued with respect to the show cause notices issued periodically, The main issue to be decided is whether Freight Handling Charges are includible in the assessable value, and whether the appellant is liable to pay Excise duty on said Charges.

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

6. I find that the appellant have collected an amount @ 0.5% of the total invoice value plus Central Excise and C.S.T. and not on the freight charges paid

by them to the transporter. It may not be considered as equalized freight. Collection of such freight@ 0.5% of the total invoice value is additional consideration. In the guise of Freight handling charges, the appellant has collected Outward Handling Charges which are not included in assessable value collected by them. And this value addition cannot be considered as averaged freight in terms of section 4(3)(d) of the CEA, 1944, which is reproduced as under;

SECTION 4. Valuation of excisable goods for purposes of charging of duty of excise. - (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall - (3) For the purpose of this section,-

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

7. In this case, it is undisputed fact that the additional amount recovered is nothing but "Freight handling charges" which is required to be included in assessable value in terms of Section 4 of Central Excise Act, 1944. I rely upon the decision of the Hon'ble Supreme Court in the case of *CCE, Bhubaneswar-II* v. *IFGL Refractories Ltd.* (supra). It is held that such benefit can be said to be additional consideration under the Valuation Rules. Now the amended Section 4 of the Central Excise Act also provides that the actual price paid by the buyer plus the money value of additional consideration flowing directly or indirectly from the buyer to the seller in connection with the sale of goods, shall be deemed to be included in the duty payable on such goods. I find that, the Case laws cited by the appellant are not applicable in the facts of the present case.

8. I also find that, the appellant have contested that there is Overlapping period April -2011 To Feb-2016 with earlier SCN issued. However I find that, same is due to two separate units merger of i.e. Lubi Elecricals ltd. and Lubi Submersible Ltd in earlier period. Hence, I find that, the extended period of limitation under Section 11A (1) is justified, as there was suppression of facts with intent to evade payment of duty. Thus, penalty imposed on the appellant is legal. Therefore, I find that the impugned order demanding duty along with interest and penalty is just and legal.

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10. In view of the foregoing discussion and findings, I uphold the impugned orders and reject both the appeals filed by the appellant.

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

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

[उमा शंकर)
आयुक्त (अपील्स]

Attested

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

date /12/17

By Regd. Post A. D

M/s. Lubi Industries LLP.
Near Kalyan Mills,
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Copy to-

1. The Chief Commissioner, CGST Central Excise, Ahmedabad zone.
2. The Commissioner, CGST Central Excise, Ahmedabad North.
3. The Asstt. Commissioner, CGSTC.EX. Div-II, Ahmedabad- North.
4. The Asstt.Commissioner (Systems), CGST C.EX. Ahmedabad-North.
5. Guard file.
6. PA File.