केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय उत्पाद शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015
सत्यमेव जयते
☎ : 079-26305065 टेलेफेक्स : 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

2113 to 2117

क फाइल संख्या (File No.) : V2(31)70 /North/Appeals/ 2017-18

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 381-17-18**
दिनांक (Date): **22-Mar-2018** जारी करने की तारीख (Date of issue): 5/4/2018
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
Passed by **Shri Uma Shanker ,** Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-III), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी मूल आदेश सं _____ दिनांक _____ से सृजित
Arising out of Order-In-Original No **04/JC/2017/GCJ Dated: 20/10/2017**
issued by: Joint Commissioner Central Excise (Div-III), Ahmedabad North

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

M/s Dhanuka Agritech 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 पूवोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए |

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

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

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

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

Cont...2

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

रेखाकिंत 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 निर्णयंन 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 ज़मा 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 Dhanuka Agritech Limited, D-1/A-B, Ajanta Industrial Estate, Sanand – Viramgam Road, village: Vasna, Taluka: Sanand, District: Ahmedabad -382 110 (hereinafter referred to as 'the appellant') has filed the present appeal against **Order-in-original No.04/JC/2017/GCJ dated 17/10/2017** (hereinafter referred to as 'the impugned order') passed by Joint Commissioner, C.G.S.T. & Central Excise, Ahmedabad (North) (hereinafter referred to as 'the adjudicating authority'). The appellant is engaged in the manufacture of insecticides / Pesticides and Fungicides falling under Chapter 38; Animal 7 Vegetable Fertilizers (Organic Manure) falling under Chapter 31 of the first schedule to the Central Excise Tariff Act, 1985 (CETA, 1985). The appellant was paying duty on the Insecticides / Pesticides and Fungicides of Chapter 38, whereas the animal or vegetable fertilizers of Chapter 31 manufactured under the brand names 'Dhanzyme granules' and 'Dhanzyme Gold granules' are being cleared without payment of duty by claiming classification under C.T.S.H. 31010099 of CETA, 1985. On the basis of information received from the Central Excise Commissionerate, Jammu & Kashmir, the issue of classification of the products, the Central Excise Preventive officers of Ahmedabad Commissionerate visited the factory premises of the appellant at Sanand and carried out verification. In his statement recorded under Section 14 of Central Excise Act, 1944 (CEA, 1944) on 17/10/2016, Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited agreed 'Dhanzyme Granules' and Dhanzyme Gold Granules' manufactured and cleared by the appellant were cleared in unit packs of 1kg, 4kgs, 5kgs, 8kgs and 10kgs and was correctly classifiable under CETH 3151000 of CETA, 1944, which covered *'Mineral or Chemical Fertilizer containing two or three of the fertilizing elements nitrogen, phosphorus and potassium; other fertilizers;* ***Goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10kgs***.The appellant had classified the product under CETH 31010099, which appeared to be incorrect. A Show Cause Notice No.V.31/15-06/OA/2017 dated 15/03/2017 (hereinafter referred to as 'the SCN' was issued to the appellant demanding Central Excise duty of Rs.1,32,70,241/- under Section 11A(4) of the CEA, 1944 invoking extended period along with interest under Section 11AA of CEA, 1944 and proposing to impose penalty on the appellant under Rule 25 of Central Excise Rules, 2002 (CER, 2002 read with Section 11AC(c) of CEA, 1944. In the impugned order, the adjudicating authority has confirmed the demand of Rs.1,32,70,241/- along with interest and has imposed equivalent penalty of Rs.1,32,70,241/- as proposed in the SCN.

2. Aggrieved by the impugned order, the appellant has filed the instant appeal mainly on the following grounds:

1) The activity carried out by the appellant does not amount to manufacture and hence no duty is payable. The products in question are formulations, which are seaweed based vegetable fertilizers. The formulations are derived from the Bio Extract Organic Fertilizer input concentrate derived from natural vegetable

seaweed which has around 42% solid content as well as from seaweed flakes. Seaweed concentrate and Seaweed flakes are procured by the appellant domestic sellers. The activity of preparation of the formulations performed by the appellants, in a nutshell, comprises of dilution of the seaweed concentrate / seaweed flakes with demineralised water and addition of preservative for increased shelf life and addition of chemicals for enhancement of fertilizing capacity / stability / to act as a conditioner. This activity does not satisfy the test of change in name, character and use. The activities undertaken by the appellant do not amount to manufacture under Section 2(f)(i)/(ii)/(iii) of CEA, 1944. Enhancement in the fertilizing capacity of the seaweed extracts due to addition of chemicals / amino acids would not amount to manufacture as the process of formulation does not give rise to a new product. The addition of stabilizer / preservative for increased shelf life does not change the basic character of the appellant's product.

2) The appellant is entitled to cum-duty benefit. From a combined reading of the provisions of Section 4(1)(a) of CEA, 1944 read with Section 4(3)(d) of CEA, 1944 it is evident that the value for the purpose of payment of excise duty is the 'price actually paid' or actually payable for the goods when sold' and the value does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable. The explanation to Section 4 also provides that the price-cum-duty shall be deemed to include the duty payable on such goods.

3) The demand for the period April-2012 to September-2016 is raised in the SCN dated 15/03/2017 by invoking extended period. The appellant submits that suppression or willful mis-statement are not present in the instant case as it had regularly filed monthly ER-1 returns in prescribed form with the department, containing the details relating to the clearances of the formulations made by the appellant. It was the responsibility of the department to scrutinize the self-assessment made by the appellant and verify the correctness of the same in terms of Rule 12(3) of CER, 2002. In any case, the appellant had never suppressed any information relating to the activity of preparation of the formulations and clearance thereof from the department. There is no column in the returns which require packaging-wise declaration of the goods manufactured and it is settled that information not supplied if not required to be supplied under law does not amount to suppression. The appellant had been audited from time to time by the department wherein all the statutory records of the appellant were verified and so extended period cannot be invoked. Extended period of limitation is not invokable when the earlier SCN dated 04/02/2015 was issued to Udhampur unit did not invoke extended period of limitation.

4) Penalty is not imposable on the appellant under Section 11AC(1) as the ingredients such as suppression of facts etc are not present in the case of the appellant. No penalty is imposable under Rule 25 of CER, 2002 as the same is subject to provision of Section 11AC of CEA, 1944. Further, penalty was not imposable as the appellant had acted in good faith and *bona fide* belief that no duty was payable on the clearances of the formulations made by them and there was no intention to evade duty. Penalty was not imposable when the demand was not sustainable. Penalty is not imposable in cases involving interpretation of statutory provisions. Penalty is not imposable in disputes involving classification of goods.

3. Personal hearing was held on 02/02/2018. Shri Ishan Bhatt, Advocate appeared on behalf of the appellant. He reiterated the grounds of appeal and submitted that the earlier order was against the appellant.

4. I have carefully gone through the contents of the impugned order as well as the grounds of appeal filed by the appellant. The disputed issue in the instant appeal is classification of the products 'Dhanzyme granules' and 'Dhanzyme gold granules'

manufactured and cleared by the appellant in packages of gross weight not exceeding 10kgs. The appellant had classified the same under CETSH **31010099** of CETA, 1985 and cleared the same @ NIL rate of Central Excise duty. The department conducted inquiry and investigations and subsequently the demand of duty has been confirmed by classifying the said products under CETSH **31051000** of CETA, 1985.

5. On examining the issue it is seen that CETH No.3101 covers '*Animal or vegetable fertilizers, whether or not mixed together or chemically treated; fertilizers produced by the mixing or chemical treatment of animal or vegetable products*' and attracts NIL rate of duty and CETSH 31010099 claimed by the appellant pertains to *'OTHER'*. On the other hand CETSH 31051000 confirmed by the department specifically covers Goods of Chapter 31 of CETA, 1985 in tablets or similar forms or in packages of a gross weight not exceeding 10kgs. In the instant case, there is no dispute that the impugned goods fall under Chapter 31 of CETA, 1985 and the clearances impugned pertain to packages of a gross weight not exceeding 10kgs. On this ground alone the classification of the impugned goods under CETSH 31051000 of CETA, 1985 is legally correct and sustainable. The principal argument of the appellant is that the impugned goods had not undergone manufacture as the activity of preparation of the formulations by the appellant comprised of dilution of the seaweed concentrate / seaweed flakes with demineralised water and addition of preservative for increased shelf life and addition of chemicals for enhancement of fertilizing capacity / stability / to act as a conditioner. There is no Chemical report available on record either by the appellant or the department to buttress the classification. Therefore, the common parlance by which the product is known and consumed in the market is a vital parameter to determine as to whether any new product emerges out of the process carried out by the appellant. It has been very clearly brought out in paragraph 81 of the impugned order that the product emerging after various processes on the said input seaweed extract is identified commercially as a distinct product in comparison to the final products 'Dhanzyme' and Dhanzyme Gold'. The appellant has not adduced any evidence to challenge this finding of the adjudicating authority. The appellant has classified the said products under CETH 3101 of CETA, 1985 which indicates that the same is Animal or vegetable fertilizers, whether or not mixed together or chemically treated; fertilizers produced by the mixing or chemical treatment of animal or vegetable products. Therefore, the challenge to the classification confirmed by the department i.e. under CETSH 31051000 pertaining to Goods of Chapter 31 in tablets or similar forms or in packages of a gross weight not exceeding 10kgs does not succeed in the instant case as long as it is not disputed that the appellant had cleared products falling under Chapter 31 of CETA, 1985 in packages of a gross weight not exceeding 10kgs. Accordingly, the demand of duty and interest confirmed in the impugned order is liable to be upheld.

6. As regards the claim for cum-duty benefit claimed by the appellant, I agree with the finding of the adjudicating authority that when the impugned clearances were made

at NIL rate of duty, there was no question of recovering Central Excise duty from the buyers. I find that it is fallacious to hold that the price of the impugned products contained duty element when the same were cleared at NIL rate of duty. The claim for cum-duty benefit is rejected. On considering the plea on limitation, it is seen that the mis-classification was unearthed based on investigations carried out on the basis of specific intelligence. The erroneous classification amounts to mis-declaration with intent to evade duty and this fact remained suppressed from the department. The plea that the department knew the facts since earlier a Show Cause Notice was issued to the appellant's unit at Udhampur, Jammu & Kashmir is not valid or reasonable to invoke the ratio of Apex Court decision in the case of Nizam Sugar Factory – 2006 (197) E.L.T. 465 (S.C.) because in the case of Nizam Sugar Factory, the subsequent notices were issued to the same unit and not to another unit. In the present case the show cause notice was issued and confirmed on the basis of investigations into the activities of the appellant's unit situated in Sanand and there is no scope to treat the notice issued to the Udhampur unit as the first notice issued to the Sanand unit. In view of these facts, the invoking of extended period and the imposition of penalty on the appellant is correct and legally sustainable in the present case. Therefore, the appeal is rejected.

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
केन्द्रीय कर (अपील्स)

Date: 22 / 03 /2018

Attested

(K.P. Jacob)
Superintendent,
Central Tax (Appeals),
Ahmedabad.

By R.P.A.D.

To

1. M/s Dhanuka Agritech Ltd.,
   D-I / A-B, Ajanta Industrial Estate,
   Sanand – Viramgam Road, Village: Vasna,
   Taluka: Sanand, District: Ahmedabad – 382 110.

Copy to:

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