रजिस्टर डाक ए .डी .द्वारा

2814 to 2818

क फाइल संख्या (File No.) : V2(52)95 /North/Appeals/ 2017-18

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP- 404-17-18**

दिनांक (Date): **23-Mar-2018** जारी करने की तारीख (Date of issue): 26/4/2018

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

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

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

Arising out of Order-In-Original No **MP/12/Dem/AC/2017/KDB Dated: 29/12/2017** issued by: Assistant Commissioner Central Excise (Div-II), Ahmedabad North

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

M/s Asarba Mills

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 चाहिएं।

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 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 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 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

The subject appeals are filed by M/s. Asarwa Mills,(A Div. of Bengal Tea & Fabrics Ltd.), Asarwa Road, Ahmedabad (hereinafter referred to as *'the appellant'*) against the Order in Original Nos. MP/12/DEM/AC/2017/KDB (hereinafter referred to as *'the impugned orders'*) passed by the Assistant Commissioner, CGST,Central Excise, Division-II, Ahmedabad-North (hereinafter referred to as *'the adjudicating authority'*). are engaged in manufacture of Yarn, Cotton Fabrics/Knitted fabrics under Chapter 52 & 55 of Central Excise Tariff Act, 1985. they are availing facility of Cenvat Credit as per Cenvat Credit Rules, 2004.

2. The facts in brief of the case are, during the course of Audit for the period October, 2014 to December, 2015 ,it was observed that the appellant had not paid Central Excise Duty on the removal of the old Capital Goods viz. SH Drill machine, SH Auto Coner, SH ring frame, compressor, etc. after 10 years of use. After 10 years of use of the said Capital Goods, the amount calculated as per the formula given in Rule 3 (5 A) (a)(ii) of Cenvat Credit Rules, 2004, as comes to 'Zero' which is less than the amount equal to the duty leviable on transaction value. The value of clearance of the said Capital goods is Rs. 1,20,26,628/-.Hence, Central Excise duty amounting to Rs.14,95,987/-required to be recovered from them along with interest and penalty. Therefore, Show Cause Notice was issued, and decided vide above order.

3. Being aggrieved with the impugned order the appellant has filed the instant appeal, on the following main grounds;

I. That they not agree with demand of recovery of duty on capital goods cleared by them after use on completion of 10 years under Rule 3(5) of Cenvat Credit Rules, 2004, on the following grounds:

II. That under Rule 3 (5) (a) of Cenvat Credit Rules, 2004, substituted by Notification No. 12/2013-CE (NT), dated 27.09.2013, if the capital goods other than computer or computer peripherals on which credit has been taken are removed after being used, the manufacturer or the provider of output service shall pay an amount equal to the Cenvat Credit taken on the said goods reduced by 2.5% for each quarter or to pay duty on transaction value whichever is higher. They had paid duty accordingly following the prescribed procedures. that there is no mention anywhere in Rule 3 of the Cenvat Credit Rules, 2004, that the goods cleared from the factory after use on completion of 10 years are liable to duty under Rule 3 (5) of Cenvat Credit Rules, 2004.

iii. There is no dishonest or fraudulent conduct on their part in suppressing the facts or any willful mis-statement to evade the duty payable by them.

iv. They had paid duty on Capital Goods in question at the time of their procurement. In reference to demand of duty on the said goods which amounts to recovery of duty second time. In this connection they relied on the case law reported in 2007 (210) ELT 433(Tri-Mum).

v. As regards the value of the Capital goods came to be Zero after calculation as per formula, Coming to zero balance is not their fault as it has accrued to following of procedure prescribed under Notification No. 12/20013-CE (NT) dated 27.09.2013.

vi. That they are bonafide Tax payers. when the capital goods in question are removed after use for a period of 10 years or more, the third proviso to Rule 3 (5) of Cenvat Credit Rules, 2004, will come into play which implies that on such removals, duty @ of 2.5% per quarter or fractions thereof, can be claimed as depreciation and only remaining portion of duty needs to be paid. that they have not claimed depreciation on the Capital Goods in question from the Income Tax.

vii. The goods in question were procured before10 years of their clearance and therefore, no question of paying duty on them arises. In this connection, they relied of the following case laws ;

1.2012 (280) ELT 470 (Tri-Del.) and 2011 (268) ELT 161 (P&H), 2. 2012 (281) ELT 714 (Del.), 3. 2013 (288) ELT 541 (Tri - LB), 4. 2017 (345) ELT 542 (T.Del.),

Rule 3 (5A) ibid not applicable when capital goods cleared after long use.

viii. There being no suppression of facts or willful mis-statement on our part ,for wrongly taking credit in clearance of Capital Goods in question hence invocation of larger period for recovery of duty not applicable in their case.They relied on the following case laws 1. 2005 (188) ELT 149 (SC) 2. 2010 (260) ELT 17 (SC),
3. 2013 (260) ELT 61 (Guj.),

4. Personal hearing in the case has been held on 21-3-.2018 and Shri Sanjiv Kumar Singh, Authorized Signatory and their Consultant Shri K.V.Parmar, appeared before me on behalf of the appellant. They reiterated the submissions made vide their appeal memorandum. I have carefully gone through the case records, GOA, and submission made by the appellant at the time of personal hearing. The issue required to be decided is whether duty required to be recovered in respect of removal of the Capital Goods after 10 years of use. I find that the appellant has removed the Capital Goods after 10 years of utilization. Rule 3(5) of the Cenvat Credit Rules,2004, which is as under; Rule 3 (5A) (a) of the Cenvat Credit Rules, 2004, as amended,

" If the capital goods on which CENVAT credit has been taken, are removed after being used, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely

ii. For capital goods, other than computers and computer peripherals @ 2.5% for each quarter:

Provided that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid Shall be equal to the duty leviable on transaction value.

5. The above proviso to Rule 3(5) was omitted and sub-Rule 5A to Rule 3 substituted w.e.f.17.03.2012 vide Notification No. 18/2012-CE (NT),dated 17.03.2012. The substituted Rule 5A provided that if the capital goods, on which CENVAT credit has been taken, are removed after being used, whether as capital goods or as scrap or waste, the manufacturer or provider of output services shall pay an amount equal to the CENVAT credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT credit, namely:-

(b) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter:

Provided that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value.

6. The said Rule 3(5A) was again substituted vide Notification No. 12/2013-CE (NT), dated 27.09.2013,

" (5A) (a) If the capital goods, on which CENVAT credit has been taken, are removed after being used, the manufacturer or provider of output services shall pay an amount equal to the CENVAT Credit taken on the said capital goods reduced by the percentage points calculated by straight line method as specified below for each quarter of a year or part thereof from the date of taking the CENVAT Credit, namely:-

(ii) for capital goods, other than computers and computer peripherals @ 2.5% for each quarter:

Provided that if the amount so calculated is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value.

(b) If the capital *goods* are cleared as waste and scrap, the manufacturer shall pay an amount equal to the duty leviable on transaction value."

From the above provisions, it is clear that sub-rule 3(5A) coveres two situations. First, where the capital goods being removed from the factory after being put to use for being used as capital goods, and second, where the capital goods are cleared as scrap.

7. I find that as the appellant has removed the Capital Goods after 10 years of use, they are liable to pay Central duty on the value arrived after deduction of 2.5% per quarter as per straight line method . According to calculation the value of the capital goods becomes ZERO, after 10 years, as such the appellant's contention is that they are not liable to pay Central Excise Duty on the same. Now I would like to point out that the said Capital Goods had been sold for an amount. The said amount is a transaction value, as per definition of "Transaction Value" as per Section 4 of Valuation Rules. As per the proviso made under Rule 3(5A) of the Cenvat Credit Rules, 2004, wherein it has been provided that wherever, the amount so calculated

is less than the amount equal to the duty leviable on transaction value, the amount to be paid shall be equal to the duty leviable on transaction value. As the value of the capital goods became zero as per calculation, and no duty can be levied on the said value. As per the above proviso cited under Rule 3 (5 A) of the Cenvat Credit Rules, 2004, as amended, duty is leviable the transaction value as mentioned in the Sale Invoice, which is transaction value. I find that, As per Notification No. 12/2013-C.E.(NT) dated 27.09.2013,it has been provided that Capital Goods removed as such , are to be removed at depreciated value. Again where the amount calculated is less than the amount equal to the duty leviable on transaction value, then the amount to be paid shall be equal to the duty leviable on transaction value.

8. I find that the appellant had not disclosed the removal of the said Capital Goods as such after 10 years for the purpose of payment of Central Excise duty/reversal of Cenvat credit and thereby they have not paid Excise duty.. They had not declared the same in their monthly ER-1 returns. Had the audit not been conducted, such clearance would have gone un-noticed. that the said appellant has suppressed substantial information about the non-payment of Central Excise Duty on the clearance of the said Capital Goods from the department deliberately with intent to evade payment of Central Excise Duty. Therefore, I find that all the essential ingredients to invoke the extended period of five years under Section 11A (4) of Central Excise Act, 1944, read with Rule 14(i) of Cenvat Credit Rules, 2004, exists in the instant case for recovery of Central Excise Duty not paid by the said appellant.

9. As discussed above, I find that the appellant has violated the provisions of Rule 3(5) of the Cenvat Credit Rules, 2004, in as much as they failed to pay proper Excise duty for the clearance of used Capital goods as discussed supra and rendered themselves liable to penalty under Section 11 AC (1) (c) of the Central Excise Act, 1944. Further, the said omission and commission on the part of the appellant has rendered themselves liable for penalty under Section 11 AC (1) (c) of the Central Excise Act, 1944.Accordingly, I hold that the impugned order is proper and legal.

10. In view of above, I uphold the impugned order and disallow the appeal.

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

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

[उमा शंकर]
आयुक्त (अपील्स]

Attested

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

date- /3/18

By Regd. Post A. D

M/s. Asarwa Mills,
(A Div. of Bengal Tea & Fabrics Ltd.),
Asarwa Road,
Ahmedabad.

Copy to-

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