केंद्रीय कर आयुक्त (अपील)

सत्यमेव जयते

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

☎: 079-26305065 टेलेफैक्स : 079 - 26305136

रजिस्टर डाक ए .डी .द्वारा

469/473

क फाइल संख्या (File No.) : **V2(73)72 /Ahd-II/Appeals-II/ 2016-17**
स्थगन आवेदन संख्या(Stay App. No.):

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP-[illegible]-17-18**
दिनांक (Date): **29/08/2017** जारी करने की तारीख (Date of issue): 5/9/17
श्री उमा शंकर, आयुक्त (अपील-II) द्वारा पारित
Passed by **Shri Uma Shanker** , Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-III), अहमदाबाद- II, आयुक्तालय द्वारा जारी मूल आदेश सं---------- दिनांक ----------से सृजित
Arising out of Order-In-Original No. 08/REFUND/16-17 **Dated: 08/05/16** issued by: Assistant Commissioner Central Excise (Div-III), Ahmedabad-II

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

M/s Aculife health care 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 धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी चाहिए ।

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

(ii) यदि माल की हानि के मामले में जब हानि कारखाने से किसी भंडारगार या अन्य कारखाने में या किसी भंडारगार से दूसरे भंडारगार में माल ले जाते हुए मार्ग में, या किसी भंडारगार या भंडार में चाहे वह किसी कारखाने में या किसी भंडारगार में हो माल की 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 उत्पाद 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 विरुद्व 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 आयुक्तालय, (अपील–II) केन्द्रीय उत्पाद शुल्क 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।

(ख) उक्तिलखित परिच्छेद 2(1) क में बताए अनुसार के अलावा की अपील, अपीलों के मामले में सीमा शुल्क, केंद्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेन्टल होस्पिटल कम्पाउंड, मेघाणी नगर, अहमदाबाद-380016.

(b) To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad: 380016, in case of appeals other than as mentioned in para-2(1) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए.-3 में निर्धारित किए अनुसार अपीलीय न्यधिकरण की गई अपील के विरूद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की माँग, ब्याज की माँगं और लगाया गया जुर्माना रुपए 5 लाख या उससे कम है वहाँ रुपए 1000/- फ़ीस भेजनी होगी । जहां उत्पाद शुल्क की माँग और लगाया गया जुर्माना रुपए 5 लाख या ५० लाख तक हो तो रुपए ५०००/ फीस भेजनी होगी । जहां उत्पाद शुल्क की माग और लगाया गया जुर्माना रुपए ५० लाख या उससे ज्यादा हो तो रुपए १००००/ फीस भेजनी होगी । फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप ,में संबंध में की जाए । यह ड्राफ्ट उस स्थान के किसी नामित सार्वजिनक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है । स्टे के लिए आवेदन-पत्र रुपए ५००/- फीस भेजनी होगी ।

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 ₹ 1,000/-, ₹ 5000/- and ₹ 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 crossed bank draft in favour of Asst. Registrar of 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. Application made for grant of stay shall be accompanied by a fee of ₹ 500/-.

(3) यदि इस आदेश में कई मूल आदेशो का समावेश होता है तो प्रत्येक मूल आदेश के लिय फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिये इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है ।

In case of the order covers a number of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner 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 ₹ 1 lacs fee of ₹ 100/- for each.

(4) न्यायालय शुल्क अधिनियम १९७० यथा संशोधित की अनुसूची-१ के अंतर्गत निर्धारित किये अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रुपए ६.५० पैसे का न्यायलय शुल्क टिकट लगा होना चाहिय ।

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

(5) इन ओर सम्बंधित मामलो को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केंद्रीय उत्पादन शुल्क एंव सेवाकर अपीलीय न्यायाधिकरण (कार्यावधि) नियम, १९८२ में निहित है ।

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

ORDER IN APPEAL

The subject appeal is filed by M/s. Aculife Healthcare Pvt. Ltd (Previously known as M/s. Core Healthcare Limited) Village: Sachana, Dist: Ahmedabad (hereinafter referred to as *'the appellant'*) against Order in Original No. No. 08/REFUND/16-17 dated 05.08.2016 (hereinafter referred to as *'the impugned order'*) passed by the Assistant Commissioner, Central Excise, Division-III,Ahmedabad-II (hereinafter referred to as *'the adjudicating authority'*).

2. The facts in brief of the case is that, the appellant unit was previously known as M/s. Core Healthcare Limited which was taken over by M/s Nirma Limited by order of Hon'ble High Court of Gujarat, subsequently demerged from M/s. Nirma Limited by the order dated 24.04.2015 of Hon'ble High Court of Gujarat and thereafter working in the name of M/s. Aculife Healthcare Pvt. Ltd. The Appellant, in the past acquired one of the units located at village Sachana from M/s. Core Healthcare Ltd .The erstwhile company M/s. Core Healthcare Ltd, during the period 1995-1998 has made duty free import against Advance Licenses (38 Nos in total) issued by the DFGT, Ahmedabad. 27 Licenses out of 38 were registered with Mumbai Customs and balance 9 Licenses were registered with Ahmedabad Customs, for duty free import with condition of fulfillment of specified export obligation. Thus, during the aforesaid period M/s. Core Healthcare imported material without paying Basic Customs Duty and CVD and SAD as applicable by claiming the exemption Notification No. 79/95-Cus dated 31.03.1995 and 30/97-Cus dated 01.04.1997,. In the former Notification, only the Basic Duty of customs exempt and in respect of the second mentioned Notification both basic Customs duty as well as CVD was exempts and accordingly the duty foregone in respect of duty leviable but for an exemption is required to be calculated for fixing the export obligation. The Appellant failed to discharge a part of their export obligation against Advance Licenses and therefore, they were called upon by the Customs Authorities to pay the duties payable on such duty-free imports. The Appellant filed two applications before the Settlement Commission, Mumbai for settling the case. Initially, those applications were returned by the Hon'ble Settlement Commission vide Order dated 24.03.2003. The said order was challenged by the Appellant before the Hon'ble Gujarat High Court and under order dated 13.01.2005 and 01.04.2005 stayed the order and directed the Appellant to pay the Principal amount of Rs.11,31,55,000/- in 24 monthly equal installments and the Commission was also directed to proceed with application on merits. The Settlement Commission vide order dated 07.11.2006 settled the case. This order of the Commission was also challenged by the Appellants before the Hon'ble Gujarat High Court, And set aside the orders dated 24.03.2003 & 7.11.2006 passed by the Settlement Commission and remitted back the case for fresh decision. The said remand was made on the plea of the Appellant that the Customs department failed to verify the claim of the Appellant that the Appellant has made some exports for which money in terms of foreign exchange was realized and therefore the duty demand is to be adjusted accordingly. However, the department submitted the revised duty liability and the Appellant accepted said duty liability. The Settlement

Commission vide its Final Order No.434-435/Final Order/Cus/MGR/2007 dated 27.11.2007, settled the case in respect of two Application filed by the Appellant, by asking the Appellants to pay Rs.2797.59 being the admitted duty liability and 10% interest on the above duty excluding CVD. Immunity from fine, penalty and prosecution was granted. As regards the claim of Appellants for allowing Modvat credit of CVD, the Commission directed the Appellants to approach the jurisdictional Commissioner of Central Excise. The Appellant vide letter dated 3.1.2008 requested the jurisdictional Assistant Commissioner to allow the benefit of Modvat credit of Rs.822.89 lakhs being CVD paid by them, along with the statement showing the bifurcation of duties i.e. Customs duty, CVD, SAD etc. the Appellant produced before him the copies of challan and demand drafts evidencing the payment of duty as well as a statement showing the details of bifurcation of duty liability for basic customs duty, CVD and SAD, vide letter dated 02.12.2008 . the Adjudicating authority passed OIO No.238/09 dated 24.02.2009 and denied the credit of CVD of Rs.822.89 lakhs. The said credit was denied on the following grounds:

(a) Statements enclosed along with application are unsigned.

(b) There is no bifurcation of duty paid on the basis of challan and therefore it is not possible to conclude whether only BCD is being paid or CVD has also been paid.

(c) Without looking at Bill of Entry it is not possible tc decide as to whether CVD was payable.

(d) Credit is not admissible as per rule 57E.

(e) Order of the Settlement Commission has not attained finality since the interest as order has yet not been paid by the Appellants.

3. Aggrieved by the aforesaid order dated 24.04.2009, Appellant filed an appeal before the Commissioner (Appeals), Ahmedabad. In the decision the Hon'ble Commissioner (Appeals), dismissed the Appeal vide OIA No.322/2009 Ahd-II)CE/CMC/Commr(A)/Ahd dated 23.09.09, in his order held as under:

> *Core Healthcare was taken over by the Appellants as per the order dated 1.03.2007 of Hon'ble Gujarat High Court which does not specifically allows the Appellants to claim credit. Therefore, the Appellants have no locus standi to claim the credit. The Appellants have failed to mention in their letter dated 3.01.2008 as to under which provision they are claiming CVD credit.*

4. Being aggrieved by the impugned Order-in-Appeal dated 23.09.2009, the Appellant filed an Appeal before the Hon'ble Bench of CESTAT, Ahmedabad. During personal hearing held on 18.03.2015 the main issues for decision before Bench were as below:

(a) The decision taken by the Commissioner (Appeals) is beyond the actual facts of the case as also the decision taken by the Adjudicating officer. Therefore, set aside the Impugned order.

(b) The Hon'ble Bench of the Tribunal under Order No. A/10246/2015 dated 18.03.2015 has held as under:

[1] "There is no material available on malafide or misstatement or fraud etc on the part of the Appellant. Therefore, in our considered view the claim of the Appellant cannot be barred under Rule 57E of erstwhile Rules."

[2] "we have noticed that the said Annexures were the part of the claim application dated 03.01.2008. The said Annexures were rejected on the grounds that said documents were unsigned. In our considered view, the Appellant should be given an opportunity to place statement with supporting material before adjudicating authority for verification of the claim in the interest of justice."

[3] The Hon'ble Tribunal in para 8 of the said order has set aside the order and remanded the matter to adjudicating authority to examine claim of payment of CVD by the Appellant, and to decide the claim on the basis of records as per relevant rules as existed during the material period.

5. Under the denovo proceedings, the Jurisdictional Assistant Commissioner rejected the claim of Modvat/ cenvat credit under OIO No. 08/Refund/16-17 dated 1.8.2016. The claim of credit was rejected on the following grounds:

i) The assessee could not substantiate their claim of payment of CVD.

ii) The assessee could not substantiate that the imported material was used in the manufacture of dutiable goods

6. Being aggrieved with the impugned order this appeal has been filed. The appellant has raised various grounds which have been briefly summarized as under:

a) The impugned order passed by the Asstt.Commissioner is non-speaking and bad in law and breach of principles of natural justice in as much as that no proper findings nor any discussions given on the submissions made by the appellant.

b) The adjudicating authority took an erroneous decision by misinterpreting the decision of the Settlement Commission without appreciation of facts in its true spirit.

c) The Adjudicating authority had only picked and quoted some portion of the order of the Hon'ble Settlement Commission and misinterpreted the decisions of the Hon'ble Commission by ignoring the final conclusion

d) During the proceedings before the Settlement Commission, Appellant produced detailed statement giving break-up of duty payable which included basic Customs duty, where only the basic customs duty was exempted and in cases where both basic customs duty and CVD were exempted.

e) The Settlement Commission had directed DGFT, Ahmedabad to verify the applications filed by the appellant with directions to the customs authorities

Ahmedabad and Mumbai to provide the relevant documents to the DGFT, Ahmedabad. The verification report of the DGFT, Ahmedabad was discussed before the Bench in presence of the customs authorities and the finally the duty liability was determined by the Settlement Commission. Such determined duty liability was paid by the appellants in installments.

f) That the final duty liability determined by the Settlement Commission is as under:

No. of Licenses and type issued by DGFT	Duty settled by the Commission (Rs. In lakhs)
Application No. 1	
1. 27 Advance Licenses	1698.52
2. 9 Advance Licenses	53.36
Application No. 2	
1. 2 Advance Licenses	140.71
2. Pre-DEPB Licenses (6 Nos)	538.75
3. Post-DEPB Licenses (65 Nos)	366.25
Total	**2797.59**

g) The adjudicating authority had only relied upon the apprehensions of the Customs authorities noted at para 11.4 of the order of the Settlement Commission. However, the conclusion of the Settlement Commission noted at para 12.2 of the order had been ignored.

h) The DGFT, under their report dated 18.10.2007, had clarified that they could not segregate the SAD from the total amount. It was nowhere stated that they could not segregate the Basic Customs Duty and the CVD. That the present claim was with respect to CVD and had nothing to do with SAD.

i) After verification of the DGFT, the appellant had approached the Customs department and the final figures of the default duty had been worked out in joint sitting with the customs authorities.

j) Thus the finding of the adjudicating authority to the effect that CVD had not been paid is erroneous.

k) The appropriate usage of the material imported under Advance Licence has been disputed by the adjudicating authority on assumptions and presumptions.

l) During the relevant period the erstwhile MODVAT Rules, a part of the Central Excise Rules, 1944, were prevalent. Under the said regime, the availment of credit on Capital Goods and Inputs was under physical control. The Statutory Documents, such as RG-23-A Part-I and RG-23-A Part-II were required to be maintained, and for receipt, consumption and inventory of raw material Form-IV and V were prescribed, which were required to be maintained on daily basis and each and every entry were countersigned by the Jurisdictional Range Officer. The prescribed RT-12 returns were required to be filed on monthly basis along with all relevant pages of Registers containing the details of Receipt consumption of raw material as well as finished goods manufactured and

cleared on payment of duty or for export. Moreover, the invoices and BOEs were defaced by the department

m) At the time of filing the application for refund on 3.1.2008, all the original documents were submitted for verification. Such documents were available with the department and in case of doubts, the veracity of the usage of raw materials could be verified from the original documents submitted to the department.

n) The adjudicating authority has not discussed the verification report of the Range Superintendent. This aspect is important since the actual verification had been undertaken by the Range Superintendent.

7. Personal hearing was accorded on 16.03.2017 and 20-03-2017 wherein Shri Vikramsinh Jhala, AGM [EXCISE] appeared on behalf of the appellant and reiterated the submissions made under their appeal memorandum. He submitted copies of the relevant worksheet/documents. The Asstt. Commissioner, Central Excise, Div-III, Ahmedabad-II was also present during the course of hearing held on dated 20-03-2017. The divisional AC aswellas the appellants were allowed 7 days time to file additional written submission in view of the discussion during the P.H.

7.1 The appellant vide their letter dated 30.3.2017 filed an affidavit explaining the facts of the case alongwith CA's certificate certifying the payment of duty and original signed copies of the statement of total customs duty bifurcation.the department filed their reply dated 26-4-17 which was received in this office on 12-06-17.

7.2 The appellants, under their letter dated 18.7.2017, requested that reply may have been submitted by the department and requested for a copy of the same. Accordingly, the copy of the report was furnished to the appellants under letter dated 21.7.2017 with directions to file written submissions (if any) within seven days. In view of the same, the appellants further filed additional submissions under their letter dated 31.7.2017 wherein it was stated that out of the total 38 licenses under consideration, 15 were issued under Notn. No. 30/97-Cus dated 1.4.1997 under which both BCD and CVD were exempted. The balance 23 licenses were issued under Notn. No. 79/95-Cus dated 31.3.1995 under which BCD was exempted. The total duty involved in respect of each license, along with the break-up of the duty heads, was submitted along with the submissions.

8. I have carefully gone through the case records, facts of the case, copies of various orders, and relevant worksheet/documents, submission made by the appellant at the time of personal hearing and the additional written submission filed on 31-03-2017 under which an Affidavit and CA Certificate were filed and further submissions dated 31-07-2017 filed by the appellant.

9. The twofold issues arising out of the appeal before me are as under:

a) The claim of payment of CVD by the appellant

b) The proper usage of the raw materials imported under the respective Advance Licenses

10. Claim of payment of CVD by the appellant

10.1 The Tribunal had remanded back the case for denovo adjudication with the following observation as regards the claim of payment of CVD is concerned:

> *"The main contention of the Authorised Representative is that the Appellant had not paid the CVD and therefore, there is no question of acceptance of the claim. It is contended by the Appellant that they paid the amount of Rs. 822.29 lakhs CVD as detailed in Annexure IV, V and VI of the application dated 3.1.2008. The aAdjudicating Authority observed that the said annexures/ statement does not bear any signature of any authorized person. It is also observed that no calculation about the bifurcation of the duty has been shown in the annexure as to how they have arrived at a particular figure. We have noticed that the said annexures were the part of the claim application dated 3.1.2008. The said annexures were rejected on the ground that the said documents were unsigned. In our considered view, the Appellant should be given an opportunity to place statement with supporting material before the Adjudicating Authority for verification of the claim in the interest of justice."*

10.2 The Adjudicating authority has rejected the claim of Modvat/ Cenvat credit on the ground that there was an argued difference in the duty payable as per the DGFT and as put forth by the customs department. This aspect has been noted at paras 11.4, 11.4.1 and 11.4.2 of the Settlement Commission's order dated 27.11.2007 (the said order for short). The said difference was attributed to non-consideration of CVD by the DGFT. Further it was observed by the adjudicating authority that the final conclusions of the Settlement Commission at para 12.2 of the said order did not find any mention of CVD and as such there was no payment of CVD and as such the question of refund did not arise. As regards the worksheets submitted by the appellants, it has been observed by the adjudicating authority that the appellant's have shown payment of CVD in all the cases without considering the notification under which the goods had been imported and in absence of vital details, the worksheets could not be relied upon.

10.3 The conclusion that CVD has not been paid has been arrived at by the adjudicating authority solely on the basis of two pieces of narration in the said order at paras 11.4, 11.4.1 and 11.4.2 and partial para 12.2. The other ground raised for rejecting the claim of payment of CVD is that the worksheets cannot be relied upon in absence of vital details. However, it is noteworthy to point out that the adjudicating authority has not brought on record any concrete evidence or document to drive home

the point that the CVD has not been paid. The conclusion has only been arrived at on surmises and negations. Such an approach would defeat the spirit of the directives of the Tribunal to the effect that "*the Appellant should be given an opportunity to place statement with supporting material before the Adjudicating Authority for verification of the claim in the interest of justice.*" Needless to say that such an opportunity should be fair and on level playing field. In light of such directions, it was the onus of the appellants to place on record material in support of their claim and it was the onus of the adjudicating authority to examine and verify the correctness of the claim in light of such materials. It is seen from the documents relied upon by the appellants that they had furnished license-wise details of duty with the break-up of the heads under which duty had been paid under their letter dated 23.7.2015. The said summary was supported by individual statements of each license showing the details of goods imported, date of import, value and the head-wise duty payable. The adjudicating authority has failed to examine the said details in light of the available material with the department and proceeded to reject the claim on surmises built on the narratives at the discussion portion of the said order.

10.4 At this junction it is also pertinent to note that the appellant had submitted the original documents to the department at the time of submission of the refund claim on 3.1.2008 as contended by them at para 13 of the appeal papers. The said facts also find mention in the letter dated 19.2.2016 filed before the adjudicating authority of which the relevant text is as under:

> "*We may point out that initially we have already supplied these details to the department, but the same are not found available in your office and so we submit the same again.*"

The above contention of the appellants has not been refuted by the adjudicating authority under the impugned order. Thus, it has to be accepted that the appellants had indeed furnished the relevant original documents to the department at the time of filing the refund claim on 3.1.2008. In such circumstances, it would not be fair to impress upon the appellants to produce the supporting documents time and again. The verification is to be made on the basis of whatever documents which have been made available to the department and in case of any discrepancy a proper and specific query is required to be raised without acting on any surmises or doubts. I find that this is not the case in the present issue before me. I also find that the issue had been under dispute since the year 2008 and the assessee has been valiantly contesting their claim. It is a well known principle that justice delayed is justice denied. The appellants could not be put to a test time and again and it would be futile that in each round of litigation the department seeks documents from the appellant and then rejects the claim on the basis of non-production of documents. Thus, looking at the age of the case, I proceed to examine the matter on the basis of evidences available on record.

10.5 It is an undisputed fact that the appellants had defaulted in their export obligation in respect of the 38 Advance licenses under consideration which resulted in them having to make the payment of customs duty. The numbers of the Advance License to which the dispute pertains is also beyond the scope of doubt. The dispute is in relation to the following Advance Licenses as per the records:

Application 1 before the Settlement Commission		
1	3494785	12.7.95
2	3494784	12.7.95
3	3494783	12.7.95
4	3500471	2.8.95
5	800055	8.9.95
6	800095	21.9.95
7	1532573	6.11.95
8	3037902	15.12.95
9	1530988	9.6.95
10	800976	28.2.96
11	801015	12.3.96
12	800978	16.4.96
13	801411	5.6.96
14	801443	12.6.96
15	41226	5.6.97
16	41230	10.6.97
17	41239	13.6.97
18	41652	21.7.97
19	41653	21.7.97
20	8000050	3.8.97
21	8000077	13.8.97
22	8000106	27.8.97
23	8000206	8.10.97
24	8000208	8.10.97
25	8000207	8.10.97
26	8000546	20.2.98
27	8000631	19.3.98
28	1532571	11.8.95
29	358	27.10.95
30	1532509	31.10.95
31	3037910	19.12.95
32	1532728	15.12.95
33	801177	27.3.96
34	801231	16.4.96
35	800587	2.8.96
36	3525	21.8.96

The above facts find confirmation in the details of licenses given by the DGFT at Annexure A to their letter File No. 08/80/40/224/AM98/ALS I dated 20.7.2005. Further, the details of the licenses is also in confirmation to the affidavit dated 2.8.2005 filed by Shri Kamlesh J Shah, Company Secretary of M/s Core Healthcare Ltd. Moreover the said details are also in consonance to the details of the licenses given in the application and the submissions made to the Settlement Commission under letter dated 3.8.2005 of M/s Core Healthcare Ltd. Further, the details of the other 2 Advance Licenses is as under:

Application 2 before the Settlement Commission		
37	8000770	21.5.98
38	8000556	25.2.98

The above details are in confirmation to the details submitted by M/s Core Healthcare Ltd. at Annx. S-3 to their letter dated 3.8.2005 submitted to the Commissioner of Customs, Custom House, Ahmedabad with respect to their application before the Settlement Commission. Thus, the details of the licenses under dispute stands verified on the count that the said details are in consonance to the various communication with regard to the application before the Settlement Commission.

10.6 The Final Order dated 27.11.2007 of the Settlement Commission finally settled the matter and the settlement amount of customs duty was ordered at Rs. 2797.59 lakhs the details of which are as under:

No. of Licenses and type issued by DGFT	Duty settled by the Commission (Rs. In lakhs)
Application No. 1	
1. 27 Advance Licenses	1698.52
2. 9 Advance Licenses	53.36
Application No. 2	
1. 2 Advance Licenses	140.71
2. Pre-DEPB Licenses (6 Nos)	538.75
3. Post-DEPB Licenses (65 Nos)	366.25
Total	**2797.59**

In the case before me, we are concerned with the 38 Advance Licenses i.e. 36 licenses under Application No. 1 and 2 licenses under Sr. No. 1 of Application No. 2

10.7 As regards the computation of duty is concerned, the duty liability admitted by the appellants under Application No. 1 was Rs. 1695.35 lakhs in respect of the 27 licenses pertaining to Mumbai Customs and Rs. 48.70 lakhs in respect of Ahmedabad

Customs which is apparent from the narration at para 9 of the said order of which the relevant text is as under:

> *"The applicant on its own initiative out of its desire to set right the default in not fulfilling the entire export obligation had filed the settlement application admitting the additional amount of duty liability of Rs. 1636.19 lakhs. The applicant thereafter, vide its applications dated 21.8.2000 and 12.3.2001 further admitted additional amount of duty liability of Rs. 97.36 lakhs and Rs. 10.50 lakhs respectively. Thus the total additional amount of duty liability admitted by the applicant in the said application was Rs. 1744.05 lakhs (Mumbai Customs – Rs. 1695.35 lakhs + Ahmedabad Customs – Rs. 48.70 lakhs). As regards the admitted additional amount of duty liability in respect of Ahmedabad Customs, after the joint meeting of the departmental officers with the applicant's representatives, the Commissioner of Customs, Ahmedabad had worked out the duty liability of Rs. 53,36,336/- as against Rs. 48.70 lakhs admitted by the applicant. The applicant accepted the liability of Rs. 53,36,336/-. However, as regards the admitted additional amount of duty liability in respect of Mumbai Customs, despite best efforts of the applicant, the exact amount of additional amount of duty was not worked out by the Mumbai Customs. Now, DGFT, Ahmedabad vide verification report dated 28.9.2007 ascertained the duty liability to Rs. 1698.52 lakhs as against the liability of Rs. 1695.35 lakhs admitted by the applicant."*

The final order portion, determining the duty liability, at para 16 of the said order indicates that in respect of 27 Advance Licenses (Mumbai Customs) duty has been determined at Rs. 1698.52 lakhs and in respect of 9 Advance Licenses (Ahmedabad Customs) duty has been determined at Rs. 53.36 lakhs against admitted liability of Rs. 1695.35 lakhs and Rs. 48.70 lakhs respectively.

10.8 The admitted liability of Rs. 1695.35 lakhs and Rs. 48.70 lakhs respectively has been worked out by the appellants as detailed at Annexure S-4 to the application before the Settlement Commission of which a copy has been submitted to the Commissioner of Customs, Ahmedabad on 3.8.2005. The details of duty worked out and admitted by the appellants under the said annexure are as under:

Sr. No.	License No	Date	Duty admitted					
			BCD	SCD	CVD	Cess	SAD	Total
Application 1 before the Settlement Commission (Mumbai Customs)								
1	3494785	12.7.95	1.84		0.69			2.53
2	3494784	12.7.95	1.43	0.01	1.71			3.15
3	3494783	12.7.95	0.66	0.005	0.8			1.465

4	3500471	2.8.95	2.01	0.02	2.4			4.43
5	800055	8.9.95	20.35		12.21			32.56
6	800095	21.9.95	19.96		11.97			31.93
7	1532573	6.11.95	10.57	0.07	12.7			23.34
8	3037902	15.12.95	1.86	0.01	2.24			4.11
9	1530988	9.6.95	1.16	0.08	0.42			1.66
10	800976	28.2.96	0.27	0.02	0.3			0.59
11	801015	12.3.96	2.82	0.21	2.13			5.16
12	800978	16.4.96	0.1	0.01	0.11			0.22
13	801411	5.6.96	0.44	0.04	0.47			0.95
14	801443	12.6.96	5.08	0.36	1.81			7.25
15	41226	5.6.97	57.21	12.4	46.86			116.47
16	41230	10.6.97	17.45	0.99	12.05			30.49
17	41239	13.6.97	17.05	1.14	13.5			31.69
18	41652	21.7.97	19.81	2.59	15.52			37.92
19	41653	21.7.97	190.61	38.12	130.87		15.57	375.17
20	8000050	3.8.97	163.69	12.76	179.25			355.7
21	8000077	13.8.97	1.63	0.35	1.85			3.83
22	8000106	27.8.97	27.91	3.96	22.53			54.4
23	8000206	8.10.97	42.45	7.09	47.7			97.24
24	8000208	8.10.97	6.01	0.6	5.08			11.69
25	8000207	8.10.97	24.86	3.84	22.58		0.38	51.66
26	8000546	20.2.98	74.51	12.42	83.39		12.65	182.97
27	8000631	19.3.98	98.96	16.49	111.33			226.78
Total			**810.7**	**113.6**	**742.5**	**0**	**28.6**	**1695.355**
Application 1 before the Settlement Commission (Ahmedabad Customs)								
28	1532571	11.8.95	0.62	0.05	0.69			1.36
29	358	27.10.95	0.71	0.06	0.79			1.56
30	1532509	31.10.95	2.5	0.22	2.76			5.48
31	3037910	19.12.95	0.08	0.01	0.1			0.19
32	1532728	15.12.95	0.44	0.04	0.49			0.97
33	801177	27.3.96	1.03	0.07	1.13			2.23
34	801231	16.4.96	1.16		1.73			2.89
35	800587	2.8.96	8.09	0.7	8.94			17.73
36	3525	21.8.96	11.42	0.8	4.08			16.3
Total			**26.05**	**1.95**	**20.71**	**0**	**0**	**48.71**
Grand Total			**836.8**	**115.5**	**763.2**	**0**	**28.6**	**1744.065**

The above clearly indicates that the component of CVD had been computed by the appellants at the time of admitting the additional duty liability before the Settlement Commission. In addition to the above admitted liability, the DGFT, Ahmedabad and Customs Ahmedabad worked out the duty liability on a higher side at Rs. 1698.52 lakhs and Rs. 53.36 lakhs respectively side which was accepted by the appellants. The

Settlement Commission also accepted the said liability and accordingly ordered that the appellant was required to pay Rs. 1698.52 lakhs and in respect of 9 Advance Licenses (Ahmedabad Customs) duty has been determined at Rs. 53.36 lakhs.

10.9 Further, the working of the duty liability in respect of 9 Advance Licenses (Ahmedabad Customs), the duty liability was worked out jointly with the Customs authorities Ahmedabad as apparent from the narrative of the said order as reproduced at para 10.7 above. The said working has not been disputed by the department as can be seen from the said order. The only dispute raised by the department before the Settlement Commission was with regard to the duty liability in respect of 27 Advance Licenses (Mumbai Customs) which is apparent from para 11.4 of the said order of which the relevant text is as under:

> *"The revenue further submitted that according to the DGFT the total liability on account of 27 Advance Licenses pertaining to application No. 1 is Rs. 1698.52 lakhs. The department's claim is Rs. 1949.95 lakhs which was also submitted earlier. The difference in the amounts claimed is on account of the following*
> *11.4.2 The DGFT in their calculation have taken into account only the Basic Custom duty i.e. they have considered only amounts to the extent of duty foregone on account of Basic Duty and have not taken into account the liability on account of Additional Duty."*

The contention of the department had been duly considered which has been noted by the Settlement Commission at para 12.2 of the said order of which the relevant text is reproduced under:

> *"However, the DGFT, vide their report dated 18.10.2007, have clarified that as regards the verification of the total amount of duty liability they have made efforts to **verify the total amount of duty involved** in respect of the advance licences and DEPBs in question based on the information/ documents submitted by the firm/ customs. However, they could not ascertain the segregation of other duties such as SAD etc. in the total amount included in the verification report."*

Thus, the above report indicates that only the segregation of SAD could not be verified by the DGFT. This aspect is not relevant to the issue at hand since the present issue is concerned regarding the computation and payment of CVD and not SAD. The report of the DGFT nowhere states that they could not verify the segregation of CVD component of the total duty liability.

10.10 Moreover, it is a known fact that Customs Duty comprises of various components such as Basic Customs Duty, CVD, SAD, SCD, Cesses, etc. Thus, when the term **'total amount of duty liability'** is referred to it would obviously mean the

aggregate of the sum of all the applicable components of the duty which would also include the CVD component. In the instant case, the appellants failed to discharge their export obligation which resulted in recovery of the customs duty foregone on the raw materials imported under the Advance Licenses. The duty foregone would obviously comprise of all the applicable components of the customs duty as specified above. Thus, verification of the **total duty liability** by the DGFT would comprise of all the components and it is out of those components that the DGFT has not been able to verify the segregation of SAD. It is a simple principle of construction that a verification report submitted by an agency mentions only the discrepancies or the shortcomings in the verification and that which has not been specified is deemed to have been verified and found correct. Since the said report only mentions the shortcoming in respect of SAD, the natural corollary follows that there is no discrepancy/ shortcoming in respect of other heads including CVD. Be that as it may, if the department was still not satisfied with the manner of computation of the **total duty liability** in respect of the 27 Advance Licenses pertaining to Mumbai Customs, the proper course of action would have been to agitate the order of the Settlement Commission before the High Court. The differential duty that ought to have been computed on account of CVD as per the department's contention is to the tune of Rs. 251.43 lakhs as evident from para 11.4 of the said order. It cannot be presumed that the department would jeopardize a huge amount of revenue to the tune of Rs. 251.43 lakhs by not appealing to the High Court or filing a review application before the Settlement Commission. **However, it is seen from records that the department has chosen not to agitate the order of the Settlement Commission before the appropriate Court or even through a Curative/ Review application before the Settlement Commission. It is a settled principle of law that the dispute of non-payment of CVD cannot be raised at this stage when the department has accepted the order passed by the Settlement Commission.**

10.11 However, for the sake of argument let us consider that the argument of the department as appearing at para 11.4 of the said order. The dispute is solely in respect of the 27 Advance Licenses in respect of the Mumbai Customs. The department has worked out a difference of Rs. 251.43 lakhs and attributed the same to CVD component by arguing that the DGFT has not considered the CVD and the working is only in respect of Basic Customs Duty. If that be s, the percentage of CVD to the total duty would be 12.9% i.e. Rs. 251.43 lakhs out of the total duty argued by the department at Rs. 1949.95 lakhs. Now let us hypothetically check whether the above theory would hold good or otherwise.

The licence-wise computation of the total customs duty has been submitted by the appellant along with the appeal papers and highest rate of basic customs duty at the material time is found at 50%. Considering the highest rate of 50% basic customs duty, the rate of CVD would be theoretically worked out at 5.56% if the percentage of CVD component is to be considered as 12.9% of the total customs duty. This can be seen from the table below:

Assessable value	Duty Component	Rate of duty	Duty leviable
100	Basic	50	50
150	CVD	5.56	8.34
158.34	SAD	4	6.3336
	Total Duty		**64.6736**
Percentage of CVD to total customs duty			12.89

Likewise the lowest rate of basic customs duty is 20% and in this case the CVD would be theoretically worked out at 3.1% as under:

Assessable value	Duty Component	Rate of duty	Duty leviable
100	Basic	20	20
120	CVD	3.08	3.696
123.72	SAD	4	4.94784
	Total Duty		**28.64384**
Percentage of CVD to total customs duty			12.9

Thus, it can be seen that the range of applicable rates of CVD would have to be between 3.08% to 5.56% if the difference of the calculation is attributed to CVD component. However, during the relevant period the rate of CVD was ranging from 10% to 25% as seen from the licence-wise calculation sheet furnished by the appellant. Thus, the theory of the difference in the calculation by the customs authorities and the DGFT cannot be attributed to the reason that the DGFT had not considered the CVD while computing the total customs duty liability. Thus, I find that theoretically also the theory of non-payment of CVD does not hold good.

10.12 Moreover, it is pertinent to note that while passing the final order, the Settlement Commission has clearly noted at para 16 under the interest part that the applicant would pay simple interest @ 10% (**excluding CVD portion**). The relevant text of the order of the Settlement Commissioner is as under:

> *"Since the applicant has come before the Commission on its own accord without waiting for the department to issue SCNs, paid the admitted duty liability as per directions of the Commission/ Hon'ble Gujarat High Court, we order the applicant to pay simple interest @ 10% p.a. (excluding CVD portion) from the date the duty was due till it was paid."*

This would clearly mean that the CVD portion has to be excluded from the total amount for the purpose of calculation of interest. The reason for not charging interest on the CVD component is that the same would have been available as cenvat/ modvat credit at the time of import of the said goods had they been imported on payment of duty. This argument has been put forth by the appellants at para 9 & 10 of the Final Order of the Settlement Commission. On this count, the Commission has not charged interest on the CVD portion. This fact expressly implies that the total duty liability included the CVD component and for the very same reason the Commission has specifically noted that interest is not to be charged on the CVD portion.

10.13 As regards the 2 Advance Licenses pertaining to Application no. 2 before the Settlement Commission, the total duty liability admitted by the appellant was to the tune of Rs. 140.71 lakhs which has been worked out as under:

Sr. No.	License No	Date	Duty admitted					
			BCD	SCD	CVD	Cess	SAD	Total
1	8000770	21.5.98	46.08	8.27	51.84	4.44	10.87	121.5
2	8000556	25.2.398	8.69	1.09	7.87		1.57	19.22
Total			**54.77**	**9.36**	**59.71**	**4.44**	**12.44**	**140.72**

The above working is found at Annexure S-3 before the Settlement Commission of which a copy has been submitted to the Commissioner of Customs, Ahmedabad under letter dated 3.8.2005. There is no dispute with regard to the said duty liability and the bifurcation thereof which is apparent from para 12.3 of the order of the Settlement Commission which reads as under:

> *"The Revenue has further submitted that the total duty liability as per DGFT on account of 2 Advance Licenses pertaining to application No. 2 is Rs. 140.71 lakhs and there is no dispute. The applicant is also not disputing this amount."*

Thus, it is evident that there is no dispute regarding payment of CVD in respect of the above 2 Advance Licenses.

10.14 The above facts clearly indicate that the CVD is included in the total duty liability worked out and accepted before the Settlement Commission. Also the department is not in possession of any solid piece of evidence that CVD has not been computed because the Settlement Commission order has not been challenged or no demand letter has been issued to the appellant so far to demand CVD ,which they must pay, if not already paid. The adjudicating authority has proceeded on presumptions and assumptions to arrive at a conclusion that CVD has not been paid. Even otherwise, the onus to substantiate the charges always lies on the person making the charges. In the instant case, it is the revenue who has raked up the issue

about the CVD component not being paid and as such the onus lies on the revenue to establish the charges. The onus cannot be passed on the appellants to prove otherwise when the charges have been initiated merely on presumption and assumption basis. In this regard I place reliance on the judgment in the case of M/s Uniworth Textiles Ltd. reported at 2013 (288) E.L.T. 161 (S.C.) wherein the Hon'ble Supreme Court has made observations above onus of proof and the relevant portion of the same is reproduced under:

> *"24. Further, we are not convinced with the finding of the Tribunal which placed the onus of providing evidence in support of bona fide conduct, by observing that "the appellants had not brought anything on record" to prove their claim of bona fide conduct, on the appellant. It is a cardinal postulate of law that the burden of proving any form of mala fide* ***lies on the shoulders of the one alleging it****. This Court observed in Union of India v. Ashok Kumar & Ors. - (2005) 8 SCC 760 that "it cannot be overlooked that burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demand proof of a high order of credibility"*

10.15 I further find that the working of duty as per Annexure S-3 and S-4 as detailed at paras 10.13 and 10.8 respectively form a part of the application before the Settlement Commission and also such documents have been submitted to the Commissioner of Customs, Ahmedabad under letter dated 3.8.2005 i.e. much before the Final Order of the Settlement Commission was pronounced and the claim for cenvat credit was made by the appellants. Thus, I find that the said working is the basis on which the final duty liability has been finally determined by the Settlement Commission. Also the element of fudging of records is also ruled out since the above computation was furnished before even the appellant was in the knowledge that they would be offered an opportunity by the Settlement Commission to claim the cenvat credit of CVD.

10.16 In view of the above discussions, I find that the revenue does not have any concrete reason to allege that CVD has not been paid in the instant case. On the contrary the parameters such as the working of total duty liability as discussed above, the findings of the Settlement Commission and the language employed in the Final Order as discussed above very much establishes the fact that the CVD has been duly computed in the total duty liability. Thus, I find that the balance of convenience in the present case is on the side of the appellants and as such I find that the due benefits of cenvat/ modvat credit ought to be rightly given to the appellants in the interest of justice.

10.17 Having made the above observations, I proceed to quantify the amount of cenvat/ modvat eligible as credit. It is an undisputed fact that during the relevant

period 2 notifications governed the provisions of Advance License. Notification No. 79/95 Cus dated 31.3.1995 provided for exemption only to Basic Customs duty. As such the CVD portion was not exempted and would have been paid by the appellants at the time of import of the raw materials. It is a different matter that the appellants have computed the CVD portion even in respect of such licenses, but the fact remains that CVD ought not have been computed in such licenses since no CVD was foregone in respect of imports under Notification No. 79/95 Cus dated 31.3.1995. By computing the CVD component in respect of such licenses covered under Notification No. 79/95 Cus dated 31.3.1995, the appellants have added to their total liability. However, such amount cannot be considered for the purpose of allowing Modvat/ cenvat credit since the same was not required to be recovered as CVD on the count that CVD portion was not duty foregone in respect of imports under Notification No. 79/95 Cus dated 31.3.1995. Thus, while computing the eligible amount of Modvat/ cenvat credit, the amount of CVD considered in licenses under Notification No. 79/95 Cus dated 31.3.1995 is required to be deducted. As regards the other Notn. No. 30/97 dated 1.4.1997, the same exempted both BCD and CVD and as such the total duty foregone in respect of imports under Notn. No. 30/97 dated 1.4.1997 would include the CVD component. Resultantly, CVD ought to be rightly recovered in respect of the licenses under Notn. No. 30/97 dated 1.4.1997.

10.18 In view of my observations at para 10.17 above, I find that eligible credit would comprise only the portion of CVD in respect of the licenses under Notn. No. 30/97 dated 1.4.1997. The bifurcation of the imports under Notn. No. 79/95 Cus and Notn. No. 30/97 Cus has been submitted by the appellants under their submission dated 31.7.2017 which is as under:

Sr. No.	License No	Date	Duty admitted					
			BCD	SCD	CVD	Cess	SAD	Total
Advance Licenses under Notn. No. 79/95 Cus dated 31.3.95								
1	3494785	12.7.95	1.84		0.69			2.53
2	3494784	12.7.95	1.43	0.01	1.71			3.15
3	3494783	12.7.95	0.66	0.005	0.8			1.465
4	3500471	2.8.95	2.01	0.02	2.4			4.43
5	1532571	11.8.95	0.62	0.05	0.69			1.36
6	800055	8.9.95	20.35		12.21			32.56
7	800095	21.9.95	19.96		11.97			31.93
8	358	27.10.95	0.71	0.06	0.79			1.56
9	1532509	31.10.95	2.5	0.22	2.76			5.48
10	1532573	6.11.95	10.57	0.07	12.7			23.34
11	3037910	19.12.95	0.08	0.01	0.1			0.19
12	1532728	15.12.95	0.44	0.04	0.49			0.97
13	3037902	15.12.95	1.86	0.01	2.24			4.11
14	1530988	9.6.95	1.16	0.08	0.42			1.66

15	800976	28.2.96	0.27	0.02	0.3			0.59
16	801015	12.3.96	2.82	0.21	2.13			5.16
17	800978	16.4.96	0.1	0.01	0.11			0.22
18	801411	5.6.96	0.44	0.04	0.47			0.95
19	801443	12.6.96	5.08	0.36	1.81			7.25
20	801177	27.3.96	1.03	0.07	1.13			2.23
21	801231	16.4.96	1.16		1.73			2.89
22	800587	2.8.96	8.09	0.7	8.94			17.73
23	3525	21.8.96	11.42	0.8	4.08			16.3
Total			**94.6**	**2.785**	**70.67**	**0**	**0**	**168.055**
Advance Licenses under Notn. No. 30/97 Cus dated 1.4.97								
1	41226	5.6.97	57.21	12.4	46.86			116.47
2	41230	10.6.97	17.45	0.99	12.05			30.49
3	41239	13.6.97	17.05	1.14	13.5			31.69
4	41652	21.7.97	19.81	2.59	15.52			37.92
5	41653	21.7.97	190.61	38.12	130.87		15.57	375.17
6	8000050	3.8.97	163.69	12.76	179.25			355.7
7	8000077	13.8.97	1.63	0.35	1.85			3.83
8	8000106	27.8.97	27.91	3.96	22.53			54.4
9	8000206	8.10.97	42.45	7.09	47.7			97.24
10	8000208	8.10.97	6.01	0.6	5.08			11.69
11	8000207	8.10.97	24.86	3.84	22.58		0.38	51.66
12	8000546	20.2.98	74.51	12.42	83.39		12.65	182.97
13	8000631	19.3.98	98.96	16.49	111.33			226.78
14	8000770	21.5.98	46.08	8.27	51.84	4.44	10.87	121.5
15	8000556	25.2.98	8.69	1.09	7.87		1.57	19.22
Total			**796.9**	**122.1**	**752.2**	**4.44**	**41.04**	**1716.73**
Grand Total			**891.5**	**124.9**	**822.9**	**4.44**	**41.04**	**1884.785**

The above bifurcation is also found to be correct in view of the dates of issue of license and the list of advance licenses appearing at Annx. A to the DGFT letter File No. 08/80/40/224/AM98/ALS I dated 20.7.2005. The same is also confirmed from the 18 Bond-cum-Bank Guarantee/ bonds furnished by Shri Kamlesh J Shah under affidavit dated 2.8.2005. The Bond-cum-Bank Guarantee/ bonds also mention the notification number and the same is found in consonance with the above bifurcation. In view of the above discussion and calculation, I find that the appellants would be entitled to modvat/ cenvat credit to the tune of Rs. 752.2 lakhs in respect of the imports under Notn. No. 30/97 Cus dated 1.4.97 and not Rs. 70.67 lakhs paid in respect of imports under Notn. No. 79/95 Cus.

11. Usage of Imported Material

11.1 The second issue under contention is the proper usage of the raw materials imported under the above Advance Licenses. With regard to the usage of materials, the adjudicating authority has observed at para 11.1.4 of the impugned order as under:

> *"I find from the records available with this office that M/s Aculife have not provided any documentary evidences regarding the actual use of the material imported under various advance licenses. In absence of such crucial documentary evidences, I am unable to come to a conclusion that the said material was used in manufacture of dutiable goods only."*

The above narrative clearly creates the impression that the adjudicating authority is unable to come to a conclusion regarding the usage of the materials. It is not the case where the adjudicating authority has found on the basis of evidence that the materials imported under the Advance License have not been used for the manufacture of finished goods. It is merely a case where the adjudicating authority has raised doubts regarding the use of such materials. Such an approach is not proper since a conclusion has to be arrived at on the basis of evidence in quasi-judicial proceedings. A matter merely cannot be ruled against the applicant on the ground that one cannot arrive at a conclusion on the basis of records.

11.2 In this regard, I find that the entire period involved is prior to the year 2000 when the erstwhile Central Excise Rules, 1944 were in operation. Under the said regime the assessee's were required to file monthly RT-12 returns. Further, they were required to file the following documents along with the return:

a) Register of credit taken and utilized which was known as RG 23A Pt. II and RG 23C Pt. II
b) Register of stock raw material which was known as RG 23A Pt. I and RG 23C Pt. I
c) Daily Stock register which was known as RG-1
d) PLA Account

During the entire period, the issue that the raw materials had not been used by the appellant for manufacture of finished goods had never arisen. In fact, in case of import under Advance Licenses, the stock of raw materials which was required to be maintained by the assessee was subject to scrutiny by the department with a view to prevent mis-use of the Advance Licence scheme. However, no such instance has been brought on record during all these years. It is improper to raise the issue at this stage and conclude that the raw materials have not been used in the manufacture of finished goods without any documentary evidence. The onus of burden of proof is to be discharged by the person making the charges as discussed at para 10.14 above. At least there should be some evidence leading to the fact of doubting the proper usage of the raw materials. This is completely lacking in the present case. Thus, I find that the

claim of the appellants cannot be merely brushed aside by raking up the issue of usage of raw materials at this stage.

11.3 I have no intention to cast any doubts on the appellants in absence of evidence whatsoever to the effect that the raw material have not been used in the manufacture of finished goods. This is all the more so since the Tribunal has also given cognizance to the finding of the Settlement Commission and observed at para 6 as under:

> *"The Settlement Commission has given a categorical finding on the bonafide of the Appellant. There is no material available on malafide or mis-statement or fraud, etc on the part of the Appellant."*

Further, the Settlement Commission has also noted at para 12.1 of the said order as under:

> *"The Revenue does not dispute the factum of exports having taken place. It is only the realization aspect which is the bone of contention."*

The above fact has been reiterated by the Hon'ble Settlement Commission at para 14 of the said order again which reads as under:

> *"There is no dispute that the exports have not taken place. The issue is only non-availability of the BRC because of which the claims are being denied"*

The above clearly indicates that it is beyond dispute that the goods have been exported. The natural corollary that follows that raw materials would be required to manufacture such goods which have been exported. In such circumstances it cannot be alleged that the raw materials have not been used properly in absence of evidence to substantiate such allegations. Such evidence to substantiate the allegations is completely missing in the case before me as held by the adjudicating authority ignoring the fact already undisputedly available on records and accepted by Revenue before the Settlement Commission.

11.4 In view of the above, I hold that the charges that the raw materials have not been used for manufacture of finished goods are not sustainable in absence of any evidence on record.

12. In view of the foregoing discussion and findings, I set aside the impugned order passed by the adjudicating authority and hold that the appellants are not entitled to modvat/ cenvat credit to the tune of Rs.70.67 lakhs as discussed above. However, they are entitled to modvat/ cenvat credit to the tune of Rs.752.2 lakhs as discussed above. Accordingly, the appeal is allowed with consequential relief, in light of the observations made hereinabove.

13. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।
..13The appeal filed by the appellant stand disposed off in above terms.

(उमा शंकर)
आयुक्त (अपील्स]

Attested

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

By Regd. Post A. D

M/s. Aculife Healthcare Pvt. Ltd
Village-Sachana,
Ta-Viramgam,
Dist-Ahmedabad.

Copy to :

1) The Chief Commissioner, Central Excise, Ahmedabad.
2) The Commissioner, Central Excise, Ahmedabad-II.
3) The Asstt. Commissioner, Central Excise, Div-III, AhmedabadII
4) The Asstt.Commissioner (Systems), Central Excise, Ahmedabad-II.
5) Guard file.
6) PA FILE.