आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate- Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
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क फाइल संख्या :File No : **V2(87)140/North/Appeals/2018-19**

ख अपील आदेश संख्या :Order-In-Appeal No.: **AHM-EXCUS-002-APP-142-18-19**

दिनाँक Date :**31-Dec-18** जारी करने की तारीख Date of Issue: 12/2/2019

श्री उमाशंकर आयुक्त (अपील) द्वारा पारित

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

ग _____आयुक्त, केन्द्रीय GST, अहमदाबाद North आयुक्तालय द्वारा जारी मूल आदेश : दिनाँक : से सृजित

Arising out of Order-in-Original:**07/AC/D/BJM/2017,** Date: **18-Jul-18** Issued by: **Assistant** Commissioner ,CGST, Div: III, Ahmedabad North.

ध अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the **Appellant** & Respondent

M/s. Nobel Automotive India 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।

I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप--धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 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 ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) 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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

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

Conti....2

ध 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 दिनॉक 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– ण्बी/35–इ के अंतर्गतः–

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

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 **दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात** 380016

To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 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

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

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

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

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

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall beer a court fee stamp of Rs.6.50 paisa 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 उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्तेत) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, १९४४ की धारा ३५फ के अंतर्गत वित्तीय(संख्या-२) अधिनियम २०१४(२०१४ की संख्या २५) दिनांक: ०६.०८.२०१४ जो की वित्तीय अधिनियम, १९९४ की धारा ८३ के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रूपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत " माँग किए गए शुल्क " में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत निर्धारित रकम

(ii) सेनवैट जमा की ली गई गलत राशि

(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, under section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under section 83 of the Finance Act, 1994 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,
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.

→**Provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.**

(6)(i) 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।

(6)(i) 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."

II. Any person aggrieved by an Order-in-Appeal issued under the Central Goods and Services Tax Act, 2017/Integrated Goods and Services Tax Act, 2017/Goods and Services Tax (Compensation to States) Act, 2017, may file an appeal before the appropriate authority.

ORDER-IN-APPEAL

M/s. Nobel Automotive Interior Systems India Pvt Ltd, Plot No.AV-5,BOL Industrial Estate, GIDC,Sanand-II, Ahmedabad (henceforth," *appellant*") has filed the present appeal against the Order-in-Original No.07/AC/D/BJM/18-19 dated 18.07.2018 (henceforth, "*impugned order*") passed by the Assistant Commissioner, Central GST & Central Excise, Division-III, Ahmedabad-North(henceforth, "*adjudicating authority*").

2. Brief facts of the case are that the appellant, a manufacturer of motor vehicle parts falling under Chapter Sub-head 87089900 of Central Excise Tariff Act, 1985 was issued a show cause notice dated 24.11.2017 for recovery of central excise duty Rs.18,98,302/- under Section 11A of Central Excise Act 1944 in respect of manufacture and clearance of tools denying the exemption under Noti.No.67/1995-CE dated 16.03.1995 which was confirmed alongwith interest and penalty under the impugned order.

3. Being aggrieved with the impugned, the appellant preferred this appeal contesting *inter alia*, that in the present case the goods are not removed whereas the liability to pay excise duty arises on removal of goods from factory; that tools were manufactured and by the appellant and used in manufacturing goods; that ownership of the tools has been transferred to M/s. Ford India Pvt Ltd but continued in possession with the appellant and hence duty is not required to be paid in term of rule 8(2) of Central Excise Rules,2002; that Rule 3(5),(5A) and (5B)of Cenvat Credit Rules,2004 also states that Cenvat credit on capital goods is payable only when the goods are removed from the factory; that ownership of the tools has been transferred and removal has not taken place; that transfer of ownership and leviability of excise are independent of each other; that as per rule 8(2) of Central Excise Rules,2002,duty is payable only when goods are removed, in the present case goods are lying in the factory; that they are paying excise duty on amortization cost of the tools; that the unit has amortized the tools/dies cost and duty has been paid; that capital goods are manufactured in a factory of the appellant and used in the factory and hence Noti. No.67/1995-CE dated 16.03.1995 is applicable; that even if duty would have been paid, its Cenvat credit would be available resulting in revenue neutral; they cited various case law and circulars stating there was no suppression of facts and penalty imposed under Section 11AC of the Act is not justifiable; Etc..

4. In the Personal hearing held on 25.07.2018 Shri Rohan Thakkar CA reiterated the grounds of appeal.

5. I have carefully gone through the appeal memorandum. The issue requiring determination is whether the appellant is entitled to avail the exemption under Noti. No.67/1995-CE dated 16.03.1995 on the tools sold to their client wherein ownership has been transferred without physical removal/delivery thereof. I find that the tools have been procured by the appellant from its manufacturers on payment of excise duty and availed Cenvat credit of capital goods on the same. I find following facts which is not disputed (i) The appellant has sold tools after reworking on it as per requirement of the buyer amounting to Rs.1,51,86,418/- under central excise invoice to M/s. Ford India Pvt Ltd by charging VAT, (ii) Manufacture and clearance of said tool has been shown by them in ER-1 retuns. (iii) The appellant has also reduced the inventories to the extent of tools sold by them. The adjudication authority while deciding applicability of Section 3 of Central Excise Act to the goods at para 10 observed that "*It is clear that the tools on which demand has been raised are indeed manufactured in their factory. As per Section 3 of Central Excise Act,1944, excise duty is levied on excisable goods manufactured in India. In this case, as a new tools has been manufactured, I find that Section 3 of Central Excise Act,1944 is applicable.*" Section 3 of Central Excise Act,1944 is reproduced below for sake of convenience;

> **Section 3. Duties specified in First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 to be levied. -**
>
> There shall be levied and collected in such manner as may be prescribed a duty of excise to be called the Central Value Added Tax (CENVAT) on all excisable goods (excluding goods produced or manufactured in special economic zones) which are **produced or manufactured** in India as, and at the rates, set forth in the Fourth Schedule :(1)
>
> **Provided** that the duty of excise which shall be levied and collected on any excisable goods which are produced or manufactured by a hundred per cent. export-oriented undertaking and brought to any other place in India, shall be an amount equal to the aggregate of the duties of customs which would be leviable under the Customs Act, 1962 (52 of 1962) or any other law for the time being in force, on like goods produced or manufactured outside India if imported into India, and where the said duties of customs are chargeable by reference to their value, the value of such excisable goods shall, notwithstanding anything contained in any other provision of this Act, be determined in accordance with the provisions of the Customs Act, 1962 and the Customs Tariff Act, 1975 (51 of 1975).
>
> ***Explanation 1.*** — Where in respect of any such like goods, any duty of customs leviable for the time being in force is leviable at different rates, then, such duty shall, for the purposes of this proviso, be deemed to be leviable at the highest of those rates.
>
> ***Explanation 2.*** — For the purposes of this sub-section, —
>
> "hundred per cent. export-oriented undertaking" means an undertaking which has been approved as a hundred per cent. export-oriented undertaking by the Board appointed in this behalf by the Central Government in exercise of the powers conferred by section 14 of the

Industries (Development and Regulation) Act, 1951 (65 of 1951), and the rules made under that Act; (i)

"Special Economic Zone" shall have the meaning assigned to it in clause (za) of section 2 of the Special Economic Zones Act, 2005 (28 of 2005). (ii)

The provisions of sub-section (1) shall apply in respect of all excisable goods which are produced or manufactured in India by or on behalf of the Government, as they apply in respect of goods which are not produced or manufactured by the Government. (2)

The Central Government may, by notification in the Official Gazette, fix, for the purposes of levying the said duty, tariff values of any articles enumerated, either specifically or under general headings, in the Fourth Schedule as chargeable with duty (3) *ad valorem* and may alter any tariff values for the time being in force.

The Central Government may fix different tariff values — (4)

(a) for different classes or descriptions of the same excisable goods; or

(b) for excisable goods of the same class or description —

produced or manufactured by different classes of producers or manufacturers; or (i)

sold to different classes of buyers : (ii)

Provided that in fixing different tariff values in respect of excisable goods falling under sub-clause (i) or sub-clause (ii), regard shall be had to the sale prices charged by the different classes of producers or manufacturers or, as the case may be, the normal practice of the wholesale trade in such goods.].

In term of above provisions under section 3 Central Excise Act,1944, I will examine whether the goods have been manufactured in the factory or not. The adjudicating authority clearly observed that the tools on which demand has been raised are indeed manufactured in their factory. The appellant also in the grounds of appeal states that they manufactured the tools and it was used by them in manufacturing goods. Thus it remained undisputed fact that the tools in question have been manufactured in the factory of the appellant. I respectfully rely on the decision of Hon'able apex court in case of M/s. ITC Limited v/s Collector of Central Excise,Patna reported in 2003(151) ELT 246(SC) wherein it is held that stick of cigarette **which remained within the factory premise** of the appellant company for testing purpose **were held to be liable to excise duty**, relevant part of the same are reproduced below:

"17.From a conspectus of the aforesaid decisions, it would be clear that for the purposes of levy of excise duty, the test to be applied is whether the goods manufactured are marketable or not. In the present case, the cigarette, which is the end product of tobacco, is fit for consumption before the same is removed for test. Packing of the cigarette cannot be said to be incidental or ancillary to the manufacturing process, but the same may be incidental or ancillary to its sale only. In case it is laid down that packing of cigarette is incidental or ancillary to the completion of manufactured products, the same may result into evasion of excise duty as before packing the cigarettes the same may be regularly supplied to each and every employee for his consumption without payment of excise duty thereon. The definition of 'manufacture' under Section 2(f) very clearly includes process which is incidental or ancillary to the completion

of manufactured product. Manufacture of cigarette is completed when the same emerges in the form of sticks of cigarettes which are sent to the laboratory for quality control test. Sticks of cigarettes can be consumed and manufacture of the end-product, i.e., cigarette, which is commercially known in the market as such, is completed before its removal for test and after testing only packing of the same, which is the requirement of Rule 93 of the Rules, is done. Thus, we hold that sticks of cigarette which are removed for the purpose of test in the quality control laboratory located within the factory premises of the appellant-Company are liable to excise duty."

6. Further it has been repeatedly accepted by the appellant that ownership of the goods has been transferred to M/s Ford India Pvt Ltd on payment of VAT/Sales Tax, however possession of the same remained with them. The adjudicating authority has held that the appellant has reduced the inventories to the extent of goods sold by them to M/s Ford India Pvt Ltd. Said finding is based on audit report which normally happens to be issued after due verification of relevant records maintained. In addition to that, it is also observed in the impugned order that the sale proceeds involved on the transactions has been recovered by the appellant from M/s Ford India Pvt Ltd. As against this, the appellant has simply pleaded on non removal of goods from the factory without producing on record evidences in support of their claim. I therefore, do not found force in such plea of the appellant. In this regard, I produced below the definition of 'sale' provided under Section 2 (h) of Central Excise Act, 1944;

(h) "sale" and "purchase", with their grammatical variations and cognate expressions, mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration;

I find that on sale, ownership has been transferred to M/s. Ford India Pvt Ltd. who is the owner of the goods. Therefore the appellant cannot claim the benefit of Noti.No.67/1995-CE ibid which is available to the "owner cum manufacturer" of a factory. In this case the ownership of the goods is not with the appellant. I respectfully rely on the decision of Hon'ble High court of Andhra Pradesh in case of G.S. Lamba & sons v/s State of Andhra Pradesh reported in 2015 (324) E.L.T. 316 (A.P.) relevant part of which is reproduced below;

16. *In Builders Association of India v. Union of India - (1989) 73 STC 370 : (1989) 2 SCC 645, the validity of the Constitution (Forty-sixth Amendment) Act was upheld. But the Apex Court ruled that the States' power to levy tax on the goods involved in a works contract is subject to the restrictions in Article 286. Article 366(29A) was elucidated by the Constitution Bench as below :*

*It refers to a tax on the transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract. The emphasis is on the transfer of property in goods (whether as goods or in some other form). The latter part of clause (29A) of Article 366 of the Constitution makes the position very clear. While referring to the **transfer**, delivery or supply of any goods that takes place as per sub-clauses (a) to (f) of clause (29A), the latter part of clause (29A) says that "such transfer, delivery or supply of any goods" shall be deemed to be a sale of those goods by the person making the transfer, delivery or supply and a purchase of those goods by the person to whom such transfer, delivery or supply is made ..... The object of the new definition introduced in clause (29A) of Article 366 of the Constitution is, therefore, to enlarge the scope of 'tax on sale or purchase of goods' wherever it occurs in the Constitution so that it may include within its scope the transfer, delivery or supply of goods that may take place under any of the transactions referred to in sub-clauses (a) to (f) thereof wherever such transfer, delivery or supply becomes subject to levy of sales tax.*

6.1 I also rely on decision in case of DCM Engineering Product v/s Commissioner of C.Ex. reported in 2006(206)ELT 417 (Tri.Del) wherein Hon'ble CESTAT Principle Bench New, Delhi held as under:

[Order per : S.S. Kang, Vice-President (For the bench)]. - Applicants filed this application for waiver of pre-deposit of duty of Rs. 25,85,800/- and penalty of Rs. 3,00,000/-. Applicants have already deposited Rupees Ten Lakhs at the time of appeal before the Commissioner (Appeals).

2. In this case, applicants have availed credit in respect of capital goods and thereafter the capital goods were sold to Maruti Udyog. The contention of the Revenue is that goods were sold to Maruti Udyog but without payment of duty and demand was confirmed.

3. The contention of applicant is that capital goods were received in their factory and they had taken the credit. The **goods were sold to Maruti Udyog but were not cleared from their factory** and they had only realised the basic price of the goods without duty. The applicants had submitted that as the capital goods are used in their factory therefore, no demand could be made and applicants relied upon the provisions of Rule 57S of Central Excise Rules.

4. We find that Rule 57S of Rules provide that capital goods in which credit on specific duty has been availed, may be removed from the factory after intimating Asstt. Commissioner and on payment of appropriate duty. In the present case, applicants sold the capital goods to Maruti Udyog and had not reversed the credit nor the duty has been paid. **Therefore, *prima facie*, it is not a fit case for total waiver of duty.** The applicants are directed to deposit a sum of Rs. Five lacs in addition to amount already deposited within six weeks from today. On deposit of the above-mentioned amount, recovery of remaining amount of duty and penalty shall stand waived for the purpose of hearing the appeal. Adjourned to 23-5-06 for compliance.

6.2 In the present case, the entire consideration/sale proceeds have been recovered by the appellant from M/s. Ford India Pvt Ltd., and hence in term of the above definition the transaction qualify as sale. Furthermore, in order to prove that the goods in question are no more in possession of the appellant, the department succeed in taking on record the evidence that appellant has reduced the inventories to the extent of goods sold by them to M/s Ford India Pvt Ltd,. This being decisive evidence, cannot be overlooked. In view of said inventory position, it can be assumed that the goods in question have been deemed to have been removed from the factory. I observe that the fact of the case is similar to the case of M/s Albert David Ltd v/s Commissioner of Central Excise,Meerut reported in

2002(148)ELT 1183(Tri.Del) wherein Hon'ble CEGAT, New Delhi considered samples which were retained inside the factory in accordance of Drugs and Cosmetics Act,1940 as **deemed clearance** and hence the same is applicable to the present case also. Relevant part of the same are reproduced below;

> **3.** Countering the arguments, Shri R.D. Negi, learned SDR, submitted that duty was demanded under the show cause notice in respect of quantity of P or P Medicines which were removed without payment of duty from the place of manufacture; that the Additional Commissioner, under the Adjudication Order, has demanded duty on the quantity of medicines which had been taken as control samples holding that a control sample of medicine being manufactured by the appellants are excisable goods which should have been accounted for in RG-1 register; that under Rules 9 and 49 of the Central Excise Rules, taking of sample for retaining inside the factory in accordance with the Drugs and Cosmetics Act will be deemed clearance inasmuch as the medicines are being utilised as samples, and, therefore, duty is leviable.
>
> **4.** We have considered the submissions of both the sides. The Commissioner (Appeals) has only confirmed a demand of duty in respect of sample of P or P medicines which were removed from the factory during August, 1994 to July, 1999. The Department has not come up in appeal nor filed any cross-objection against the other findings as given in the impugned order setting aside the confiscation and the demand of duty. The control samples are of the P or P medicines manufactured by the appellants. These samples are kept by them as required under the provisions of Drugs and Cosmetics Act. However, the samples contained P or P medicines which have been manufactured and the duty is to be discharged before these are cleared. There is no substance in the contention of the appellants that these samples have been removed before quality control test. The samples are retained as control samples only if quality control test carried out by them on other sample is successful. Once the test has been carried out the goods have become liable to central excise duty and the mere fact that the control samples had been removed prior to the test will not make them non-excisable. The provisions of Rules 9 and 49 of the C.Ex. Rules, 1944 are very clear wherein it has been provided that excisable goods manufactured and consumed or utilised as such shall be deemed to have been removed from the place of manufacture before utilisation. It has been held by the Tribunal in the case of *Mapra Laboratories Pvt. Ltd.* v. *C.C.E.* - 2001 (127) E.L.T. 695 that "taking of samples for being retained inside the factory in accordance with the provisions of Drugs and Cosmetics Act will be deemed clearance as per explanation to Rules 9 and 49". We do not find any substance in the submissions of the appellants that duty has been confirmed on the expired samples as it is evident from the show cause notice that duty has been demanded on the medicines removed for being kept as control samples. The decision in the case of *Bayer Diagnostics India Ltd.* is, therefore, not applicable. We, therefore, confirm the demand of duty. However, penalty imposed is on the higher side, we reduce the same to Rs. 5,000/- (rupees five thousand only).
> The appeal is disposed of in the above terms.

7. It is further pleaded by the appellant that the unit has amortized the tools/dies cost and duty has been paid on it. However, in view of the fact which is not disputed by the appellant that they have separately recovered the sale proceeds against the goods in question from M/s Ford India Pvt Ltd, said plea is also not sufficient and I am not ready to accept the applicability of Noti.No.67/1995-CE ibid

8. In view of aforesaid discussion, I uphold the impugned order and reject the appeal.

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

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

3/11/18
3/11/18

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:

Attested

(D.A.Parmar)
Superintendent, Central Tax (Appeals)
Ahmedabad.

By R.P.A.D.

To,
M/s. Nobel Automotive Interior Systems India Pvt Ltd,.
Plot No.AV-5,BOL Industrial Estate,GIDC,
Sanand-II,Ahmedabad-382110.

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad-North.
3. The Additional Commissioner, Central Tax (System),Ahmedabad-North.
4. The Asstt./Deputy Commissioner, Central Tax, Division-III, Ahmedabad-North.
5. Guard File.
6. P.A.