



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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9781709785

क फाइल संख्या (File No.): V2(39)171 /North/Appeals/ 2018-19

ख अपील आदेश संख्या (Order-In-Appeal No.): AHM-EXCUS-002-APP-164-18-19

दिनांक (Date): 11/01/2019 जारी करने की तारीख (Date of issue): 25/3/2019

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by Shri Uma Shanker, Commissioner (Appeals)

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-IV), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी

मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No 04/DC/D/2018/AKJ Dated: 28/09/2018

issued by: Assistant Commissioner-Central Excise (Div-IV), Ahmedabad North,

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

M/s MBR Flexibles Limited

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

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

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

(1) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में 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 प्रक्रिया 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।



घ अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट 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 दिनोंक 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 वालाना 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 रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

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

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- षोबी/35-इ के अंतर्गत:-

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, बहुमाली 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 न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग और 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 और लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नागित 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. Registrar 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 आदेश 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 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 notwithstanding 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 रु.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 bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

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

Attention is 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, 1988 की धारा 34फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 25) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1994 की धारा 23 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 अर्जी एवं अपील को लागू नहीं होंगे।

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

This appeal has been filed by M/s. MBR Flexibles Limited, 79-80, Survey No. 47/4, Vasna Chacharwadi, Vasna, Ahmedabad – 380 006 [for short –‘appellant’] against OIO No. 4/DC/D/2008/AKJ dated 28.9.2018 passed by the Deputy Commissioner, Division IV, CGST, Ahmedabad North Commissionerate [for short - ‘adjudicating authority’].

2. Briefly, the facts are that the appellant was issued a show cause notice dated 5.7.2018, based on an internal audit objection that during the period from March 2016 to 23.6.2016, the appellant had wrongly classified *printed laminated pouch* falling under CETH no. 39201012 instead of 39232100. Resultantly the appellant was discharging duty on the goods @12.5% *advalorem* instead of discharging duty @15% , in terms of notification No. 12/2016-CE dated 1.3.2016, which amended notification No. 12/2012-CE dated 17.3.2012. The show cause notice *inter alia* proposed classification of the printed laminated pouch under CETH 39232100 instead of 39201012 for the clearances from 1.3.2016; demanded duty of Rs. 6.37 lacs along with interest and further proposed penalty under section 11AC of the Central Excise Act, 1944, along with penalty under rule 25 of the Central Excise Rules, 2002.

3. This notice was adjudicated vide the impugned OIO dated 28.9.2018 by the adjudicating authority, wherein he classified the disputed product viz *printed laminated pouch* under CETH 39232100; confirmed the duty along with interest and further imposed penalty on the appellant under Rule 25 of the Central Excise Rules 2002 read with Section 11AC of the Central Excise Act, 1944.

4. Feeling aggrieved, the appellant has filed this appeal, raising the following averments/grounds:

- that the adjudicating authority has not given findings on the points raised viz [a] non observance of Board’s circular No. 818/15/2005-Cx dated 15.7.2005; and [b] failure of ER-1/ER-3 scrutiny;
- that the appellant had classified the product under dispute, under 39201012, since years and it was never objected by the department; that surprisingly though the notice proposed classification of the disputed product under 39232100 only from March 2016, the impugned OIO has while classifying the disputed product, not mentioned the period, thereby going beyond the scope of the notice;
- that there was no fraud, misrepresentation, suppression, etc.;
- that the adjudicating authority failed to give his findings on their reliance to the case law of Dabur India[2005(181) ELT 225] and Aeon’s Construction Products [2005(180)ELT 209];
- that the only reason for contesting/challenging the classification of the product from March 2016 is on account of insertion of serial no. 148AA vide notification no. 12/2016-CE dated 1.3.2016;
- that the department has failed to explain as to how the department was made aware/came to know, that the appellant was aware about the correct classification;
- that they would like to rely on the case of Reliance Communications [2015(320) ELT 306], Euro International Ltd [2002(149) ELT 1383], Adani Gas [2017(349) ELT 349];
- that the department is debarred from taking a contrary stand in absence of adequate independent evidence in support of classification;
- that the adjudicating authority has held their letter of protest to be fictitious without citing any evidence.



5. Personal hearing in the case was held on 13.12.2018 wherein Shri J T Vyas, Advocate, appeared on behalf of the appellant and reiterated the grounds of appeal. He submitted that practice of classification for the last ten years was not challenged. He also produced a copy of the notification No. 12/2016-CE, *ibid*, to substantiate his point.

6. I have gone through the facts of the case, the grounds of appeal and the oral averments made during the personal hearing. The question to be decided is whether the re-classification done by the adjudicating authority is correct and whether the appellant is liable for payment of duty along with interest and penalty.

7. Let me cull out the facts first.

During the course of audit of the appellant under EA 2000, for the period from April 2016 to March 2017, it was observed that they were classifying the disputed product viz. *printed laminated pouch* under CETH 39201012 and discharging duty @12.5% in terms of notification No. 12/2012-CE dated 17.3.2012. The audit, felt that the correct classification of the disputed product was under CETH 39232100 and accordingly, from 1.3.2016 in terms of notification No 12/2016-CE, the appellant was liable to discharge duty @15% *advalorem*. In-fact the appellant had from 23.6.2016, started classifying the said product under 39232100 and was discharging duty @15%. The appellant is also on record stating that they had changed the classification and paid 15% duty from 23.6.2016, in terms of verbal direction from the Range office.

It is in this background that I have to decide the question framed in para 6.

8. The appellant in his grounds of appeal, has very vaguely questioned the new classification. In-fact, I find that the show cause notice had proposed vacation of protest for the period from 23.6.2016 onwards, in respect of payment of duty @15%. However, the adjudicating authority in para 19, page 14, of his impugned OIO held that the appellant, failed to establish that they had paid the duty under protest for the said period and as no payment was being made under protest there was no need to vacate a non existing protest. **So one thing is clear - that neither the appellant nor the department is contesting the classification of the disputed product from 23.6.2016**, the date on which the appellant started classifying the disputed product under 39232100 and started discharging duty @15%. What remains in dispute is whether the product was classifiable under 39232100 for the period from 1.3.2016 to 23.6.2016. I am mentioning this period since the show cause notice talks only about this period. Since the notice does not talk about the period prior to 1.3.2016, technically one cannot go beyond the scope of the notice, as it would be bad in law.

9. As far as classification goes, I have already mentioned that there remains no dispute about the classification from 23.6.2016. By virtue of this, the question of classification of the disputed product for the period of dispute i.e. from 1.3.2016 to 23.6.2016, would inevitably be under CETH No. 39232100. This can only be the rational conclusion and this would also logically prevail. So, I uphold the classification done by the adjudicating authority for the disputed product for the period in question.



10. But after having said so, I find that the appellant has a point in disputing the demand of duty along with interest and the imposition of penalty. Let me examine the same. The show cause notice for the demand is issued on 5.7.2018, for the period covering March 2016 to 23.6.2016 under section 11A(4) of the Central Excise Act, 1944, which states as follows:

(4) *Where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by the reason of—*

- (a) *fraud; or*
- (b) *collusion; or*
- (c) *any wilful mis-statement; or*
- (d) *suppression of facts; or*
- (e) *contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty,*
by any person chargeable with the duty, the Central Excise Officer shall, within five years from the relevant date, serve notice on such person requiring him to show cause why he should not pay the amount specified in the notice along with interest payable thereon under section 11AA and a penalty equivalent to the duty specified in the notice.

Again returning to facts, the audit probably went in the earlier part of the year 2018, as is evident from their query letter dated 29.5.2018. Way back in 2016, the appellant on instructions from the range office had changed the classification and discharged the duty, from 23.6.2016. The appellant states that he was classifying the said disputed product since years under 39201012, which was never disputed by the department. When informed verbally, he changed the classification and discharged the duty although from 23.6.2016, thereby proving his bonafides. Now, I am not able to understand which ingredient for invoking extended period was present in the current dispute, which would support the departmental stand of invoking the extended period. The appellant, as is evident is vehemently questioning the invocation of extended period. I find merit in his grounds. **There is nothing on record which warrants invocation of extended period in the present case.** Consequently, the confirmation of duty, interest and imposition of penalty is set aside. Further, how could penalty be imposed under Rule 25 of the Central Excise Rules, 2002, when there was no proposal for confiscation of the goods?

11. The aforementioned findings are also based on reliance to the case of GAIL (India) Ltd [2015(323) ELT 186], the head notes of which are as follows:

Demand - Limitation - Classification dispute - Pentane being classified by assessee under sub-heading 2711.19 of Central Excise Tariff availing benefit of exemption under Notification No. 3/2001-C.E. - Revenue holding classification under sub-heading 2710.90 ibid and demanding duty invoking extended period of limitation - HELD : Undisputed fact that assessee had been filing declarations and returns claiming classification under sub-heading 2711.19 ibid - Impugned goods also held to be classified under sub-heading 2711.19 ibid in other units of GAIL in different jurisdiction - Settled law that change in classification by Department is prospective - There being no suppression or misstatement on part of assessee, demand dropped on account of limitation only - Section 11A of Central Excise Act, 1944. [paras 4, 5, 6, 7, 8]

12. In view of the foregoing, the appeal is allowed and the impugned OIO, in so far as it confirms the duty, along with interest and imposes penalty on the appellant, is set aside.



- 12.1. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
12.1. The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर

(उमा शंकर)

प्रधान आयुक्त (अपील्स)

Date : 11.1.2019

Attested

Vinod Lukose
(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

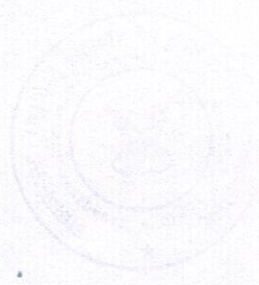
To,

M/s. MBR Flexibles Limited,
79-80, Survey No. 47/4,
Vasna Chacharwadi,
Vasna,
Ahmedabad – 380 006.

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Commissioner, Central Tax, Ahmedabad North Commissionerate.
3. The Assistant Commissioner, Central Tax Division- IV, Ahmedabad North Commissionerate.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad North Commissionerate.
5. Guard File.
6. P.A.





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