आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
. ☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
Email- commrappl1-cexamd@nic.in

DIN-20211264SW000000D07A

5487 TO 5491

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/380/2020 -Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-54/2021-22**
दिनाँक Date : **31.12.2021** जारी करने की तारीख Date of Issue : **31.12.2021**

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original Nos. **03/AC/Dem/2020-21/BK dated 23.09.2020**, passed by the Assistant Commissioner, CGST, Div-V, Ahmedabad-North.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant- M/s. Swiss Parenterals Pvt. Ltd., 808, 809, 810, Kerala Industrial Estate, GIDC, Kerala, Nr. Bavla, Ahmedabad.

Respondent-The Assistant Commissioner, Central GST & Central Excise, Div-V, Ahmedabad-North.

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 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) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक 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।

(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.

(क) 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।

(A) 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.

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

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

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

(c) 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 फ़ी 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) 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 2nd **माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद** –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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 a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

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

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

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण **(सिस्टेट)**, के प्रति अपीलो के मामले में **कर्तव्य मांग** (Demand) एवं **दंड** (Penalty) का 10% **पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा** 10 **करोड़ रुपए** है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "**कर्तव्य की मांग**"(Duty Demanded) -

(i) *(Section)* **खंड** 11D **के तहत निर्धारित राशि;**
(ii) **लिया गलत सेनवैट क्रेडिट की राशि;**
(iii) **सेनवैट क्रेडिट नियमों के नियम** 6 **के तहत देय राशि.**

☞ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

1. This order arises out of an appeal filed by M/s. Swiss Parenterals Ltd., 808 to 810, Kerala Industrial Estate, Near Bavla, Dist. Ahmedabad-382220 (hereinafter referred to as '*appellant*') against Order in Original No. 03/AC/Dem/2020-21/BK dated 23.09.2020 (hereinafter referred to as '*the impugned order*') passed by the Assistant Commissioner, CGST & Central Excise, Division-V, Commissionerate:Ahmedabad-North (hereinafter referred to as '*the adjudicating authority*').

2. Facts of the case, in brief, are that the appellant is engaged in the manufacturing of P & P Medicines falling under Chapter 30 of the First Schedule to the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AACCS6806PXM001.

2.1 The appellant was also engaged in export of excisable goods. During the period from April, 2013 to July, 2014, the appellant had procured certain raw materials and packing materials (as details mentioned at Para-2 of the impugned order) for manufacture of excisable goods intended for export, without payment of duty under the provisions of Notification No. 43/2001-CE(NT), as amended. On scrutiny of the quarterly return filed by the appellant for the quarter ending June, 2016, in terms of the provisions of Rule 5 of the Central Excise (Removal of Goods at Concessional Rate of Duty for manufacture of Excisable Goods) Rules, 2001, it was observed that the appellant had failed to indicate that the goods procured without payment of duty, have been used for the intended purpose i.e. in the manufacture of excisable goods meant for export as envisaged under Notification No. 43/2001-CE(NT). Accordingly, a Show Cause Notice was issued under F.No. III/DSCN/Swiss Parenterals/16-17/860 dated 22.03.2018 to the appellant demanding Central Excise duty to the tune of Rs. 9,08,982/- and it was proposed to be recovered from them by enforcing the B-1 Bond excecuted by them, for the said duty free procurements. It was also proposed to recover the interest under Section 11AA of the Central Excise Act, 1944 and also to impose penalty under the provisions of Rule 25 of the Central Excise Rules, 2002.

2.2 The show cause notice issued under F.No. III/DSCN/Swiss Parenterals/16-17/860 dated 22.03.2018 has been adjudicated by the adjudicating authority vide the impugned order, under which it is held that

"the appellant has not fulfilled the conditions of Notification No. 43/2001-CE(NT), in as much as, they have failed to use the raw materials for the specified purpose" and accordingly, it was ordered as briefly reproduced below:

(i) He ordered for recovery of Central Excise duty of Rs. 9,08,982/- from the appellant, by enforcing the B-1 Bond executed by them, under Section 11A of the Central Excise Act, 1944 read with Section 174 of CGST Act, 2017.

(ii) He also ordered for recovery of Interest at the prescribed rate in terms of the provisions of Section 11AA of the Central Excise Act, 1944, read with Section 174 of CGST Act, 2017.

(iii) Penalty of Rs. 4,50,000/- has been imposed on the appellant under the provisions of Rule 25 of the Central Excise Rules, 2002.

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds, as reproduced in the following paragraphs.

3.1 Violation of natural justice:-

The Assistant Commissioner, issuing the order, had not heard the appellant. This is clearly in violation of principles of natural justice. Furthermore, the last hearing notice was received by the appellant after the date of hearing. This was communicated to the department and despite such clear communication, no hearing was given. This is clearly in violation of natural justice.

The impugned order has relied on report dated 12.09.2016, as mentioned in Para-12 of the impugned order, however no copy of the report was given to the appellant. At the same time, there was specific reporting by Range Superintendent under letter dated 17.09.2019 but no notice is taken of the letter.

3.2 Submissions on merit:-

The bond wise detailed submissions made by the appellant have not been taken into consideration. It appears that all eight bonds, quarterly return ending on June, 2016 are incorrect. The correct position of quarter wise is as under:

(i) Bond No. DLK-V/Swiss/25/13-14/1897 dated 16.04.2013 (Packing Materials- Total Qty. 3996000 Nos.)

The appellant had submitted revised (corrected) consumption report as prescribed format as well as quarter wise consumption summary. As per the report, the total quantity consumed upto February, 2016 is 3991950, leaving closing balance of 4050 nos.

The appellant had cleared the finished goods, manufactured from the quantity procured under Notification No. 43/2001-CE(NT), for export under ARE-1 instead of ARE-2.

The ultimate objective of the said notification is that the finished goods must be exported, and finished goods, is in fact exported in the present case. The proof of exports were also submitted to the Range Office. Thus, use of ARE-1 instead of ARE-2 was procedural mistake.

The appellant has consumed some quantity of purchase under Invoice No. 187/27.05.2013, for domestic purpose and the duty alongwith interest in respect of the same has been paid by Challan No. 19052400460358 dated 23.05.2019.

(ii) Bond No. DLK-V/Swiss/47/13-14/2548 dated 27.05.2013 (Packing Materials-Total Qty. 1969000 Nos.)

The appellant had consumed total 1955360 nos. during the period upto September, 2013, leaving closing balance of 13640 nos. which is reflected in quarterly return for the period upto June, 2016.

Further, the quantity of 13640 nos. is destroyed on 30.06.2017 with payment of duty of Rs. 8864 under Invoice No. 119 dated 30.06.2017.

(iii) Bond No. DLK-V/129/13-14/750 dated 14.02.2013 (Packing Materials-Total Qty. 5441300 Nos.)

The appellant had submitted fresh consumption report, according to which they consumed 5438550 nos. upto the month of September, 2014. Thereafter, closing balance of 2750 nos. is consumed during the quarter from Oct to December, 2015 for exports, which were exported under ARE-1 No. 150/28.12.2015.

(iv) Bond No. DLK-V/Swiss/147/13-14/7586 dated 25.03.2014 (Vials-Total Qty. 344600 Nos.)

The appellant had submitted fresh consumption report, according to which, the quantity of 344600 nos. have been consumed upto October, 2014.

Out of total quantity of 344600, the appellant had consumed 24200 nos. of vials (which were received under Excise Invoice No. 4270/29.03.2014) for domestic purpose. The appellant had paid duty of Rs. 1690/- alongwith interest of Rs. 1468/- (upto 31.05.2019) under Challan No. 19052400460358 dated 23.05.2019.

(v) Bond No. DLK-V/Swiss/149/13-14/7855 dated 25.03.2014 (Succinyl Choline Chloride-Total Qty. 344600 Nos.)

The appellant has submitted fresh consumption report, according to which they consumed 76.752 Kgs. during the period upto February, 2016, leaving closing balance of 15.248 Kgs. still lying in stock.

Out of the total consumed quantity of 76.752 Kgs., the appellant had consumed 1.550 Kgs. for domestic purpose. The appellant had paid duty of Rs. 2203/- alongwith interest of Rs. 1688/- under Challan No. 19052400460358 dated 23.05.2019.

(vi) Bond No. DLK-V/Swiss/151/13-14/17852 dated 25.03.2014 (Packing Material-Total Qty. 500000 Nos.)

The appellant has submitted fresh consumption report, according to which they consumed 500000 Nos. during the period upto November, 2014.

As per consumption report, 2 batches quantity were yet not exported and was destroyed as the self life was over. The appellant had paid duty of Rs. 5358/- alongwith interest of Rs. 4730/- under Challan No. 19052400460358 dated 23.05.2019.

(vii) Bond No. DLK-V/Swiss/59/13-14/1326 dated 11.07.2014 (Packing Material-Total Qty. 306000 Nos.)

The appellant has submitted fresh consumption report, according to which they consumed 287400 Nos. during the period upto June, 2015, leaving closing balance of 18600 nos. still lying in stock.

(viii) Bond No. DLK-V/Swiss/61/13-14/1328 dated 11.07.2014 (Packing Material-Total Qty. 306000 Nos.)

The appellant has submitted fresh consumption report, according to which they consumed 305480 Nos. during the period upto August, 2015, leaving closing balance of 4520 nos.

Further, as per fresh consumption report, 2 batches are consumed for domestic purpose and in respect of which the duty of Rs. 150/- and Interest of Rs. 107/- paid by Challan No. 19052400460358 dated 23.05.2019.

3.3 As regards Penalty:-

Under the scheme of the Notification No. 43/2001-Central Excise (NT) dated 26.06.2001, the exemption from duty is given to the manufacturer of such inputs, subject to condition of the notification. However, when the breach of conditions happened, the duty liability would shift to the receiver of the goods under the said notification, in terms of the provisions of Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001. However, there is no provision to impose penalty in case of breach of conditions of said rules. Accordingly, the penalty imposed is without any authority of provision.

Further, the penalty imposed in the present case under Rule 25 of the Central Excise Rules, 2002. From the reading of the said rule, it is clear that it applies to a manufacturer, whereas in the present case, the appellant is not the manufacturer of impugned goods but they only procured the goods as inputs for them. Therefore, Rule 25 is not applicable in this case.

4. The appellant was granted opportunity for personal hearing on 12.11.2021 through video conferencing. Shri S. J. Vyas, Advocate, appeared for personal hearing as authorised representative of the appellant. He re-iterated the submissions made in Appeal Memorandum. He requested that the matter be remanded back to the adjudicating authority, as they were not granted personal hearing and the documents, submitted by them were not considered.

5. I have carefully gone through the facts of the case available on record, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellant at the time of hearing. The issues to be decided in the present appeal are as under:

- Whether the contention of the appellant as regards the 'Violation of Natural Justice' is correct or otherwise?
- Whether the demand of Central Excise duty amounting to Rs. 9,08,982/- confirmed by the adjudicating authority, for non fulfillment of the conditions of the Notification No. 43/2001-CE(NT)

and ordered to be recovered from the appellant by enforcing B-1 Bond, under Section 11A of the Central Excise Act read with Section 174 of CGST Act, 2017 alongwith Interest under the provision of Section 11AA of the Central Excise Act, 1944 is correct or otherwise?

- Whether the penalty of Rs. 4,50,000/- imposed under the provisions of Rule 25 of the Central Excise Rules, 2002 is correct or otherwise?

6. As regards the issue of 'Violation of Natural Justice', it is observed from Para 6 of the impugned order that the advocate and authorized signatory had attended personal hearing on 28.05.2019. Subsequently, on change of adjudicating authority, opportunities for personal hearing were granted to the appellant by the adjudicating authority six times i.e. on 17.06.2020, 01.07.2020, 20.07.2020, 28.07.2020, 07.08.2020 and 17.08.2020. However, they did not appear before the adjudicating authority.

6.1 Further, it is observed that the appellant has made submission that "the last hearing notice was received by them after the date of hearing and the same was communicated to the department and despite such communication, no hearing was given". On going through the copy of letter dated 18.08.2020 submitted by the appellant, I find that it was informed by them to the adjudicating authority that the letter of personal hearing scheduled on 07.08.2020 was received by them, on 10.08.2020. However, as per the details mentioned in Para-6 above, the appellant was also granted P.H. on 17.08.2020 by the adjudicating authority which was also not attended by the appellant. The appellant has neither made any submission nor produced any documentary evidences, as regards the non attendance of personal hearing by them on 17.08.2020.

6.2 Accordingly, as per the facts on record, I find that the appellant was granted ample opportunities for personal hearing in the present case, which have not been attended by them. Further, it is also observed that as per the contention of the appellant, the copy of the report dated 12.09.2016 relying in Para-12 of the impugned order has not been given to them. As regards the said submission, I find as per the impugned order that the demand confirmed by the adjudicating authority on the basis that "the appellant have failed to export finished excisable goods under cover of ARE-2 and thereby contravened the provisions of Rule 19(2) of the Central Excise Rules, 2002 read with Notification No. 43/2001-CE(NT)". Accordingly, the contention that the report dated 12.09.2016 has been relied upon by the adjudicating

authority is factually incorrect. In view of the above, I find that the contentions made by the appellant as regards the 'violation of natural justice' do not contain any merit.

7. As regards the merits of the demand confirmed and ordered to be recovered by the adjudicating authority by enforcing the B-1 Bond executed by the appellant, it is observed that the appellant had procured raw materials/packing materials (as per the details mentioned in table at Para-3 of the impugned order), availing the benefit of exemption under Notification No. 43/2001-CE(NT) dated 26.06.2001. The said Notification No. 43/2001-CE(NT) dated 26.06.2001, reads as under:

> "G.S.R. In exercise of the powers conferred by of sub-rule (3) read with sub-rule (2) of rule 19 of the Central Excise (No. 2) Rules, 2001, the Central Board of Excise and Customs hereby notifies the conditions, safeguards and procedures for procurement of the excisable without payment of duty for the purpose of use in the manufacture or processing of export goods and their exportation out of India, to any country except Nepal and Bhutan, namely :-
>
> (i) the manufacturer or the processor intending to avail benefit of this notification shall register himself under rule 9 of the Central Excise (No. 2) Rules, 2001;
>
> (ii) provisions of the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2002 shall be followed, mutatis mutandis;
>
> (iii) the manufacturer or processor shall, while filing declaration under the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001, also declare ratio of input and output and rate of duty payable on excisable goods to be procured without payment of duty.
>
> (iv) the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise shall also verify the correctness of the ratio of input and output and other particulars mentioned in the declaration filed before commencement of export of such goods. He may, if necessary, call for samples of finished goods or inspect such goods in the factory of manufacture for verifying the declarations. He shall, after being satisfied about the correctness of declarations, countersign the application in the manner specified in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacturer of Excisable Goods) Rules, 2001;
>
> (v) The manufacturer or processor may remove the excisable goods so received as such or after these have been partially processed during the course of manufacture or processing of finished goods to a place outside the factory -
>
> (a) for the purpose of test, repairs, refining, reconditioning or carrying out any other operation necessary for the manufacture or processing of the finished goods and return the same to his factory without payment of duty for further use in the manufacture or processing of finished goods or remove the same without payment of duty in bond for export, provided that the waste, if any, arising in the course of such operation is also returned to the said factory of the manufacture or processing; or
>
> (b) for the purpose of manufacture of intermediate products

necessary for the manufacture of processing of finished goods and return the said intermediate products to his factory for further use in the manufacture or processing of finished goods without payment of duty or remove the same, without payment of duty in bond for export, provided that the waste, if any, arising in the course of such operation is also returned to the factory of manufacturer or processor; and

(c) any waste arising from the processing of the excisable goods may be removed on payment of appropriate duty as if such waste is manufactured in the factory of the manufacturer or processor;

(vi) the goods shall be exported on the application in **Form A.R.E 2** specified in the Annexure and the procedures specified in Ministry of Finance (Department of Revenue) Notification No. 40/2001-Central Excise (N.T.) dated 26th June, 2001 or in Notification No. 42/2001-Central Excise dated 26th June, 2001 shall be followed."

7.1 As regards the consumption of raw material & packing material procured by the appellant, availing the benefit of Notification No. 43/2001-CE(NT) dated 26.06.2001, it is observed as per the contention of the appellant as mentioned in Para-3.2 above, that "the appellant had cleared the finished goods, manufactured from the quantity procured under Notification No. 43/2001-CE(NT), for export under ARE-1 instead of ARE-2. The ultimate objective of the said notification is that the finished goods must be exported, and finished goods, is in fact exported in the present case. The proof of exports was also submitted to the Range Office. Thus, use of ARE-1 instead of ARE-2 was procedural mistake." However, I find that the condition no. (vi) of the said Notification No. 43/2001-CE (NT) clearly states that "the goods shall be exported on the application in **Form A.R.E 2** specified in the Annexure and the procedures specified in Ministry of Finance (Department of Revenue) Notification No. 40/2001-Central Excise (N.T.) dated 26th June, 2001 or in Notification No. 42/2001-Central Excise dated 26th June, 2001 shall be followed."

7.2 Further, I find that vide Notification No. 10/2004 - Central Excise (N.T) dated 02.06.2004, the provisions of Notification No. 43/2001-CE (NT) has been amended, as reproduced hereunder:

In exercise of the powers conferred by sub-rule (3), read with sub-rule (2) of rule 19 of the Central Excise Rules, 2002, the Central Board of Excise and Customs hereby makes the following further amendments in the notification of the Ministry of Finance (Department of Revenue) No.43/2001-Central Excise (N.T.) dated the 26th June, 2001, namely:-

In the said notification,-

(a) for paragraph (vi), the following paragraph shall be substituted, namely:-

"(vi) ***The goods shall be exported on the application in Form ARE-2 specified in the Annexure*** *and the Procedures specified in the Ministry of Finance (Department of Revenue) Notification No.42/2001-Central Excise*

(N.T.), dated the 26th June, 2001 (vide G.S.R.471(E), dated the 26th June, 2001, shall be followed.";

(b) after Explanation I, the following Explanation shall be inserted, namely:-

"Explanation II. For the removal of doubt, it is clarified that the goods manufactured or processed using the excisable goods so procured without payment of duty under this notification shall be exported in terms of sub-rule (1) of rule 19 of the Central Excise Rules, 2002."

The provisions of Rule 18 as well as Rule 19 of the Central Excise Rules, 2002 are also reproduced hereunder:-

Rule 18. Rebate of duty. -

Where any goods are exported, the Central Government may, by notification, grant rebate of duty paid on such excisable goods or duty paid on materials used in the manufacture or processing of such goods and the rebate shall be subject to such conditions or limitations, if any, and fulfilment of such procedure, as may be specified in the notification.

Explanation. - "Export" includes goods shipped as provision or stores for use on board a ship proceeding to a foreign port or supplied to a foreign going aircraft.

Rule 19. Export without payment of duty. -

(1) Any excisable goods may be exported without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, as may be approved by the Commissioner.

(2) Any material may be removed without payment of duty from a factory of the producer or the manufacturer or the warehouse or any other premises, for use in the manufacture or processing of goods which are exported, as may be approved by the Commissioner.

(3) The export under sub-rule (1) or sub-rule (2) shall be subject to such conditions, safeguards and procedure as may be specified by notification by the Board.

7.3 Further, on going through the formats for ARE-1 and ARE-2 for export, it is observed that when the raw materials and/or packing material procured, availing the benefit of exemption under Notification No. 43/2001-CE(NT) on the grounds that the same would be used in the manufacture of finished goods and such finished goods would be exported, the ARE-2 format contain certain specific details which plays the role of both, the document for export and also a declaration of using the excise free input goods. However, the ARE-1 format have no such prerequisites, so as to establish the correlation between the finished goods being exported and the raw material/packing material used therein. Further, it is also observed that the format ARE-2 having certain declarations which also barring the benefit of some of the export incentive schemes like Drawback etc. Accordingly, I find that the conditions of the Notification No. 43/2001-CE (NT), as amended, that the finished goods shall be exported under the cover of 'ARE-2' and in terms of the sub-rule (1) of Rule 19 of the Central Excise Rules, 2002 and also, the provision of Rule 5 of Central Excise (Removal of Goods at Concessional Rate

of Duty for Manufacture of Excisable Goods) Rules, 2001 that the manufacturer shall submit a monthly return in Return at Annexure-II to the said Assistant Commissioner or Deputy Commissioner have been prescribed so as to enable such Competent Officer to verify and ensure that the goods received, availing exemption, are used by the manufacturer for the intended purpose and no undue benefit of any export incentive scheme availed simultaneously.

7.4 Further, I also find as per the facts mentioned in copy of the letter dated 16.03.2020 submitted by the appellant to the adjudicating authority at the relevant time, that the appellant themselves submitted as, "Here in our case we have consume almost material to manufacture excisable finish goods and exported under ARE-1 instead of ARE-2. While exporting the said goods in some cases we have cleared the goods UNDER CLAIM FOR REBATE AND IN SOME CASES UNDER CT-1 (under Bond) and some quantity.....". Accordingly, I find that the exports made by the appellant in certain cases are clearly in violation of the condition of Notification No. 43/2001-CE (NT), as amended vide Notification No. 10/2004 - Central Excise (N.T) dated 02.06.2004 read with Rule 19 of the Central Excise Rules, 2002.

7.5 I also find that the Hon'ble CESTAT, Ahmedabad in the case of Commissioner of Central Excise & S.Tax, Vapi Versus KLJ Plasticizers [2017 (353) ELT 366 (Tri. Ahmd.) held that:

> **"4.4** CESTAT Mumbai in the case of *Indofil Chemical Co.* v. *CCE, Mumbai* - 2003 (159) E.L.T. 443 (Tri.-Mum.) *inter alia* observes as follows :-
>
> > "5. ..... The goods in question are subject to excise levy under the law of the land. The Central Government, under delegated legislation, makes rules and issues notifications granting exemption from such levy in suitable cases; and in the public interest, subject to such conditions and procedural safeguards as are deemed appropriate in each case. These need to be followed by tax officials as well as the assessees for ensuring orderly tax collection and grant of exemption. It cannot be left to the whims and fancies of individual tax officials to determine in each case which are essential conditions and which are not. Similarly it cannot be left to the choice of the assesses as to which conditions they can ignore and yet get the exemption. Such a state of affairs, if allowed by this Tribunal, would lead to a state of chaos in tax administration. Once the Govt. in its wisdom lays down certain conditions for availing an exemption, the same must be satisfied *in toto* to get that exemption. The assessee has a choice not to follow the conditions, in which case he must pay the full levy as authorised under the law without claiming the exemption. He may even challenge the *vires* of the conditions before an appropriate court, but so long as the conditions remain unchallenged, those must be necessarily satisfied before the tax officials can allow such conditional exemption."

4.5 Thus, in the case of *Indofil Chemical Co.*, the CESTAT holds that the

assessee has no choice but to follow the condition(s) given in the rules and the notification. In the present case, when the conditions have not been fulfilled, necessary consequences are to be faced by the Respondent-Assessee.

4.6 Further, the Hon'ble Supreme Court in the case of *CCE, Allahabad* v. *Ginni Filaments Ltd.* -2005 (181) E.L.T. 145 (S.C.) *inter alia* holds that the condition(s) of the notification cannot be ignored. Consequently, the present respondent-assessee is liable to make payment of Central Excise duty when the condition(s) of Notification No. 44/2001-C.E. (N.T.) (supra) have not been followed. Hence, the impugned Order-in-Appeal is set aside and the demand of Central Excise duty of Rs. 21,60,969/- along with interest is hereby confirmed. However, in view of the overall facts and circumstances of the case, the penalty of Rs. 21 lakhs imposed under Rule 25 of Central Excise Rules, 2002 on the respondent-assessee by the OIO passed by the Additional Commissioner of Central Excise is hereby reduced to Rs. 2,16,096/- (Rupees Two lakh, Sixteen Thousands and Ninety Six Only), which is 10% of the Central Excise duty confirmed against the respondent-assessee."

7.6 Further, I also find that Hon'ble High Court of Madras in case of Irbaz Shoe Co. Versus Commr. of C.Ex., and Central Tax, Chennai [2019 (365) ELT 263 (Mad.)] held that:

"**20.** Conditions have been laid in the Notification to ensure that only such goods are exempted from duty which are actually exported. The authorities have to satisfy themselves of the claim for exemption and it is only after such satisfaction by the authorities that the manufacturer or processor can remove the excisable goods to a place outside the factory in order to avail the benefit of exemption from paying excise duty.

21. In the present case, the appellant was not registered under Rule 9 of the Central Excise Rules, 2001. The appellant has also not informed the department about the clearance of the goods. Complete non-observance of procedure cannot be said to be a mere procedural lapse. The appellant has not fulfilled any of the conditions. Merely stating that they have not paid the Central Excise Duty as they felt that they would be used by M/s. Metro & Metro for export purposes would not be sufficient. The authorities have to get satisfied that the goods cleared were the one, which were actually used for export.

22. It is well settled that the stringency and the mandatory nature of any notification is decided on the basis of the purpose it seeks to achieve. The purpose of Notification No. 43 of 2001, dated 26-6-2001 is to ensure that excise duty should not be evaded under the garb of export sales. The Hon'ble Apex Court in *Indian Aluminium Company Limited* v. *Thane Municipal Corporation* reported in 1992 Supp (1) SCC 480 in Paragraph No. 6 at Page No. 488 and Paragraph No. 3 at Page No. 485, has observed as under :-

"6..... There is an understandable reason for the stringency of the provisions. The object of S. 5(2) (a) (ii) of the Act and the rules made thereunder is self-evident. While they are obviously intended to give exemption to a dealer in respect of sales to registered dealers' of specified classes of goods, it seeks also to prevent fraud and collusion in an attempt to evade tax. In the nature of things, in view of innumerable transactions that may be entered into between dealers, it will wellnigh be impossible for the taxing authorities to ascertain in each case whether a dealer has sold the specified goods to another for the purposes mentioned in the section. Therefore, presumably to achieve the two-fold object, namely, prevention of fraud and facilitating administrative efficiency, the exemption given is made subject to a condition that the person claiming the exemption shall furnish a declaration form in the manner prescribed under the section. The liberal construction suggested will facilitate the commission of fraud and introduce

administrative inconveniences, both of which the provisions of the said clause seek to avoid....."

3.....The declaration contemplated in Form 14 is to the effect that the goods imported shall not be used for any other purpose for sale or otherwise etc. It can thus be seen that an incentive is sought to be given to such entrepreneurs by such concession if the raw material which is imported is also utilised in the industrial undertaking without selling or disposing of otherwise. That being the object a verification at the relevant time by the octroi authorities becomes very much necessary before a concession can be given. In the absence of filing such a declaration in the required Form 14, there is no opportunity for the authorities to verify. Therefore the petitioner Company has definitely failed to fulfil an important obligation under the law though procedural. The Learned Counsel, however, submitted that even now the authorities can verify the necessary records which are audited and submitted to the authorities and find out whether the material was used in its own undertaking or not. We do not think we can accede to this contention. Having failed to file the necessary declaration he cannot now turnaround and ask the authorities to make a verification of some records. The verification at the time when the raw material was still there is entirely different from a verification at a belated stage after it has ceased to be there. May be that the raw-material was used in the industrial undertaking as claimed by the petitioner Company or it may not be. In any event the failure to file the necessary declaration has necessarily prevented the authorities to have a proper verification."

The Hon'ble Apex Court in *Kedarnath Jute Manufacturing Co.* v. *CTO* reported in (1965) 3 SCR 626 at page No. 630 has observed as under :-

It can thus be seen that the submission namely that the dealer, even without filing a declaration, can later prove his case by producing other evidence, is also rejected. This ratio applies on all fours to the case before us. As already mentioned the concession can be granted only if the raw material is used in the industrial undertaking seeking such concession. For that a verification was necessary and that is why in the rule itself it is mentioned that a declaration has to be filed in Form 14 facilitating verification. Failure to file the same would automatically disentitle the Company from claiming any such concession.

23. The Learned Counsel appearing for the appellant has placed reliance on a judgment dated 12-6-2017 passed by the Division Bench of this Court in C.M.A. No. 3044 of 2011 [2017 (355) E.L.T. 45 (Mad.)], wherein, this Court observed 'as under :-

13. Therefore, what emanates from the facts obtaining in the present case is that, there was a non-disclosure of information by the Assessee. The Assessee has taken a stand that, since, it was always below the monetary limit fixed for clearances qua SSI Units, it never had an occasion to make any disclosure via a classification list.

13.1 In our view, this cannot be construed as suppression of fact, within the meaning of Section 11A(1) of the 1944 Act. Mere non-disclosure of facts, in such like circumstances, cannot constitute suppression of facts. Given the way the Section is framed, the expression "suppression of fact", appears in the company of words and expressions, such as, fraud, collusion, willful misstatement. Therefore, the expression "suppression of facts", has to take colour from the words whose company, it appears in. A mere non-disclosure of information, when there is no obligation in law to furnish the same, will not amount to, in our opinion, fraud or collusion or even, willful misstatement and, hence, trigger the extended period of limitation [See *Collector of Central Excise, Hyderabad* v. *M/s. Chemphar Drugs and Liniments, Hyderabad*, 1989 (40) E.L.T. 276 (S.C.).; *Padmini Products* v. *Collector of C. Ex.*, 1989 (43) E.L.T. 195 (S.C.) and *Pushpam Pharmaceuticals*

Company v. *Collector of Central Excise, Bombay*, 1995 (78) E.L.T. 401 (S.C.)].

24. The ratio of the said judgment, cannot be applied to the facts of the case for availing benefit of Rule 19 of the Central Excise Rule. The purpose of Notification No. 43 of 2001, dated 26th June, 2001, is to ensure prevention of evasion of duty under the garb of export sales. Keeping the purpose in mind, it is not sufficient for a manufacture to come up and say that all the goods manufactured by him have been exported and therefore, he is entitled to the benefit of Rule 19 of Central Excise Rules. If such a view is taken that the conditions prescribed in Notification No. 43 of 2001, is only procedural then the entire purpose of issuing the said Notification, would be defeated."

7.7 In the present case, it is observed as per the details submitted alongwith the appeal memorandum that in all the cases, wherein the appellant claimed that the raw material/packing material procured under Notification No. 43/2001-CE(NT) have been used in the manufacture of finished goods and such goods have been exported, such exports have been made under the cover of the ARE-1 only, and not under ARE-2 as per the condition of the said Notification. Further, the said facts have not been disputed by the appellant at any point of time.

7.8 Accordingly, in view of the discussion made in Para-7.1 to Para-7.4 above and respectfully following the judgment of Hon'ble Tribunal (as discussed in Para-7.5 above) and also of Hon'ble High Court (as discussed in Para-7.6 above), I find that the contention of the appellant that "the condition of Notification No. 43/2001-CE (NT) as regards the exports to be made under the cover of ARE-2 is of a procedural nature only and since the finished goods have been exported under 'ARE-1', it can be considered as fulfillment of the conditions of Notification No. 43/2001-CE(NT) dated 26.06.2001, as amended", is not legally sustainable.

8. Further, I find as per the contention made by the appellant as per the details mentioned in Para-3.2 above, that:

(i) In certain cases, the appellant had already paid duty alongwith interest wherein some quantity of the raw material/packing material either have been used for finished goods cleared in domestic market or destroyed.

(ii) In certain cases, the closing balance of the respective raw material or packing material, which was procure duty free, is still lying in stock.

(iii) In certain cases, the quantity of raw material/packing material procured is less than the same mentioned in their application and the relevant bond executed for the same.

As regards the said contentions, I find that it would be proper to remand back the matter to the adjudicating authority to verify the said facts submitted by the appellant, to examine the said aspects and accordingly, to re-quantify the demand confirmed against the appellant vide the impugned order, after following the principles of natural justice.

Further, as regards the contention of the appellant in respect of the penalty imposed under Rule 25 of the Central Excise Rules, 2002, I find that since the impugned order is being remanded back to the adjudicating authority to decide it afresh, as discussed in above, the contention of the appellant against the penalty may also be examined by the adjudicating authority during denovo proceedings and decide it accordingly.

9. On careful consideration of the relevant legal provisions and submission made by the appellant, I pass the Order as below:

(i) I find that the contentions of the appellant, as discussed in Para-6.2 and Para-7.8 above, are not legally sustainable. However, I find merit in the contentions of the appellant as mentioned in Para-8 above and accordingly, the impugned order is set aside by way of remanding it back to the adjudicating authority for the limited purpose, to decide it afresh after verifying the facts and examine the said contentions of the appellant as discussed in Para-8 above and re-quantification of the demand accordingly and also to re-examine the issue of penalty imposed on the appellant, following the principle of natural justice.

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

31st December, 2021

(Akhilesh Kumar)
Commissioner (Appeals)

Date: 31st December, 2021

Attested

(M.P.Sisodiya)
Superintendent (Appeals)
Central Excise, Ahmedabad

By Regd. Post A. D

M/s. Swiss Parenterals Pvt. Ltd.,
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Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Commissioner, CGST and Central Excise, Commissionerate:Ahmedabad-North.
3. The Deputy /Asstt. Commissioner, Central GST, Division-V (Dholka), Commissionerate:Ahmedabad-North.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Commissionerate:Ahmedabad-North.
5. Guard file
6. PA File