सत्यमेव जयते

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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स्पीड पोस्ट

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क फाइल संख्या : File No : GAPPL/COM/CEXP/580/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-08/2022-23**
दिनाँक Date : **02.06.2022** जारी करने की तारीख Date of Issue : **02.06.2022**

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

ग Arising out of Order-in-Original Nos. **06/AC/Dem/2020-21/BK dated 05.11.2020**, passed by the Assistant Commissioner, Central GST & Central Excise, Division-V, Ahmedabad-North.

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

Appellant- M/s. Amneal Pharmaceuticals Pvt. Ltd., Plot No. 882/1-871, Sarkhej Bavla Highway, Rajoda, Bavla, Ahmedabad.

Respondent- Assistant Commissioner, Central GST & Central Excise, Division-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 फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

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

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–

Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

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

(क) 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

This appeal has been filed by M/s. Amneal Pharmaceuticals Pvt. Ltd., Plot No.882/1-871, Near Hotel Kankavati, Village-Rajoda, Bavla, Ahmedabad (hereinafter referred to as '*the appellant*') against the OIO No.06/AC/Dem/2020-2021/BK dated 05.11.2020 (in short '*impugned order*') passed by the Assistant Commissioner, Division-V, Central GST, Ahmedabad North (in short '*the adjudicating authority*').

2. The facts of the case, in brief, are that the appellant is a 100% EOU engaged in the manufacture of pharmaceutical products falling under Chapter 30 of the CETA, 1975. They had filed three applications on quarterly basis claiming refund of unutilized CENVAT credit of inputs and input services, used in the manufacturing process. During EA-2000 of the records of the appellant, it was noticed that the appellant had in the month of August,2015 taken CENVAT credit of Rs.7,71,696/- in respect of Business Auxiliary Services, Business Support Service, Courier Services, on the strength of invoices issued by the service providers during the year 2012, 2013 and 2014 (till February). The credit was taken after one year of the date of issue of the invoices, in contravention of the provisions of Rule 4(1) of the CCR, 2004. On being pointed out, the appellant claimed that the *suo moto* re-credit was taken on withdrawal of refund claim filed by them for the period October, 2013 to March, 2014, hence was well within the time limit. It was also noticed that the credit taken was of service tax paid on various services like Air Freight Charges, Fuel Charges for Freight, MS structural fabrication work etc, which have no nexus either with the manufacturing activity or any taxable output services provided, therefore, such credit was not eligible in terms of Rule 2(l) of CCR, 2004. Moreover these credits were taken on the strength of receipt memos issued by M/s. AVS Cargo Management Services Pvt. Ltd and M/s. Singapore Airlines and on Delivery Notifications issued by M/s. Jet Airways, which department claim is not a specified document under Rule 9(1) of CCR, 2004 for taking credit.

3. A SCN was, therefore, issued to the appellant proposing recovery of cenvat credit amount of Rs.7,71,696/- u/s 11A(4) and interest u/s 11AA of the CEA, 1944. Penalty u/s 11AC was also proposed on the appellant. The said SCN was adjudicated vide impugned OIO, wherein the demand was confirmed alongwith interest and penalty.

4. Aggrieved by the impugned order, the appellant filed the present appeal alongwith application seeking condonation for delay and contending the impugned OIO, on following grounds;

- They pleaded that receipt of OIO could not be traced hence, there was delay in filing appeal as the same was filed after collecting the copy of OIO from Division, therefore, requested to condone the delay.
- Originally cenvat credit of Rs.7,71,696/- was availed within one year from the date of issue of invoice in terms of Rule 4(1) as is evident from the cenvat credit register. Subsequently, refund claims for the period (June, 2013 to September, 2013), (October, 2013 to December, 2013) and (January, 2014 to March, 2014) were filed but departmental authorities verbally appraised them that refund for few invoices may not be allowed, therefore, to avoid litigation they suo-moto filed an application for withdrawal of partial refund amount pertaining to invoices such as BAS service, Business Support Service etc, which was also recorded in the

refund sanctioning order. Thus, the amount of actual claim was debited in the cenvat credit register and the debit entry of withdrawn amount was reversed. There was no re-availment of credit beyond the period of one year from the date of invoice. Only the re-entry of reversal of debited amount was done in August, 2020, for which there is no time limit prescribed in the law. In support of their argument they placed reliance on decision passed by Hon'ble Tribunal in the case of Shree Rubber Plast Co. Pvt. Ltd.

- The invoices involving service tax credit of Rs.1,701/- was misplaced, therefore, the airline company issued receipt memo/delivery notification disclosing the service tax and cess amount. Since these payments were made towards the receipt of services, absence of invoices should not be treated as a basis for denying the credit of Rs.1,701/-, as there is no malafide intention.
- Services like air freight charges for raw materials/ packing materials, delivery order charges, manifestation charges on import of goods (raw materials), terminal handling charges etc are mandatorily required to manufacture and clear finished foods as these services are used in normal day to day business of the company. Additionally, the works contract services received pertain to repair and maintenance work carried out in the factory, which are included in the definition of input service defined in Rule 2(l) of the CCR, 2004.
- There is no malafide intention of availing excess cenvat credit as the amount credited is nothing but reversal of debit entry made earlier due to withdrawal of refund amount. Had there been mens rea they would not have withdrawn the amount which would have resulted in excess cash inflow of Rs.7,71,696/-. They placed reliance on the decision passed by Hon'ble Allahabad High Court in the case of CCE V Delphi Automotive Systems Ltd- 2013 (292) E.L.T. 189 (All.) and requested to drop the penalty.
- Since no cenvat credit is being demanded, interest also cannot be recovered.

5. Personal hearing in the matter was held on 21.04.2022, through virtual mode. Shri Karan Rajvir and Shri Sagar Vaja, both Authorized Representatives, appeared on behalf of the appellant. Shri Karan Rajvir reiterated the submissions made in the appeal memorandum.

6. I have carefully gone through the facts of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as the submissions made at the time of personal hearing and the copies of documents submitted in support of their submissions. The issue to be decided under the present appeal is whether the demand of CENVAT credit of Rs.7,71,696/- alongwith interest and penalty is sustainable or not?

7. It is observed that the credit of Rs.7,71,696/- has been disallowed basically on the arguments that (i) the credit was taken beyond the prescribed one year period; (ii) credit was availed on the receipt memos /delivery notifications issued by service provider which are not prescribed document for taking credit; and (iii) credit taken in respect of services such air freight charges, fuel charges for freight, MS structural fabrication work etc, which have no nexus either with the manufacturing activity or for providing any taxable output services.

7.1 On the issue of taking credit beyond the prescribed one year period, it is observed that prior to introduction of 3rd proviso in Rule 4(1) of Cenvat Credit Rules, 2004 w.e.f. 1-9-2014, an assessee was entitled to take cenvat credit at any time after receipt of the relevant document along with the goods specified therein. However, with effect from 1-9-2014, vide Notification No. 21/2014- Central Excise dated 11.07.2014, by introducing the 3rd proviso in Rule 4(1) of CCR, it was provided as follows:

> *"Provided also that the manufacturer or the provider of output services shall not take Cenvat credit after **six months** of the date of issue of any of the documents specified in sub-rule (1) of Rule 9".*

This provision was subsequently amended vide Notification No. 06/2015-CE(NT) dated 01.03.2015, wherein the time limit for availing of input has been increased from 6 months to one year from the date of issue of duty paying documents specified in rule 9(1).

7.1.1 The invoices based on which the credit was availed, were issued during F.Y.2012-2013 till February, 2014. Considering the date of invoice, there is no dispute that during the relevant period both the above notifications prescribing the time limit for taking credit were not in existence. Therefore, the appellant was not bound to take the credit within the period of one year as envisages in the impugned OIO. Also, Hon'ble CESTAT Principal Bench, New Delhi, in the case of Sanghvi Marmo Pvt Ltd- 2020 (33) G.S.T.L. 232 (Tri. - Del.) at para-3 held that;

> *"I find that the said proviso has been introduced w.e.f. 1-9-2014 and there is no stipulation in the amending notification that the same shall apply retrospectively. Rules of interpretation provide that whenever any statute is newly added the same has got only prospective effect unless it is specifically provided in the amending statute or the amendment is by way of substitution of an existing provision mainly by way of clarification or removal of defects. Accordingly, **I hold that the said proviso in Rule 4(1) of Cenvat Credit Rules has got only prospective effect**. Accordingly, the appeal is allowed and it is held that the appellant has taken credit rightly on 20-1-2015 on the basis of Bill of Entry dated 22-5-2014. Appeal is allowed and the appellant is entitled to consequential benefits, in accordance with law."*

7.1.2 Similarly, Hon'ble CESTAT, West Zone Bench, Ahmedabad in the case of Essel Propack Ltd.- 2022 (379) E.L.T. 123 (Tri. - Ahmd.), at para-4, held that;

> *"I have carefully considered …….. The appellant have taken the credit in the month of July, 2013 in respect to the goods received during the period 2009-10 and 2010-11. During that period no time limit was prescribed for taking the credit. Therefore, in my considered view **the department cannot import the time limit which is not statutorily stipulated in the law. The time limit has been prescribed by the Notification No. 21/2014-C.E. (N.T.), dated 11-7-2014 whereby the assessee is supposed to take the credit within 6 months/1 year from the date of invoice. Considering this amendment for the past period this Tribunal has considered the similar issue wherein it was held that the invoice issued prior to date of Notification No. 21/2014-C.E. (N.T.), dated 11-7-2014 the Cenvat credit cannot be denied on the ground of limitation…."***

7.1.3 Thus relying on the above decisions, I find that as far as the receipt of inputs and input services is not disputed, the credit cannot be denied to the appellant merely by importing the time limit which was not specified in the law.

7.2 To examine the issues (i) whether credit availed on the basis of receipt memos issued by M/s. AVS Cargo Management service/ M/s. Singapore Airlines and delivery notification issued by M/s. Jet Airways and (ii) whether credit of service tax paid on Air Freight Charges, Fuel Charges for Freight, MS structural fabrication work etc was rightly denied, I have gone through the FAR No.745/2017-18. I find that the audit was conducted for the period January, 2015 to March, 2016, wherein the inadmissible credit of Rs.7,71,696/- availed on the invoices issued during 2012, 2013 & 2014 was noticed. Demanding recovery of credit for the period, which is not part of the audit period, is not legally sustainable. Even in the previous audit, conducted for the period January, 2010 to December, 2014, the issue of inadmissibility of credit availed on the invoices issued during 2012, 2013 & 2014, was not raised. When the receipt and utilization of services, their eligibility as input service and payment of service tax paid thereon, was not been disputed by the department during the audit of this relevant period, questioning the admissibility of such credit in subsequent audit, by invoking suppression is not tenable.

7.3 I find that originally the appellant took the credit of above disputed services on the same set of documents, which was never challenged by the department at the material time. It is also not in dispute that consequent to filing of refund claims in 2014 & 2015, the appellant debited the credit of claimed amount. Later, when they withdrew the claim of Rs.7,71,696/-, they reversed the debit entry to that extent. The appellant thus took suo moto re-credit. Such re-credit or reversal of debit entry cannot be questioned unless the credit originally availed is not disputed. So without going into the merit of the admissibility of credit, I find that demand of Rs.7,71,696/-, is not sustainable on limitation alone.

7.4 I find that the Hon'ble High Court of Karnataka in the case of *MTR Foods Ltd.* - 2012 (282) E.L.T. 196 (Kar.), held that :-

> *"4. As is clear from the material on record, the returns were filed promptly. In the returns it is clearly mentioned that they availed credit under the aforesaid rules. The audit partly accepted the same. It is only in the second audit that they noticed the mistake and initiated proceedings. Therefore, in the light of the aforesaid facts none of the other conditions prescribed in the proviso exists in this case to extend the period of limitation of 5 years. It is in this background the Tribunal was justified in setting aside the order passed by the appellate authority and in restoring the order passed by the original authority.* Therefore, there is no merit in this appeal. Accordingly, it is dismissed."

8. In view of above judicial pronouncements and in the facts of this case, extended period cannot be invoked for demanding CENVAT credit from the appellant. The demand being beyond the period of limitation, I set aside the entire demand. Consequently, the interest and the penalties imposed are also set aside.

9. In view of above discussion and the decision of the judicial forum, I set-aside the impugned Order-in-Original and allow the appeal filed by the appellant.

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

(**Akhilesh Kumar**)
Commissioner (Appeals)

Date: 06.2022

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,
M/s. Amneal Pharmaceuticals Pvt. Ltd., - **Appellant**
Plot No.882/1-871, Near Hotel Kankavati,
Village-Rajoda, Bavla,
Ahmedabad

The Assistant Commissioner - **Respondent**
CGST, Division-V
Ahmedabad North
Ahmedabad

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Deputy Commissioner, CGST, Division-V, Ahmedabad North
4. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
5. Guard File.