



• आयुक्तालय (अपील-1) केंद्रीय उत्पादन शुल्क *

सातवाँ तल, केंद्रीय उत्पाद शुल्क भवन,
पोलिटेकनिक के पास, अम्बाबाडी,
अहमदाबाद - 380015.

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(52)/46/Ahd-I/2016-17
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-009-2016-17
दिनांक Date : 27.07.2016 जारी करने की तारीख Date of Issue 27/7/2016

श्री अभय कुमार श्रीवास्तव आयुक्त (अपील-1) द्वारा पारित
Passed by Shri. Abhai Kumar Srivastav, Commissioner (Appeal-1)

ग Addl. Commissioner, केंद्रीय उत्पाद शुल्क, A'bad-I द्वारा जारी मूल आदेश सं
45/Addl.Commr./2009 दिनांक: 18.02.2009 से सृजित

Arising out of Order-in-Original No.45/Addl.Commr./2009 Dated : 18.02.2009 issued by
Additional Commissioner, Central Excise, Ahmedabad-I

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/S. PINCO TEXTILES
Ahmedabad

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) केंद्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त 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 प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to
another factory or from one warehouse to another during the course of processing of the goods in a
warehouse or in storage whether in a factory or in a warehouse.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे
माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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

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



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

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 दिनांक 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।

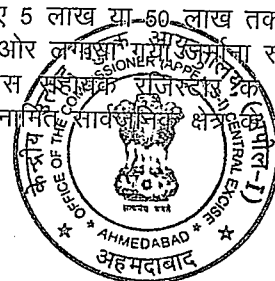
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. 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 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-बी/35-इ के अंतर्गत:-
Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं
- (a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.
- (ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेटल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.
- (b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.
- (2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय 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 बैंक खाते के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है।



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 Appellate 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 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील 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।

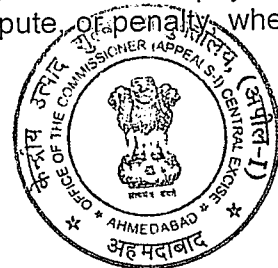
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 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 सन्दर्भ में 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, of penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

M/s. Pinco Textiles, behind Calico Mills, Behrampura, Ahmedabad (hereinafter referred to as the appellant) had filed this appeal on 17.4.2009 along with stay application against OIO No. 45/Additional Commissioner/2009 dated 17.02.2009, passed by the Additional Commissioner, Central Excise, Ahmedabad-I (hereinafter referred to as the "adjudicating authority").

2. Briefly stated, the facts are that the appellants are engaged in the processing of Cotton Fabrics, MMF falling under chapter 52,54 and 55 of Central Excise Tariff Act, 1985; that they had failed to discharge their duty liability by the stipulated date, as per Annual Production Capacity determined under Section 3A of the Central Excise Act, 1944 [hereinafter referred to as the Act] for the month of January 2001; that subsequently, the appellant paid total duty of Rs. 8,00,000/- along with interest at the rate of 24% in terms of sub-rule(1) of rule 96ZQ. As the appellant failed to pay the duty by the date specified in sub-rule (3) of rule 96ZQ *ibid*, a show cause notice dated 18.6.2002 was issued, proposing imposition of penalty equal to the amount of duty outstanding from them at the end of January 2001; that the Adjudicating Authority vide the impugned order imposed penalty of Rs. 8,00,000/-.

3. Aggrieved, the appellant filed this appeal along with stay application for dispensing with the condition of pre-deposit of the amount of penalty during the pendency of appeal. The appeal has been filed mainly on the ground that they could not deposit the amount of duty in accordance with the time schedule prescribed under rule 96ZQ, because of severe financial constraints and the assessee contends that such a harsh penalty ought not to have been imposed, as there was no suppression of facts or any ill intention on the appellant's part. It is further averred that penalty for mere late payment was illegal and unjustified, more so when the appellant had paid interest at a substantial rate of 24% p.a. The appellant has also questioned the jurisdiction of deciding the issue since both section 3A and rule 96ZQ were omitted without a saving clause.

4. The appeal was kept in call book since the department had filed an appeal before the Apex Court on an identical issue against the decision of Hon'ble High Court of Gujarat [in SCA No.1984 of 2002] in the case of M/s. Krishna Processors [2012(280)ELT 186 (Guj.)]. As the Hon'ble Supreme Court has decided the issue, the appeal stands retrieved from the call book.

5. Personal hearing in the matter was held on 13.7.2016. Advocate, Shri Sudhanshu Bissa, appeared on behalf of the appellant. He has cited reference of Apex Court decision in the case of Bhagwati Rolling Mills [2015(326)ELT 209 (SC)] and also relied upon CESTAT Order No. A/10384/2016 dated 4.5.2016 in the matter of Bhagyalaxmi Steel Rolling Mills, Viramgam, Ahmedabad. He has requested to set aside the order of imposition of penalty.



6. I have gone through the fact of the case, the appellant's grounds of appeal, and submissions made at the time of personal hearing. Due to considerable passage of time, the stay application has become extraneous. Therefore, I am proceeding with the main appeal. It is a fact that Rules 96ZO, 96ZP and 96ZQ were omitted vide notification No.6/2001-C.E.(N.T.) dated 1st March, 2001. Subsequently, section 3A of the Act was omitted w.e.f. 11th May, 2001 by Finance Act, 2001.

7. The question to be decided in this appeal is whether the appellant is liable for penalty under Rule 96ZQ(5)(ii) of the Central Excise Rules, 1944.

8. As the entire issue revolves primarily around rule 96ZQ i.e. imposition of penalty, the relevant extracts of sub rule 5 of rule 96ZQ are reproduced below, for ease of reference:

(5) *If an independent processor fails to pay the amount of duty or any part thereof by the date specified in sub-rule (3), he shall be liable to :-*

- (i); and
- (ii) *a penalty equal to an amount of duty outstanding from him at the end of such month or rupees five thousand, whichever is greater.*

9. The issue of *vires* of rule 96ZQ of the Central Excise Rules, 1944 and section 3A of the Central Excise Act, 1944, was raised before the Gujarat High Court in SCA no. 1984/2002 in the case of M/s. Krishna Processors [reported at 2012(280) ELT 186(Guj.)]. The Hon'ble High Court of Gujarat vide its order dated 16.3.2012, held the penal provisions contained in Rule 96ZQ(5) (ii) of the Central Excise Rules, 1944 to be *ultra vires* of Article 14, 19(1)(g) and 265 of the Constitution of India. Department, feeling aggrieved, filed an appeal before the Supreme Court [SCA No. 13619/2015] against the aforementioned order of the Hon'ble High Court of Gujarat. The Hon'ble Supreme Court vide its order dated 24.11.2015, reported at 2015(326)E.L.T.209 (SC)], held that :

- *struck down rules 96ZO, 96ZP and 96ZQ insofar as they impose a mandatory penalty equivalent to the amount of duty on the ground that these provisions are violative of articles 14 & 19(1)(g) of the Constitution and are ultra vires the Central Excise Act, 1944.*
- *on the question of whether omission of the compounded levy scheme in 2001 wipes out the liability of the assessee for the period during which the scheme was in operation, it was held that the issue has already been decided in Fibre Board's case, wherein it was held that 'omission' is akin to 'deletion' that this is form of 'repeal', and that therefore previous proceedings would be protected by Section 6 of the General Clauses Act because repeal does not amount to obliteration from the beginning and that 'omission' is only in futuro.*

10. It was the Hon'ble Supreme Court which had in the case of M/s. Dharmendra Textile Processors [reported at 2008(231) ELT 3(SC)], held that Rule 96ZQ did not grant discretion insofar as imposition of penalty was concerned. Vide the aforementioned order dated 24.11.2015, the Supreme Court struck down rule 96ZQ of the Central Excise Rules, 1944, insofar as it imposes mandatory penalty equivalent to the amount of duty, further holding that the omission would amount to repeal and that previous proceedings would be protected by Section 6 of the General Clauses Act. In the Order No. A/10384/2016 dated 4.5.2016, referred to by the advocate



of the appellant, the Hon'ble Tribunal set aside imposition of penalty imposed under rule 96ZQ; in view of the said Apex Court judgment.

11. In this backdrop, the question of jurisdiction raised by the appellant is answered in negative. Further, as rule 96ZQ (5) (ii) of the Central Excise Rules, 1944 has been struck down by the Hon'ble Supreme Court, penalty imposed vide OIO dated 17.02.2009, is set aside.

12. The appeal stands disposed off accordingly.

Abhai 27.7.16
(Abhai Kumar Srivastav)
Commissioner (Appeal-I)
Central Excise, Ahmedabad

Date: 27.7.2016

ATTESTED

Vinod
(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad

BY R.P.A.D.

To,

M/s. Pinco Textiles,
Behind Calico Mills,
Behrampura,
Ahmedabad

Copy To:-

1. The Chief Commissioner, Central Excise, Ahmedabad zone, Ahmedabad.
2. The Principal Commissioner, Central Excise, Ahmedabad-I.
3. The Deputy/Assistant Commissioner, Central Excise Division IV, Ahmedabad-I
4. Guard File.
5. P.A.

