



• आयुक्तालय (अपील-I) केंद्रीय उत्पादन शुल्क *

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

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(29)/80/Ahd-I/2015-16 & V2(32)/79/AHD-I/2015-16
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-012 & 013-2016-17
दिनांक Date : 28.07.2016 जारी करने की तारीख Date of Issue 31/8/2016

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

ग Deputy Commissioner, केंद्रीय उत्पाद शुल्क, A'bad-I द्वारा जारी मूल आदेश सं MP/10/DC/2015-16 दिनांक: 28.09.2015 से सृजित

Arising out of Order-in-Original No. MP/10/DC/2015-16 Dated : 28.09.2015 issued by
Deputy Commissioner, Central Excise, Ahmedabad-I

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. Bodal Chemicals Ltd. and Shri I.K.Purohit, Manager of M/s. Bodal Chemicals Ltd.
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 प्रकिया के दौरान हुई हो।

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

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के 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 मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी 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 है 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 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 अनुसूची-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 the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."



ORDER IN APPEAL

Appeals have been filed by [i] M/s Bodal Chemicals Ltd., Unit-I, Plot No. 110, Phase-II, GIDC, Vatwa, Ahmedabad and [ii] Shri Inderkishan Gopikishen Purohit, Manager (hereinafter referred to as the appellant-I & appellant-II, respectively) against the Order-in-Original No. MP/10/DC/2015-16 dated 28.9.2015 passed by Deputy Commissioner, Central Excise, Division-III, Ahmedabad-I Commissionerate. As the issue involved is the same, both these appeals are taken up together.

2. The facts of the case, in brief, is that during the course of search, conducted at the premises of the appellant-I on 3.6.2014, shortage of raw materials and shortage in the stock of Sulpo Para Vinyl Sulphone [SPVS] manufactured by the appellant for its Unit-VII, was noticed. Further, it was observed that certain plant and machinery had been removed from the unit, without payment of Central Excise duty. Alleging that the appellant had contravened various provisions of the Central Excise Act, 1944, and the rules made there-under, a notice dated 8.12.2014 was issued, proposing inter-alia, confiscation of the plant and machinery and demanding duty along with interest on the raw materials and SPVS found short. The notice further proposed penalty under rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944 on appellant-I and penalty under rule 26 of the Central Excise Rules, 2002 on appellant-II.

3. This notice was adjudicated vide OIO dated 28.9.2015, wherein the adjudicating authority ordered confiscation of the plant and machinery, confirmed the demand of duty along with interest, imposed redemption fine & penalties on both the appellants.

4. Aggrieved, both the appellants, have filed the present appeals on the grounds that:

- the appellant not being a manufacturer of the raw materials alleged to be short, the demand of duty in this respect is without authority of law;
- the onus was on the department to put on record, that the alleged shortages were due to removal of the raw materials;
- that mere shortage of goods is not a conclusive proof of removal of goods;
- they wish to rely on the case law of RA Casting P Ltd [2015 (318) ELT 433] wherein it has been held that penalty is not imposable merely because of shortage of finished goods and raw materials without any tangible evidence of clandestine removal;
- there is no justification for imposing such a huge redemption fine;
- in respect of penalty on appellant -II, it was argued that no evidence direct or even indirect has been adduced to show that the appellant had some knowledge of contravention of law; that the impugned order does not disclose as to what active role was played by the appellant-II in the alleged offence.

5. Personal hearing was held on 13.7.2016 and Shri N. K. Tiwari, Consultant, appeared on behalf of both the appellants. He reiterated the submissions made in the appeal memorandum. He also provided copies of orders passed by the Hon'ble Tribunal in the case of Ambica Polytubes [2013(290) ELT 317], Mahavir Polyplast (P) Ltd [2013 (287)ELT 139 (Tri-Del)], Galaxy Textiles [2011(263) ELT 604 (Tri-Abad)], Marigold Paints P Ltd [2014 (308) ELT 421 (Tri-Abad)], R.A.Casting P Ltd [2015(318) ELT 433 (Tri-Del.)] and OIA No. AHM-EXCUS-1-APP-33 and 44-2015-16 dated 26.11.2015 & 22.12.2015, in the case of the appellants themselves.

6. I have carefully gone through the facts of the case on record, the submissions made in the appeal memorandum and the oral averments made during the course of personal hearing.



7. The facts as enumerated above is that during the course of the search conducted at the premises of the appellant, shortages of raw materials/job worked goods and removal of plant and machinery without payment of duty was noticed, leading to the above proceedings.

8. The issues to be decided are whether the confiscation of plant & machinery, demand of duty and interest on shortages (and on plant and machinery), and imposition of penalty on both the appellants, is correct.

9. First issue that I would like to take up is the shortages noticed in [a] inputs/raw materials and [b] Sulpho Para Vinyl Sulphone [SPVS], which the appellant-I was manufacturing as a job worker for the Unit-VII. The demand has been confirmed in respect of [a] and [b] by the adjudicating authority along with interest. It is also noticed that the entire amount stands paid and is appropriated. It is further evident in para 14, that the appellant-II agreed with the shortages & appellant-I discharged the duty on the shortages. Further, the adjudicating authority has clearly recorded with reasons the contraventions of various provisions of the Central Excise Rules, 2002. While the appellant has raised a plea that the department has not fulfilled its onus to put on record that the alleged shortages were due to removal, it is a fact, also admitted by the appellant, that there were indeed shortages. As is recorded by the original authority, it was incumbent on the appellant to maintain proper records & to the extent there were shortages [based on the records maintained by the appellant himself], the findings that the raw materials/goods received for job work, found short have been removed – appears convincing. In this era of self assessment, the appellant-I has failed to give a plausible reason to explain the shortages, evident on record.

10. The appellant's plea, however, that duty cannot be demanded on the shortage of raw materials more so in view of the fact that they did not have the requisite plant and machinery, to manufacture these raw materials – appears to be logical. The appellant in his submissions has stated that though these issues were raised before the original adjudicating authority, the same were not addressed. In-fact, Central Excise duty can only be demanded on manufacture and it is for this very reason that sub-rule 5 of Rule 3 of the CENVAT Credit Rules, 2004, caters to removal of raw materials, wherein the person removing inputs as such is supposed to pay an amount equivalent to the credit availed in respect of such inputs. This plea of the appellant, it seems, has not been addressed by the adjudicating authority. As far as duty confirmed along with interest on SPVS is concerned, I find that since the shortages have been noticed which stand accepted by the appellant, the duty confirmation and demand of interest, is correct.

11. Regarding the second issue of confiscation of plant and machinery, it goes without saying that duty can be demanded under Rule 3(5A) of the CENVAT Credit Rules, 2004 on the plant and machinery so removed only if CENVAT credit was availed on the said plant and machinery in the first place. There is no such finding by the adjudicating authority that credit had been availed on the plant and machinery on which duty is demanded in terms of Rule 3(5A) of the CENVAT Credit Rules, 2004. It goes without saying that the demand of duty and interest can be confirmed in this regard only if the credit of capital goods was availed in respect of the said plant and machinery.

12. Further, on the question of redemption fine, the consultant during the course of personal hearing has raised a plea that redemption fine cannot be imposed when the goods were not available. The



no longer res-integra. In-fact the Hon'ble Supreme Court in the case of Weston Components Ltd [2000(115) ELT 278 (SC)] and the Larger bench of the Tribunal in the case of Shiv Kripa Ispat (P) Ltd [2009(235) ELT 623 (Tri-LB)] has already dealt with the issue. I agree with the contention that no redemption fine can be imposed if the goods are not available and therefore, the redemption fine imposed in respect of confiscation of plant and machinery, which is not available, is set aside.

13. However, since the issues raised in paras 10 and 11 above need to be addressed and gone into afresh, it is felt that the ends of justice would be met if the matter is remanded to the original adjudicating authority with a direction to give detailed finding after necessary verification/scrutiny. I have already upheld the duty demand along with interest in respect of SPVS. I have also set aside the redemption fine. However, since the quantum of demand needs to be re-worked in respect of inputs found short and finding needs to be given as to whether capital goods credit was availed in respect of plant and machinery on which duty is demanded, the matter is being remanded to the original adjudicating authority; who is further directed to pass clear orders and thereafter re-determine the duty and quantum of penalty to be imposed on the firm and the manager of the firm. Further, while deciding on the penalty issue, the adjudicating authority should consider the case laws relied upon by the appellants viz RA Casting P Ltd [2015 (318) ELT 433], Ambica Polymers [2013(290) ELT 317 (Tri-Del.)].

14. In view of the above findings, I partly set aside the OIO and remand back the matter to the original adjudicating authority in terms of para 13 above. Both the appeals stand disposed of accordingly.

Abhai
28.07.16
(Abhai Kumar Srivastav)
Commissioner (Appeal-I)
Central Excise
Ahmedabad

Attested

Vinod
(Vinod Lukose)
Superintendent (Appeal-I)
Central Excise,
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BY R.P.A.D.

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Copy to:-

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Principal Commissioner of Central Excise, Ahmedabad-I
3. The Dy. Commissioner, Central Excise, Division-III, Ahmedabad-I.
4. The Additional Commissioner(Systems), Central Excise, Ahmedabad-I.
5. Guard file.
6. P.A.