

• 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(84)/82 Ahd-I/2015-16
Stay Appl.No. NA/2015-16

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-016-2016-17
दिनांक Date : 11.08.2016 जारी करने की तारीख Date of Issue 12.08.2016

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

ग Deputy Commissioner, केंद्रीय उत्पाद शुल्क, A'bad-I द्वारा जारी मूल आदेश सं
MP/04/Dem/2015-16 दिनांक: 09.09.2015 से सृजित

Arising out of Order-in-Original No. MP/04/Dem/2015-16 Dated : 09.09.2015 issued by
Deputy Commissioner, Central Excise, Ahmedabad-I

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. The Anup Engineering 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.

अंतिग 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 हों।

- (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 :-

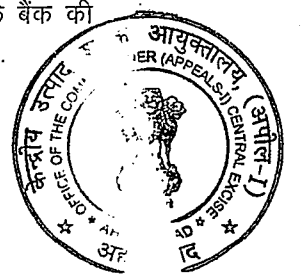
- (क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

- (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, अपील के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल 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 इए-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 वहाँ 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 वहाँ 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 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 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 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. 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, or penalty, where penalty alone is in dispute."



ORDER-IN-APPEAL

This appeal is filed by M/s. The Anup Engineering Ltd., situated behind 65 KVA Substation, Odhav Road, Odhav, Ahmedabad- 382 415 (hereinafter referred to as "the appellant", for brevity) against OIO No. MP/04/Dem/2015-16 dated 9.9.2015 passed by the Deputy Commissioner, Central Excise, Division V, Ahmedabad-I Commissionerate.

2. The facts briefly are that a show cause notice dated 22.01.2015 was issued to the appellant, *inter alia*, seeking inclusion of the additional consideration collected towards third party inspection charges, to the transaction value for the period from January 2014 to September 2014; demanding duty along with interest and penalty on the said duty leviable on the additional consideration and proposing penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944. This notice was issued in terms of the provisions of section 11A(7A) of the Central Excise Act, 1944. Earlier three notices have been issued on the same matter, which has originated from an audit objection contending that the appellant had received money from their buyers in addition to the assessable value - towards third party inspection.

3. Vide OIO dated 9.9.2015, supra, the adjudicating authority directed inclusion of the amount received as additional consideration towards third party inspection charges, confirmed the duty on the additional consideration along with interest and also imposed penalty equivalent to duty under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002. It is against this order that the present appeal has been filed.

4. The grounds raised in the appeal are:-

- (a) the demand is not made on actual recovery but on presumptive basis;
- (b) the contract provides third party inspection by the agencies specified by the buyer in the contract at the cost of the buyer, which is to be reimbursed by the buyer;
- (c) the goods are marketable even without third party inspection; the marketability/sale of the goods does not depend upon third party inspection;
- (d) third party inspection is neither a condition for sale nor has any effect on the manufacturing process undertaken by the appellant;
- (e) the goods are ready for delivery after which inspection is done; thus the goods are marketable even before the inspection;
- (f) that when such inspection is not done by the appellant, the cost of it is not to be borne by the appellant;
- (g) that since the inspection is organized by the appellant for convenience sake, the payment at the first instance is made by the appellant and thereafter it is reimbursed by the buyer; and
- (h) that extended period cannot be invoked and the demand beyond the period of limitation is time barred.

5. Personal hearing in the matter was held on 8.8.2016. Shri S. J. Vyas, Advocate, appeared on behalf of the appellant. He reiterated the submissions already advanced in the grounds of appeal. Further pointing to para 2 of the show cause notice, he stated that the averment of the department regarding 0.5% being the inspection charges, was not based upon any document but an assumption.



5. The main issue to be decided is whether as alleged by the department, third party inspection charges would form part of the assessable value, for computing Central Excise duty ?

6. Before we dwell into the facts, the legal/statutory provisions, on which the case revolves, is reproduced below for ease of reference:

CENTRAL EXCISE ACT, 1944

Section [4. Valuation of excisable goods for purposes of charging of duty of excise. —

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

(2)....

(3)....

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

Central Excise Valuation (Determination Of Price Of Excisable Goods) Rules, 2000

Rule 6. Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

[Provided that where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to such assessee, the value of such goods shall be deemed to be the transaction value.]

7. The appellant is a manufacturer of large tailor-made machineries like heat exchangers, pressure vessels, etc. used in industries like petroleum refining, pharmaceutical manufacturing, power generation. It is a fact that certain buyers had specified in the purchase orders that on completion of the manufacturing process of their machinery, a third party inspection and certification should be carried out, only after which delivery would be taken. It is also an admitted fact by the appellant that since the inspection was organized by them, for the sake of convenience, the payment at the first instance was made by the appellant and thereafter reimbursed by the buyer.

8. Valuation, in respect of manufactured goods, is governed by Section 4 of the Central Excise Act, 1944. In case of sale of goods, wherein delivery is at the time and place of removal and where the buyer and seller are not related and price is the sole consideration of the sale, the value of such goods would be the 'transaction value'. However, in other cases, resort is to be taken to Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Rule 6 of the said rule states that where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. In the present case, the buyer has collected *third party inspection charges* and has not included it in the assessable value. Therefore, the amount so collected is an additional consideration and would fall within the purview of Rule 6 of the Valuation Rules, 2000, supra.



9. What is significant in such cases is the product in question. The appellant's products viz. heat exchangers, pressure vessels, are used in sensitive industries and hence critical. The buyer, through third party inspection, ensures that the tailor-made product is according to the specification sought and adheres to safety standards. It is not a case wherein the product manufactured is of general nature, produced in mass, not tailor-made wherein some of the buyers insist on a third party inspection. The difference between a general product and a tailor-made product of such nature also negates the averment raised that even without the third party inspection the goods were marketable/saleable. It is difficult to comprehend the argument that [a hypothetical situation] even if a third party during the course of inspection would not grant a clearance, the product would be saleable. It would not only be difficult to find a new buyer on account of the product being tailor-made, but such sale could also result in mishaps.

10. The appellant has also raised a plea, both in the appeal papers and also during the course of personal hearing, that the third party inspection charges computed @ 0.5 % is not based on any documents; that it is based on assumption. This is the fourth notice, in the matter. In all likelihood, no averments were raised before the original adjudicating authority questioning the computation of third party inspection charges. If the amount computed by the department was based on assumption, the appellant should have come forward with the correct figures as it is an admitted fact that the third party inspection charges have been paid by the appellant and thereafter reimbursed by the buyer. Failure to share the data readily available with them and thereafter questioning the computation methodology adopted by the department, does not help the appellant's case. The argument questioning the computation, therefore, lacks coherence and is therefore rejected.

11. The demand in the impugned OIO pertains to the period from January 2014 to September, 2014, and the show cause notice was issued on 22.1.2015. It is on this factual background that the appellant has questioned the invocation of extended period and argued that the demand beyond the period of limitation is time barred. The argument is factually incorrect as the demand was issued well within the normal period.

12. In view of the foregoing, the appeal is rejected.

Date: 11.08.2016

Abhai
11.8.16
(Abhai Kumar Srivastav)
Commissioner (Appeals-I)
Central Excise, Ahmedabad

Attested

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

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Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Principal Commissioner, Central Excise, Ahmedabad-I
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-I
4. The Dy. / Asstt. Commissioner, Central Excise, Division- V, Ahmedabad-I
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