

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)/101/Ahd-I/2015-16
Stay Appl.No. NA/2015-16

3164-3168

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-029-2016-17
दिनांक Date : 18.11.2016 जारी करने की तारीख Date of Issue 22/11/2016

श्री उमा शंकर आयुक्त (अपील-1) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeal-I)

ग Asst. COMMR., DIV-II, केंद्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं 06/Ref/2015
दिनांक: 09.12.2015, से सृजित

Arising out of Order-in-Original No. 06/Ref/2015 दिनांक 09.12.2015 issued by Asst. COMMR., DIV-II, Central Excise, Ahmedabad-I

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

M/s HDO Technologies Ltd.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिती 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।

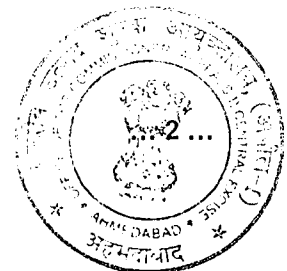
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by 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.

(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।



(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.

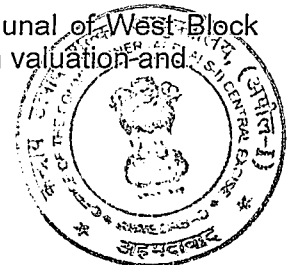
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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



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, 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 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

M/s. HDO Technologies Limited, 5/1/2 Phase-I, GIDC, Near Vatwa Railway Crossing, Vatwa, Ahmedabad, Gujarat [for short - 'appellant'] has filed this appeal against OIO No. 06/Ref./2015 dated 9.12.2015, passed by the Assistant Commissioner, Central Excise, Division II, Ahmedabad -I Commissionerate [for short - 'adjudicating authority'].

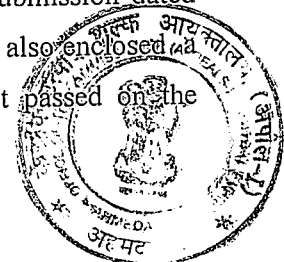
2. Vide revenue para 6 of Final Audit Report No. 274/2015-16-Central Excise dated 11.5.2015, issued by Audit-I Commissionerate, Ahmedabad, an objection was raised that the appellant had wrongly availed CENVAT Credit of Rs. 1.22 crores, against cancelled invoices, issued in the months of October, November and December, 2014; that these goods purportedly claimed to have not been dispatched by the appellant, were found to have been removed from the factory gate and no documents were provided, to prove that the goods were received back. The FAR further stated that the amount of CENVAT credit wrongly availed along with interest and penalty was paid by the appellant and the paragraph was hence, shown as a settled.

3. Subsequently, the appellant vide his letter dated 10.09.2015, filed a refund claim for Rs. 1.30 crores, contending that this amount was paid towards duty, interest and penalty at the insistence of the audit party, under duress. They also referred to a protest letter dated 15.07.2015, earlier filed by them, with the adjudicating authority. The adjudicating authority vide his impugned OIO, rejected the refund claim, holding that it was not maintainable under Section 11B of the Central Excise Act, 1944 [for short CEA '44].

4. The appellant, feeling aggrieved by the impugned OIO, has in this appeal, raised the following averments:

- that the amount claimed as refund pertains to erroneously debited amounts and payment of interest by cash and out of CENVAT credit balance as the clerk was not aware of the various provisions of CENVAT Credit Rules, 2004;
- the said credit availed pertains to duty charged on invoices in respect of goods not cleared from factory; that these invoices were cancelled and no goods were cleared from factory;
- that for conclusion of proceedings under Section 11A(7) of CEA '44, entire duty, interest and penalties as provided under Section 11(6) of CEA '44, should have been paid; that they had not paid penalties but protested payment of duty by way of reversal of payments made in cash;
- the adjudicating authority has not dealt with the merits of the case and has rejected the claim only on the grounds of jurisdiction.

5. Personal hearing in the matter was held on 7.11.2016. Shri R Subramanya, Advocate, appeared on behalf of the appellant and reiterated the arguments made in the grounds of appeal. The appellant further submitted additional written submission dated 14.11.2016, wherein the grounds already submitted, were reiterated. They also enclosed certificate from a Chartered Accountant to the effect that they had not passed on the incidence of duty.



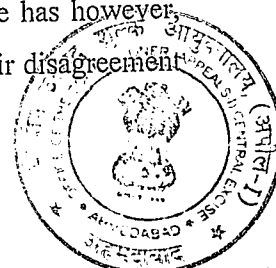
6. I have gone through the facts of the case, the grounds of appeal and the oral averments, raised during the course of personal hearing.

7. I find that the lower adjudicating authority has passed a very detailed order, discussing the merits of almost all the relevant issues. Hence, it would be prudent to briefly, mention the findings, recorded by the adjudicating authority:

- the mechanism prescribed under law to deal with an audit objection are two fold: [a] if the party accepts the objection and pays, the matter stands concluded [b] if the party does not accept, a show cause notice is issued; that in case of a disagreement between the audit and the appellant, the resolution is by way of issuing a show cause notice issued under the provisions of Section 11A of CEA '44;
- the contention of audit that there can be no protest seeking to undo action voluntarily taken by the appellant under section 11(6), *ibid*, is upheld ; that if the appellant was not in agreement with the objection, he should not have followed the option provided under section 11A(6), so as to enable audit to legally undertaken the process of issuing show cause notice; that after having chosen not to do so the appellant cannot turn around and seek to get the merits adjudicated under Section 11B of CEA '44, by filing a refund;
- the protest referred under section 11B of CEA '44, cannot be interpreted to include disagreement with audit;
- the amounts based on audit objection was paid on 23.2.2015 and 5.3.2015 and refund filed on 10.9.2015, within one year; that since the protest filed was not as per law, the appellant cannot undo the deemed concluded status of the issue, if indeed the issue was so deemed concluded; the appellant further paid the interest and penalty on 5.3.2015 and hence were acting within the letter and spirit of Section 11A(6) which prescribe all these steps, namely – acceptance, payment and communication;
- the appellant vide his letter dated 4.3.2015, had agreed to all objections raised by the audit team; that they had promised to pay the penalty and interest on 5.3.2015; that this letter was signed by their authorized signatory, who has signed the refund application and hence their contention that debits in the CENVAT account was on account of a clerk who was not aware of the provisions, is not a valid argument;
- the copy of the letter dated 6.4.2015 of the appellant, sent to audit, which the audit claims to never have been received, does not bear any acknowledgement from audit/department; that the audit did receive another letter dated 12.3.2015 from the appellant showing their disagreement in respect of some other audit para.

8. As per the FAR, the audit of the appellant was conducted on 6th, 9th, 10th, 23rd and on 24th of February, 2015. The audit issued a letter on 17.2.2015, communicating the gist of the objection. The appellant, paid the amount involved in the present dispute on 23.2.2015. Thereafter, vide letter dated 4.3.2015, *signed by the authorized signatory of the appellant*, it was promised that the amount of penalty and interest would be paid on 5.3.2015. This interest and penalty was, in-fact paid on 5.3.2015. The FAR was issued on 11.5.2015. These facts are not under dispute.

9. Now, the appellant has informed that they had, vide their letter dated 6.4.2015, informed audit of their disagreement in respect of the said objection. To verify this claim, the adjudicating authority sought information in respect of the said averment, from the Audit Commissionerate. The Audit Commissionerate replied that no such letter was received by their office. The appellant has enclosed the copy of this letter along with the appeal papers. There is no evidence on the body of the letter to the effect that it was received by Audit Commissionerate. The adjudicating authority has also given the same observation [refer para 38 of the impugned order]. The Audit Commissionerate has however, stated that they had in-fact, received a letter dated 12.3.2015, informing their disagreement

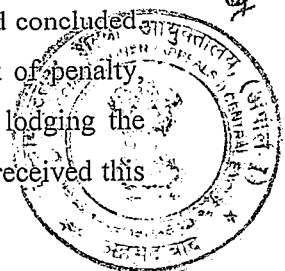


in respect of some other para – in which case, a show cause notice was issued. Here, the dates are of great importance. The duty in respect of this objection was paid on 23.2.2015. Thereafter, a letter dated 4.3.2015 [which is undisputed], was sent by the appellant to the department promising payment of interest and penalty by 5.3.2015. The interest and penalty was paid on 5.3.2015. In this sequence of event, why would any appellant not inform that he is contesting this para, in the letter dated 12.3.2015 sent to audit [where he is disputing some other para] rather than wait and mention it in their letter dated 6.4.2015. This raises serious doubts to the claim made by the appellant that they had sent their disagreement to audit vide letter dated 6.4.2015. The chronology of events, leads one to doubt the veracity of the claim that such a letter [dated 6.4.2015] was ever sent to audit in the first place.

10. Since the impugned order quotes section 11A(5), (6) and (7) of the Central Excise Act, 1944, verbatim, reproducing it once again, it is felt, would be an exercise in futility. On going through the three subsections, *ibid*, it is clear that:

- subsection (5) provides that a show cause notice needs to be issued in case it is detected during the course of audit that any duty has not be levied or paid or has been short paid etc..
- sub-section (6) provides an option or to use the words of the adjudicating authority a ‘*package deal*’ in case the person chargeable with duty under sub-section (5) intends to pay duty along with interest, in respect of the portion of the duty, as may be accepted by him. The person availing the benefit, is also required to pay penalty as per the rate provided in the sub-section, subject to a ceiling. The said sub-section ends with the phrase – “*and inform the Central Excise officer of such payment in writing*”.
- sub-section (7), thereafter, states that the Central Excise officer, on receipt of the information under sub-section (6), shall not serve any notice in respect of the amount so paid and all proceedings in respect of the said duty shall be deemed to be concluded where the amount of duty, interest and penalty as provided in sub-section (6) has been paid fully.

11. On examining the legality aspect i.e. whether the appellant was within his right to lodge his protest subsequent to exercising his right under Section 11A(6) of CEA ‘44. I have mentioned in detail, the step-wise procedure to be adopted in case of an audit objection, *supra*. As is evident, consequent to exercising his right under Section 11A(6) of CEA ‘44, the proceedings *suo-moto* gets concluded – in respect of that portion for which the duty, interest and penalty, stands paid. This conclusion is not only for the department but also for the assessee – in this case the appellant. In this case, since he has paid the duty, interest and penalty in respect of the entire audit objection, the proceedings were to quote the sub-section “*shall be deemed to be concluded*”. Hence, consequent to payment of the duty, interest and penalty and informing the Central Excise Officer in writing of such a payment [vide his letter dated 4.3.2015], the appellant has forfeited his right to lodge a protest at a later date, more so because in the eyes of law the proceedings stand concluded. The appellant’s averment is that they had lodged the protest before payment of penalty, appears to be false, since even by the appellant’s own admission his letter lodging the protest is dated 6.4.2015. It is an altogether different matter that Audit never received this letter.



12. The appellant's last contention is that the refund was not dealt on merits but on jurisdiction. As I have already mentioned, the audit objection records the events, leading to the objection, in respect of CENVAT Credit taken under Rule 16 of the Central Excise Rules, 2002, as follows:

"During scrutiny of their invoices with sales challans of these dispatches it revealed that these goods were removed from factory gate and were never returned to factory. The assessee on showing these evidences of actual dispatch from their factory admitted that CENVAT credit was wrongly taken by them on forged documents by issuing credit memo."

The appellant has not refuted these facts. What is mentioned in the grounds is that the refund pertains to duty charged on invoices which were never cleared from the factory. The audit records clearly that the goods were in-fact removed and that they were never returned to the factory. Nothing has been produced before ^{me} to negate the facts mentioned in the objection. Even on examination of the refund claim on merit, it is clear that the CENVAT credit was wrongly availed. The question of refund therefore, in respect of payment of wrongly availed CENVAT credit does not arise.

13. In view of the foregoing, the appeal filed by the appellant is rejected.

14. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

14. The appeal filed by the appellant stands disposed of in above terms.




(उमा शंकर)

आयुक्त (अपील्स - I)

Date: 18/11/2016

Attested


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

BY R.P.A.D.

To,

M/s. HDO Technologies Limited,
5/1/2 Phase-I, GIDC,
Near Vatwa Railway Crossing,
Vatwa, Ahmedabad

Copy to:-

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-I.
3. The Additional Commissioner (System), Central Excise, Ahmedabad-I.
4. The Deputy/Assistant Commissioner, Central Excise, ~~II~~ Division, Ahmedabad-I.
5. Guard file.
6. P.A

