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| | • आयुक्तालय (अपील-I) केंद्रीय उत्पादन शुल्क *<br>सातमाँ तल, केंद्रीय उत्पाद शुल्क भवन,<br>पोलिटेकनिक के पास, आमबाबाडि,<br>अहमदाबाद – 380015. |

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(72)/123/Ahd-I/2015-16 | 4149-4153
Stay Appl.No. NA/2015-16

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-039-2016-17**
दिनाँक Date : **21.12.2016**जारी करने की तारीख Date of Issue _____

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

ग DEPUTY COMMR.,Div-III, केन्द्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं **MP/29/DC/2015-16 REF** दिनाँक: **22-01-2016,** से सृजित

Arising out of Order-in-Original No. **MP/29/DC/2015-16 REF** दिनाँक **22-01-2016** issued by DEPUTY COMMR., Div-III, Central Excise, Ahmedabad-I

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

**M/s Unison Metals Ltd.,**

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 a 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.

(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 मामलें 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 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।

(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 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) 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. 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 क़ई 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

M/s. Unison Metals Limited, Plot No. 5015, Phase-IV, Ramol Char Rasta, GIDC Vatwa, Ahmedabad- 382 445 (for short - '*appellant*) has filed this appeal against OIO No. MP/29/DC/2015-16 Ref dated 22.01.2016, passed by the Deputy Commissioner, Central Excise, Division-III, Ahmedabad–I Commissionerate (for short - '*adjudicating authority*').

2. Briefly stated, the facts of the case are that the appellant filed a refund claim for Rs. 1,19,613/- on 23.2.2015 under section 11B of the Central Excise Act, 1944, on the grounds that out of their eight cold rolling machines, three machines were non operational, for the period from 2.1.2015 to 31.1.2015. The appellant, was working under the compound levy scheme under notification No. 17/2007-CE dated 1.3.2007 and discharging duty @ Rs. 41,200/- per machine, per month. A show cause notice dated 14.5.2015, was issued to the appellant, proposing rejection of the refund claim on the grounds of non-establishment of dismantling of the three machines during the period from 2.1.2015 to 31.1.2015. This notice, was adjudicated vide the impugned OIO dated 22.1.2016, wherein the adjudicating authority, rejected the refund claim.

3. Feeling aggrieved, the appellant has filed this appeal, on the following grounds:

- that the three machines were not operated during the period from 2.1.20165 to 31.1.2015 and hence they were entitled for refund;
- the delay in submitting the intimation letter regarding change in the number of cold rolling machines cannot be the reason to deny the refund claim; the delay in intimation is a procedural lapse for which substantive benefit should not be denied;
- the excise duty on all eight cold rolling machines, were paid in advance;
- that they would like to rely on the case laws of Jocund India [2015(33) ELT 805], Sun Pharmaceutical Industries [2015(328) ELT 792], Themis Medicare [2014(313) ELT 924], Nilkamal Limited [2011 (271) ELT 476], Jupiter Industries [2006(206) ELT 1195], Acme Industries [2011(269) ELT 523], D R Metal Industries [2007(219) ELT 239], Fitwell Fastner India Private Limited [1993(68) ELT 50] and 11 other case laws;
- the allegation that the three machines were installed in the factory premises even when the parts which are important for operation were removed is absurd and baseless;
- that it is practically impossible to detach the installed cold rolling machine from the earth and completely dismantle it;
- the panchnama itself mentions that the three cold rolling machines were found in idle condition;
- the fact that the work roll and motor was removed from the three cold rolling machines should be sufficient for treating the said machines in dismantled condition and no duty liability should be fastened for such non functional cold rolling machines.

4. Personal hearing was held on 20.12.2016. Shri Pradeep Jain, Chartered Accountant, appeared on behalf of the appellant and reiterated the grounds of appeal. He also submitted copy of judgements in the case of Acme Industries [2011(269) ELT 523], Jupiter Industries [2006(206) ELT 1195], D R Metal Industries [2007(219) ELT 239].

5. I have gone through the facts of the case, the appellant's grounds of appeal, and submissions made during the course of personal hearing. The primary issue to be decided

in this appeal is whether the appellant is eligible for refund filed under Section 11B of the Central Excise Act, 1944 or otherwise.

6. The adjudicating authority has while rejecting the refund, held as follows:

- as per clause 4(3) of notification No. 17/2007-CE dated 1.3.2007, the manufacturer shall obtain written approval from the Superintendent of Central Excise before making any such change; that no change in number of cold rolling machines can be done until prior approval of the jurisdictional Superintendent is obtained;
- the Inspector on a visit to the unit on 29.1.2015 found the three cold rolling machines in installed condition with upper back up roll with choke removed and v belt not connected with the motor;
- the range Superintendent drew panchnama in the factory premises on 301.2015, which clearly depicts that the three machines were in installed condition;
- that the visit on 4.2.2015 revealed that the machines were completely rooted out of earth;
- that all the eight cold rolling machines [including the three cold rolling machines] were installed for the entire month of January 2015 and remained so upto 4.2.2015;
- there is no provision in the notification, *ibid,* which allows refund of duty paid on machines which are installed in the unit and are *suo moto* made inoperative;
- the appellant is not eligible for refund for non establishment of dismantling of three machines for the period from 2.1.2015 to 31.1.2015.

7. As is already mentioned, the appellant was working under *compounded levy scheme* in terms of notification No. 17/2007-CE dated 1.3.2007, which grants an option to an assessee to pay duty of excise, on the basis of cold rolling machines installed for cold rolling of goods, and fixes the rate of duty per cold rolling machine. This facility is subject to a condition that no credit of duty paid on any raw materials, component part or machinery or finished products used for cold rolling of aluminium circles shall be taken under the CENVAT Credit Rules, 2004. The assessee intending to avail the benefit of this notification/scheme has to make an application and thereafter, on being permitted to avail the benefit of the scheme, has to file an application in Appendix II before the competent officer, informing about the number of cold rolling machines which are to be installed and employed. The scheme in para 4(3) of the notification, *ibid,* further states that the manufacturer shall intimate the Superintendent in writing of any proposed change in the number of cold rolling machines installed, and obtain the written approval of such officer before making any such change.

9. As is evident, the entire dispute hinges around the fact that the appellant without taking the written approval, [as envisaged in the notification/scheme], vide his letter dated 2.1.2015 [received on 5.1.2015] intimated the range office, of dismantling three cold rolling machines out of the eight machines installed in their factory. Hence, the adjudicating authority rejected the refund in respect of duty paid in advance in respect of the three machines, [said to be non operational from 2.1.2015 to 31.1.2015] on the grounds that [a] no prior written approval was obtained from the competent officer [b] the three

machines were not dismantled [as was evident during the visit of an officer on 29.1.2015 and as recorded in the panchnama dated 30.1.2015].

10. These two core issues of the dispute however, are no longer *res integra*. I find that the jurisdictional Tribunal in the case of Ambuja Metal Industries [2010(256) ELT 763], has already passed an order on the issue. The relevant extract is reproduced here-in-below, for reference:

5. After giving careful consideration to the disputed issue, we find that a justifiable interpretation to the expression "installed" as appearing in Rule 96ZB is required to be given to. The present case is not one where the cold rolling machine installed in the factory has, intermittently not been used for production of final product, in which case, admittedly no relief can be given to the assessee for the period when the said installed machine was not being put to use. Here is a case where the machine originally installed subsequently broke down on account of its old condition and was admittedly not being used by the assesses, under intimation to the Revenue. The Revenue's only objection is that though the machine was not being utilized, the same was installed in the factory premises. Presuming that the appellants would have dismantled the machine and installation would have been uprooted, no objection could have been raised by the Revenue. We also note that in terms of provisions of Rule 96ZC sub-rule 3, manufacturer is under an obligation to intimate the proper officer in writing of any proposed change in the number of cold rolling machines installed by him or on his behalf and obtain written approval of such officer before making any such change. As such, the said provisions foresee circumstances where the number of cold rolling machines installed in the assessee's factory may change. The only condition is that before such change, written approval of the officer is required. This is only to ensure that the facts are placed before the jurisdictional authority and no clandestine activity takes place. In the present case, the appellant had intimated their jurisdictional Central Excise officers about the non-functioning of the two machines, which fact also stand admitted by the orders of the authorities below. As such, the only lapse on the part of the assessee was to obtain written approval of such officer. In fact, the appellants having intimated the officers, it was now the duty of the officer to grant such written approval. The same having not been granted (though not specifically asked for by the appellant), the appellants cannot be put to a circumstance disadvantageous to him.

6. We further note that the expression used in the notification issued in terms of provisions of Rule 96ZB is "utilized" as against expression "installed" used in the rule. "Utilized" necessarily mean used on continuation basis. By applying the golden rule of harmonious interpretation of statutes to the expression used in Rule 96ZB and in notification would be that the cold rolling machines should be installed and utilized in the assessee's factory. No doubt, the two machines in question were initially installed and utilized for cold rolling of stainless steel pattas/patties but subsequently they remained installed only and not utilized. In absence of any doubt to the above fact, we are of the view that non-utilisation of the said machines for the period from 1-2-98 onwards, resulting in mechanical confirmation of demand would not be justified. We want to make it clear that it is not a case where the installed machine was not utilised for some period between, for which no abatement can be granted as it is not provided under the scheme. It is the case where the two machines in question stopped functioning altogether w.e.f. 1-2-98 onwards and the only fault on the part of the assessee can be said that the same were not dismantled and de-installed. The appellants cannot be held to pay for the same.

11. As, both the grounds, adduced by the adjudicating authority, for rejecting the refund viz [a] not obtaining prior written approval from the competent officer [b] the three machines not having been dismantled, stand addressed in favour of the appellant in the aforementioned judgement, it is felt that the refund rejected on these two grounds is not legally tenable. However, a primary issue which seems to have been ignored by the adjudicating authority is whether the machines were being operated/utilized during the said period or otherwise, since it is not disputed that they were in installed condition. For deciding the issue of eligibility of refund, it needs to be thoroughly examined, whether the machines, alleged by the department as being in installed condition, were lying unutilized as is being claimed by the appellant.

12. The ends of justice, would be met if the matter is remanded back to the adjudicating authority to carry out a detailed verification into the claim of the appellant that during the period from 2.1.2015 to 31.1.2015, the three machines were lying unutilized though they were installed in the factory. The appellant, is directed to produce all the documentary evidence in support of this claim. The adjudicating authority is further directed to examine the above contention of the appellant. In case, it is held that the three machines were lying unutilized, the appellant, needless to state becomes eligible for refund claim, subject however, to the other conditions enumerated in Section 11B of the Central Excise Act, 1944.

13. In view of the foregoing, the appeal is allowed by way of remand and the impugned order is set aside. While remanding the matter, I rely on the case of M/s. Honda Seil Power Products Ltd [2013(287) ELT 353].

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

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

(उमा शंकर)
आयुक्त (अपील्स - I)

Date: 21/12/2016

Attested

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

BY RPAD.

To,

M/s. Unison Metals Limited,
Plot No. 5015, Phase-IV,
Ramol Char Rasta,
GIDC Vatwa,
Ahmedabad- 382 445

Copy to:-

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