



- आयुक्तालय (अपील-1) केंद्रीय उत्पादन शुल्क *
सातमाँ तल, केंद्रीय उत्पाद शुल्क भवन,
पोलिटेकनिक के पास, आमबाबाडि,
अहमदाबाद - 380015.

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(29)/117/Ahd-II/2015-16
Stay Appl.No. NA/2015-16

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-047-2016-17
दिनांक Date : 22.12.2016 जारी करने की तारीख Date of Issue 12/1/17

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

ग Asst. COMMR., Div-III, केंद्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं AC/09/Div-II/2015-16
दिनांक: 23-12-2015, से सृजित

Arising out of Order-in-Original No. AC/09/Div-II/2015-16 दिनांक 23-12-2015 issued by Asst. COMMR., Div-III, Central Excise, Ahmedabad-I

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

M/s Kemit Chemical Pvt 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 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.

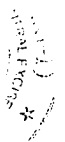
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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।

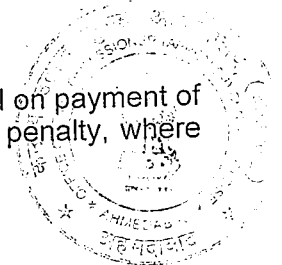
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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. Kemit Chemical Private Limited, 78/12, GIDC, Industrial Estate, Phase-1, Vatwa, Ahmedabad 382 445 (for short 'appellant') has filed this appeal against OIO No. AC/09/Div II/2015-16 dated 23.12.2015, passed by the Assistant Commissioner, Central Excise, Division-II, Ahmedabad-I Commissionerate (for short -"adjudicating authority").

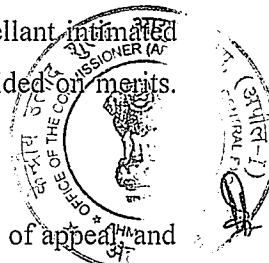
2. Briefly stated, the facts limited to the appeal is that vide FAR No. 144/2012-13 dated 21.12.2012, auditors raised an objection that the appellant had not paid Rs. 75,272/- as service tax on Bank charges under the category of 'Banking and Financial Services'. Subsequently, during the course of the next audit, it was noticed that the appellant had after payment of the service tax along with interest, taken CENVAT credit of the tax so paid. A show cause notice dated 13.10.2015, was therefore, issued, *inter-alia*, demanding CENVAT credit wrongly availed, along with interest based on FAR No. 213/2014-15. The notice, further proposed penalty under section 15(2) of the CENVAT Credit Rules, 2004, [for short 'CCR '04'] read with Section 11AC(1)(c) of the Central Excise Act, 1944. This notice was adjudicated vide the impugned OIO dated 23.12.2015, wherein the adjudicating authority, *inter-alia*, disallowed the CENVAT credit wrongly availed along with interest and also imposed penalty on the appellant.

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

- CENVAT credit was taken vide entry no. 330 & 331 dated 6.11.2012 to the tune of Rs. 75,272/-;
- appellant has properly disclosed all the information from time to time through intimation letter, ER-1 returns and details relating to CENVAT credit availed during February 2009 to August 2013;
- vide Trade Notice no. 20/2013-14 dated 10.2.2014, issued by Bombay Service Tax Commissionerate, it is clarified that in cases where the foreign banks are recovering certain charges for processing of import/export documents regarding remittance of foreign currency, the banks in India would be treated as recipient of service and are therefore, required to pay service tax; that the appellant was not required to pay any service tax under reverse charge mechanism;
- that the wish to rely on the case law of Castrol (I) Limited [2008(231) ELT 175], Deloitte Haskins and Sells [Appeal No. ST/200 & 211/10] ; Osaka Alloys [2005(192) ELT 1197 (Tri-Del)];
- that payment after being pointed out by audit cannot be considered as paid by reason of fraud or collusion or wilful mis-statement or suppression of fact;
- that as per explanation 3 inserted vide Finance Bill 2010 no penalty under any of the provisions of this act or rules shall be imposed in cases covered by section 11A(2B) of Central Excise Act, 1944.

4. Personal hearing was granted on 22.11.2016 and 28.11.2016. Nobody appeared on behalf of the appellant. However, vide letter dated 2.12.2016, the appellant intimated that they did not wish to be heard in person and that the case may be decided on merits. Accordingly, I take up this case for decision.

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 was eligible for CENVAT Credit in respect of an amount paid towards service tax on Bank charges under the category of *Banking and Financial Services*, in respect of the period 2007-08 to 2011-12, which was paid subsequent to being pointed out by the auditor.

6. The adjudicating authority while holding that the CENVAT credit was wrongly availed, has held as follows:

- that the appellant did not pay service tax on foreign bank charges throughout the period 2007-08 to 2011-12; that on being pointed out by the auditors the service tax was paid for the entire period;
- that service tax due, was not paid by suppressing the facts to the department;
- that by availing CENVAT credit in respect of the said payment, the appellant had violated the provisions of Rule 9(1)(bb) of CENVAT Credit Rules, 2004, in light of the fact that the challan evidencing payment of service tax on reverse charge mechanism became an invalid document.

7. I find that the demand has been confirmed on the grounds that they had contravened the provisions of Rule 9(1)(bb) of the CCR '04, the relevant extracts of which are reproduced below, for ease of reference:

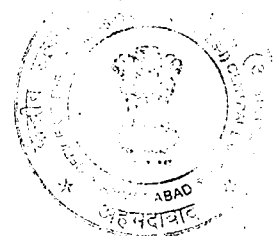
RULE 9. Documents and accounts. — (1) The CENVAT credit shall be taken by the manufacturer or the provider of output service or input service distributor, as the case may be, on the basis of any of the following documents, namely

[(bb) a supplementary invoice, bill or challan issued by a provider of output service, in terms of the provisions of Service Tax Rules, 1994 except where the additional amount of tax became recoverable from the provider of service on account of non-levy or non-payment or short-levy or short-payment by reason of fraud or collusion or wilful mis-statement or suppression of facts or contravention of any of the provisions of the Finance Act or of the rules made there under with the intent to evade payment of service tax; or]

[emphasis added]

8. The facts reveal that the objection of non payment of service tax was raised vide Revenue Para 3 of FAR No. 144/2012-13 dated 21.12.2012. The objection covered the period from 2007-2008 to 2011-2012 [page 13 of the impugned OIO]. The adjudicating authority, has held that since the service tax was short paid by reason of suppression of facts, the subsequent CENVAT credit availment in respect of the service tax paid, was hit by the mischief of Rule 9(bb) of the CCR '04.

9. The fact that the service tax was deposited only after being pointed out by audit is not being disputed. The appellant has not pointed out as to how he had informed the department about availing this credit. It is nowhere on record that the appellant at any time had informed specifically of his having taken the CENVAT credit of the tax paid subsequent to audit objection.



10. Further, the fact that the tax was not discharged for the period from 2007-08 upto 2011-12, until being pointed out by Audit, clearly shows that there was suppression of facts and contravention of the provisions of the Finance Act and the rules made there under with the intent to evade Service tax and therefore, I agree with the view taken by the adjudicating authority that the CENVAT credit was wrongly availed in terms of Rule 9(bb) of the CCR '04

11. Even otherwise, the appellant has contended that vide Trade Notice no. 20/2013-14 dated 10.2.2014, issued by Commissioner, Service Tax-I Commissionerate, Mumbai, the appellant was not supposed to pay any service tax on bank charges under the Banking and Financial Services, in the first place.

12. As per the said Trade Notice if the services are provided by the foreign bank to a bank in India, as a recipient of service, the bank in India, is required to pay service tax under erstwhile section 66A prior to 1.7.2012 and under the provisions of notification No. 30/2012-ST after 1.7.2012; that in cases where foreign banks are recovering certain charges for processing of import/export documents, regarding remittance of foreign currency, the banks in India would be treated as recipient of service and therefore, will be required to pay service tax. Going by this Trade Notice, it is clear that the appellant was not liable to discharge service tax in this case.

13. I find that the Hon'ble Tribunal in the case of Gujarat Ambuja Exports Limited [2013(30) STR 667] has also held as follows:

We find that the amount charged by foreign bank, prima facie cannot be considered as service received by the appellant. We are of the view that the appellant made a strong case for the waiver of pre-deposit of the amounts involved. Accordingly, application for the waiver of the pre-deposit of the balance amounts involved is allowed and recovery thereof stayed till the disposal of appeal.

14. Now, since the allegation is that the appellant had availed the CENVAT credit wrongly, we need to examine the availment in light of Rule 3 of the CCR '04, which deals with eligibility for availment. This is more so because as per the para supra, it clearly comes out, that the service tax was not supposed to be paid by the appellant. Relevant extracts of Rule 3 of CCR '04, as far as availment of CENVAT credit is concerned, is reproduced below for ease of reference:

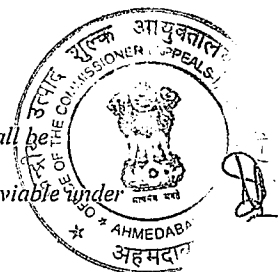
RULE 3. CENVAT credit. —

(1) A manufacturer or producer of final products or a [provider of output service] shall be allowed to take credit (hereinafter referred to as the CENVAT credit) of -

(i) the duty of excise specified in the First Schedule to the Excise Tariff Act, leviable under the Excise Act :

(ii) to (viii)

(ix) the service tax leviable under section 66 of the Finance Act;



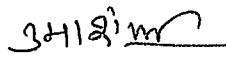
[*(ixa) the service tax leviable under section 66A of the Finance Act;*
 [*(ixb) the service tax leviable under section 66B of the Finance Act;*
 (*x) the Education Cess on taxable services leviable under section 91 read with section 95 of the Finance (No. 2) Act, 2004 (23 of 2004);*
 [*(xa) the Secondary and Higher Education Cess on taxable services leviable under section 136 read with section 140 of the Finance Act, 2007 (22 of 2007); and*]

paid on -

(i); and
 (ii) any input service received by the manufacturer of final product or by the provider of output services on or after the 10th day of September, 2004, including the said duties, or tax, or cess paid on any input or input service, as the case may be, used in the manufacture of intermediate products, by a job-worker availing the benefit of exemption specified in the notification of the Government of India in the Ministry of Finance (Department of Revenue), No. 214/86-Central Excise, dated the 25th March, 1986, published in the Gazette of India vide number G.S.R. 547(E), dated the 25th March, 1986, and received by the manufacturer for use in, or in relation to, the manufacture of final product, on or after the 10th day of September, 2004 :

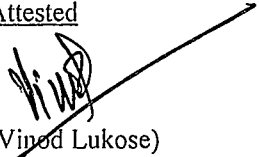
A reading of the above rule, clearly demonstrates that credit can only be availed in case service tax is leviable under the Finance Act, 1994. Since in the present dispute, the appellant was not liable to pay service tax on Bank charges under the category of Banking and Financial Services, in view of paragraph 11, supra, the question of availing CENVAT credit, does not arise and therefore, it is clearly established that the appellant has wrongly availed the CENVAT credit even on this count. The impugned OIO, is therefore upheld and the appeal is rejected.

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)

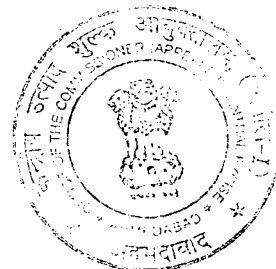
Date: 24/12/2016

Attested


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

BY RPAD.

To,
 M/s. Kemit Chemical Private Limited,
 78/12, GIDC, Industrial Estate, Phase-1,
 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-II, Ahmedabad-I
5. Guard file.
6. P.A

