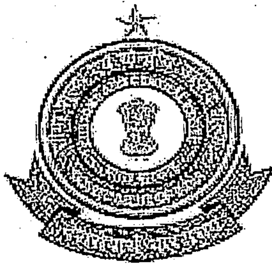


आयुक्तालय (अपील-I) केंद्रीय उत्पादन शुल्क
सातमाँ तल, केंद्रीय उत्पाद शुल्क भवन,
पोलिटेकनिक के पास, आमबाबाडि,
अहमदाबाद – 380015.

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(39)/06/EA2/Ahd-I/2015-16
Stay Appl.No. NA/2015-16

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-048-2016-17**
दिनाँक Date : **23.12.2016** जारी करने की तारीख Date of Issue

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

ग Asst. COMMR.,Div-IV, केन्द्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं **10/Assistant Commissioner/2015-16** दिनाँक: **12-10-2015,** से सृजित

Arising out of Order-in-Original No. **10/Assistant Commissioner/2015-16** दिनाँक **12-10-2015** issued by Asst. COMMR., Div-IV, Central Excise, Ahmedabad-I

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

M/s. Dhariyal Chemical.

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।

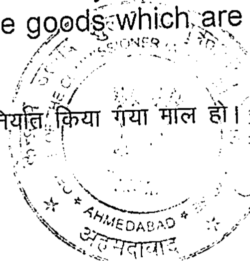
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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

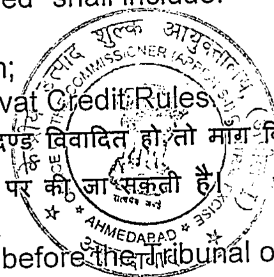
केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(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 माग 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

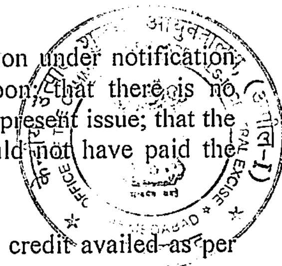
Assistant Commissioner, Central Excise, Division IV(Narol), Ahmedabad-I Commissionerate, [*for short – 'appellant'*] has filed this appeal against OIO No. 10/DC/2015-Ref. Dated 3.7.2015 passed by Deputy Commissioner, Central Excise, Division, IV, Ahmedabad-I Commissionerate [*for short - 'adjudicating authority'*]. The appeal has been filed based on the authorization and review order issued by the Principal Commissioner, Central Excise, Ahmedabad-I [issued from F. No. IV/16-282/OIO/Ref/2015-16-RA dated 12.10.2015]. The respondent in the appeal is M/s. Dhariyal Chemicals, 4, Prabhudas Estate, Near Sabar Tiles, Danilimda, Ahmedabad- 380 028.

2. Briefly stated, the facts are that the respondent filed a refund claim on 16.12.2013, for Rs. 4,07,176/-, towards duty paid on goods cleared to M/s. ONGC under International Competitive Bidding[ICB]. Incidentally, goods cleared towards ICB are exempted from duty vide notification No. 12/2012-Central Excise [Sl. No. 336] dated 17.3.2012.

3. A show cause notice came to be issued to the respondent, asking him to show cause as to why the refund, filed beyond the prescribed time, should not be rejected on limitation. This show cause notice was adjudicated vide OIO No. 2/AC/2014-Ref dated 7.4.2014, wherein the then adjudicating authority, rejected the refund on limitation. Aggrieved, the respondent approached the Commissioner(A) who vide his OIA No. AHM-EXCUS-001-APP-039-2014-15 dated 18/22.7.2014, set aside the OIO dated 7.4.2014 and allowed the appeal. This OIA was reviewed by the Committee of Commissioners, and an appeal was preferred before the Hon'ble CESTAT, who vide its order No. A/12127/2014 dated 1.12.2014, remanded the case to the original adjudicating authority, to reconsider the issue afresh.

4. Based on the directions of the Hon'ble Tribunal, the adjudicating authority has passed the aforementioned impugned order dated 3.7.2015, wherein he has sanctioned the refund. However, the Principal Commissioner, Central Excise, Ahmedabad-I has reviewed the impugned OIO under section 35E(2) of the Central Excise Act, 1944, [*for short – 'CEA '44*] and has authorized the appellant, to file this appeal, wherein the following grounds are raised:

- the adjudicating authority erred in holding that exemption under notification No. 12/2012 is conditional and cannot be insisted upon; that there is no correlation between Section 5A(1A) of CEA '44 and the present issue; that the respondent availing the benefit of the notification should not have paid the duty;



- that the respondent should have reversed the CENVAT credit availed as per Rule 6 of the CENVAT Credit Rules, 2004.

5. Personal hearing was granted on 9.12.2016. Shri Rahul Gajeria, Advocate, appeared on behalf of the respondent and filed written submissions, wherein the following averments were raised:

- that the goods were cleared during the period September 2011 to January 2012;
- that they had paid duty in accordance with the prevailing practice - of paying the duty and thereafter claiming refund from DGFT;
- vide DGFT notification No. 4(RE-2013)/2009-14 dated 18.4.2013, para 8.3(c) of FTP 2009-2014, was amended to provide that refund of terminal excise duty will be given in case of those deemed exports where exemption is not available;
- DGFT further clarified vide Policy Circular No. 16(RE-2012/2009-14) dated 15.3.2013 that in case of supplies against ICB since duty is exempted, DGFT will not give refund and that the assessee should avail the excise exemption and if duty has been paid, the refund should be claimed from the authority with whom the duty is paid and not from DGFT;
- Department's appeal contends that the goods were exempt from duty and duty was not payable, it would follow that the duty which was paid was not required to be paid and hence should be refunded; that the refund has therefore, been correctly granted to the respondent;
- that it is clearly provided under Rule 6(6) of CENVAT Credit Rules, 2004, that provision of Rule 6(1) to (4) shall not be applicable.

6. 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 is whether the adjudicating authority erred in sanctioning the refund to the respondent.

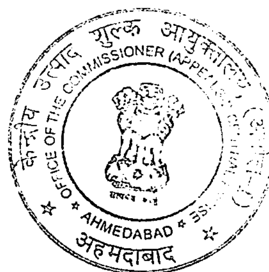
7. The grounds of appeal i.e. 'Annexure B', primarily raises two grounds in the departmental appeal viz:

[a] that since the goods cleared under ICB was exempt from duty, the respondent should not have cleared the goods on payment of duty on his own volition; that the adjudicating authority erred in holding that notification No. 12/2012 is conditional; and

[b] the respondent was liable to pay an amount as reversal, as specified under Rule 6 of the CENVAT Credit Rules, 2004.

8. As these are the only two grounds raised in the appeal, I would first like to address these two issues.

8.1 As far as the first ground is concerned, the notification No. 12/2012-Central Excise dated 17.3.2012, under which exemption has been availed, is issued under Section 5A of CEA '44. Section 5A(1A), *ibid*, clearly states that where an exemption under sub-section (1) of Section 5A of CEA '44, is granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods. The show cause notice dated 3.2.2014, states that the goods were cleared under Sr. No. 336 of the said notification. The said Sr. No. is reproduced for ease of reference:



TABLE

Sl. No.	Chapter or heading or sub-heading or tariff item of the First Schedule	Description of excisable goods	Rate	Condition No.
(1)	(2)	(3)	(4)	(5)
335	Any Chapter	Parts of hearing aids	Nil	-
336	Any Chapter	All goods supplied against International Competitive Bidding.	Nil	41

Condition No.	Conditions
41.	If the goods are exempted from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under section 3 of the said Customs Tariff Act when imported into India.

Section 5A(1A) of the Central Excise Act, 1944, states as follows :

(1A) For the removal of doubts, it is hereby declared that where an exemption under sub-section (1) in respect of any excisable goods from the whole of the duty of excise leviable thereon has been granted absolutely, the manufacturer of such excisable goods shall not pay the duty of excise on such goods.

8.2 The scheme of things under section 5A, ibid, is very aptly explained by the Hon'ble Madras High Court in the case of M/s. Hlg Trading v/s UOI , W.P.Nos.24507, 26010 and 26011 of 2015. The relevant extracts are as follows:

"21. A careful look at sub-section (1) of Section 5A would show that there are different types of exemptions that could be granted by the Central Government. They are as follows:

(i) absolute exemption
(ii) exemption subject to fulfillment of certain conditions before removal
(iii) exemption subject to fulfillment of certain conditions after removal
(iv) exemption from the whole of the Duty of Excise and
(v) exemption from any part of the Duty of Excise.

22. Due to the very fact that there are different types of exemptions contemplated by sub-section (1) of Section 5A, it follows as a natural corollary that the benefits of such exemption notifications would also fall under different categories. The position can be summarised as follows:

(i) If the exemption is absolute, all domestic manufacturers will be entitled to the benefit of the notification.
(ii) If the exemption is not absolute but made subject to certain conditions, it is only those domestic manufacturers who fulfill those conditions either before or after removal, who will be entitled to the benefit of the exemption notification. Persons who do not fulfil the conditions may not be entitled to the benefit of the notification. "

Though there is condition no. 41 in respect of Sr. No. 336 under notification No. 12/2012-CE dated 17.3.2012, it would not be correct to hold that it is a conditional exemption. Conditional exemption notifications are those which offer a choice to the appellant to either avail the benefit of a notification or otherwise. Condition no. 41, only states that the benefit of Sr. No. 336 can be availed if it is exempted under Customs Tariff Act. Since it is exempted under Customs Tariff Act, by virtue of the fact that M/s. ONGC is a licensee, this leaves no choice for the appellant, who has supplied to the goods to M/s. ONGC but to avail the benefit of the notification and hence it becomes an absolute exemption.

8.3 Hence, the first ground that since the goods were absolutely exempt, the respondent should have cleared the goods without payment of duty by availing the exemption, is a correct argument and is therefore upheld.

8.4 Now, moving to the second ground raised in the review order, it is contended that the appellant should have reversed the credit as per Rule 6 of the CENVAT Credit Rules, 2004. Rule 6 of the CENVAT Credit Rules, 2004, deals with the obligation of the manufacturer or producer of final products and provider of output service, in cases where they manufacture both excisable and exempted goods. However, there is sub-rule 6(6) which is a non-obstante clause, which states as follows:

6) The provisions of sub-rules (1), (2), (3) and (4) shall not be applicable in case the excisable goods removed without payment of duty are either –

[(i) to (vi) ...
[(vii) all goods which are exempt from the duties of customs leviable under the First Schedule to the Customs Tariff Act, 1975 (51 of 1975) and the additional duty leviable under sub-section (1) of section 3 of the said Customs Tariff Act when imported into India and are supplied, —

(a) against International Competitive Bidding; or

8.2.1 In view of Rule 6(6)(vii)(a), as quoted *supra*, the contention that the respondent was liable to reverse an amount specified under Rule 6 of the CENVAT Credit Rules, 2004, in respect of clearances made towards ICB, is not a tenable argument.

9. However, the issue needs a critical examination in view of recent decision of Hon'ble High Court of Bombay in the case of Sandoz Private Limited [reported in 2016(341)ELT 22(Bom)]. The respondent has contended that they were paying duty in accordance with the practice which was then prevailing i.e. of paying the duty and thereafter claiming refund from DGFT. However, it is on record that subsequently, DGFT rejected their refund claim in view of policy circular No. 16(RE-2012/2009-14) dated 15.3.2013. It was then that the respondent approached the department by filing the refund claim to avail refund of duty paid towards clearance made towards ICB. To understand the issue in depth, I would like to reproduce para 3 of DGFT policy circular No. 16(RE-2012/2009-14) dated 15.3.2013, which states as follows:

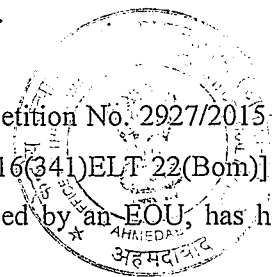
"It has come to the notice of this Directorate that some RAs of DGFT and the Offices of Development Commissioners of SEZ are providing refund of TED even in those cases where supplies of goods, under deemed exports, is ab-initio exempted.

2. There are three categories of supplies where supply of goods, under deemed exports, are ab- initio exempted from payment of excise duties. These are as follows:

(i) Supply of goods under Invalidation letter issued against Advance Authorisation [Para 8.3© of FTP];
(ii) Supply of goods under ICB [Para 8.3(c) of FTP]; and
(iii) Supply of goods to EOUs [Para 6.11(c) (ii) of FTP]

3. Prudent financial management and adherence to discipline of budget would be compromised if refund is provided, in cases, where exemption is mandated. In fact, in such cases the relevant taxes should not have been collected to begin with. And if, there has been an error/oversight committed, then the agency collecting the tax would refund it, rather than seeking reimbursement from another agency. Accordingly, it is clarified that in respect of supplies, as stated at Para 2 above, no refund of TED should be provided by RAs of DGFT/Office of Development Commissioners, because such supplies are ab-initio exempted from payment of excise duty."

The scheme of refund of Terminal excise duty in respect of clearances against ICB was earlier allowed by the DGFT. Subsequently, DGFT in its wisdom, stopped it and the aforementioned policy circular came to be issued. The respondent, under the erstwhile scheme was availing the benefit by clearing goods under payment of duty and thereafter claiming duty by way of refund. When the DGFT clarified on the scheme of refund, which their office was granting and stopped it, the respondent approached the department, for the refund. However, nothing has been produced to show that CBEC has issued any notification granting refund in cases where clearances are made to ICB, on payment of duty. As far as CBEC is concerned, I find that there is an exemption in place, which is clear and final. The respondent could either avail the benefit of the exemption or pay duty on his own volition. The respondent chose the latter. The respondent thereafter, has tried to side track the exemption notification, by firstly paying duty and thereafter claiming refund of the same. By no stretch of imagination can one say that this is what was intended by the Government vide notification No. 12/2012 dated 17.3.2012. In-fact DGFT, is emphatically clear that the department can only be approached in case there is error/oversight committed leading to payment of taxes. The adjudicating authority in the impugned order dated 3.7.2015 has clearly held that the payment of duty on clearance against ICB cannot be termed as collected by error/oversight and that it was a matter of practice. This raises a larger question: *Can benefit of a notification be availed, by way of refund?*. **The clear cut answer is No**. Exemptions are to be availed as is provided for in the notification and not by circumventing it. This also answers the respondent's argument that since no duty was to be paid, the refund ought to have been granted. It is the respondent's own argument that the exemption was not absolute. Therefore, now to contend that since duty was paid, the department should refund it is a futile argument, since the respondent on his own free will chose to pay duty. In view of the foregoing, it is held that the refund allowed by the adjudicating authority vide the impugned OIO, was not correct.



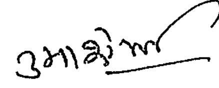
10. The Hon'ble High Court of Bombay, in Writ Petition No. 2927/2015 in the case of M/s. Sandoz Private Limited v/s UOI, [reported at 2016(341)ELT 22(Bom)] while considering a similar matter in respect of refund of TED filed by an EOU, has held as follows:

> 41. *Once there was a clear stipulation in the policy itself, then, all that the circular does is to clarify this obvious position. If there was no obligation to pay duty, then, there is no question of claiming a refund in the manner done. If this is what has been held and appears to be the essential finding, then, that is not in any manner contrary to the mandate of the provisions and particularly of section 5 of the FTDR Act.* This is not a case where anything is being stated and for the first time so as to term it as an amendment to the policy and, therefore, would apply prospectively. Insofar as the subject issue is concerned, all that the respondents have done is to clarify that para 8.3(c) and para 6.2(b) and 6.11(c)(ii) of the FTP read harmoniously and together imply that no refund on supplies under para 8.3 is admissible. When there is an exemption, then, this refund claim was rightly disallowed. We do not think that any individual decision and in the case of a distinct assessee would, therefore, be of assistance to the present petitioners.
>
> 42. ***Though in the past such claims have been granted does not mean that the practice or the past orders should govern the issue necessarily.*** *When the petitioners themselves were aware of a policy circular and sought to urge that it would not be governing the controversy and for the period for which refund is claimed, then, it is clear that they were required to overcome the said stipulations and the circular itself. That having found rightly to be clarifying the obvious position, we have no hesitation in concluding that the refund applications were properly and correctly disallowed.*
>
> [emphasis supplied]

11. In the above decision, Hon'ble High Court of Mumbai, has clearly decided that past practice should not govern the issue. In view of the foregoing, the departmental appeal is allowed and the impugned OIO dated 3.7.2015 is set aside.

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

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



(उमा शंकर)
आयुक्त (अपील्स - I)

Date:23/12/2016
Attested

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

BY RPAD.

To,

M/s. Dhariyal Chemicals,
4,Prabhudas Estate,
Near Sabar Tiles,
Danilimda,
Ahmedabad- 380 028.

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-IV, Ahmedabad-I
5. Guard file.
6. P.A