• 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(28)/39/Ahd-I/2016-17/4837-4841
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-061-2016-17**
दिनाँक **25.01.2017**जारी करने की तारीख Date of Issue 02/02/2017

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

ग Asst. Commissioner, Div-II केन्द्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं **AC/01/Div.-II/2016-17** दिनाँक: **5/2/2016,** से सृजित

Arising out of Order-in-Original No. **AC/01/Div.-II/2016-17** दिनाँक: **5/2/2016** issued by Asst. Commissioner,Div-II Central Excise, Ahmedabad-I

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

M/s. Kastwell Foundries
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person 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।

... 2 ...

अहमदाबाद

(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 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.

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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 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. Kastweel Foundries, 46/A, Near Kiran Bus Stop, Phase I, GIDC, Vatwa, Ahmedabad (for short - *'appellant"*) has filed this appeal against OIO No. AC/01/Div II/2016-17 dated 4.4.2016, passed by the Assistant Commissioner, Central Excise, Division-II, Ahmedabad–I (for short - *'adjudicating authority"*).

2. Briefly, the facts are that based on an audit objection, a show cause notice dated 7.4.2015 was issued to the appellant, alleging that they had availed CENVAT credit in respect of common taxable services but had failed to maintain separate accounts as stipulated in Rule 6 of the CENAT Credit Rules, 2004. The notice further alleged that the appellant was engaged in trading activity in addition to manufacturing goods, falling under chapter 28,72,75,76 and 81 of the Central Excise Tariff Act, 1985. The notice therefore, *inter alia*, demanded an amount under Rule 6(3)(i) in respect of the period from March 2011 to February 2015 along with interest and also proposed penalty under Rule 15(2) of the CENVAT Credit Rules, 2004 [for short CCR '04] read with Section 11AC of the Central Excise Act, 1944.

3. Vide the impugned OIO dated 4.4.2016, the adjudicating authority decided the aforementioned show cause notice wherein he confirmed the demand of Rs. 4,24,751/- along with interest and also imposed penalty on the appellant.

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

(a) that trading activity is nothing but purchase and sale, covered under sales tax, and hence is not a service; that since it is not a service, it cannot be held as a exempted service;
(b) once credit is reversed under rule 3(5) of the CENVAT Credit Rules, 2004, further reversal is not required under rule 6, ibid;
(c) that mention of trading in negative list is only out of abandon caution; that trading sale was considered as exempted service only w.e.f. 1.4.2011 and therefore, for the period prior thereto, the demand cannot be made; that they would like to rely on the case of Krishna Auto Sales [2015(40) STR 1121];
(d) applying the percentage of trading sales to the total sale, the proportionate credit to be reversed is only Rs. 173/- which stands reversed ;
(e) that since the rule 6 of CCR '04 permits exercising of option, written intimation has already been given before the adjudicating authority; that there is no time limit prescribed for filing such declaration; that the option can be exercised at any point of time or any period of time;
(f) that it is permissible for the appellant to select the alternative under rule 6 of the CENVAT Credit Rules, 2004 for reversing proportionate credit;
(g) that the matter is barred by limitation since the notice was issued on 7.4.2015 for the period covering March 2011 to February 2015.

5. Personal hearing in the matter was held on 17.01.2017. Shri S.J.Vyas Advocate, appeared on behalf of the appellant and reiterated the arguments made in the grounds of appeal. He further relied on two case laws (i) Mahavir Cylinder Limited [2016(341) ELT 361] and UP Telelinks [2015(329) ELT 888].

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 issue to be decided is whether the demand of Rs. 4,24,751/-, confirmed by the adjudicating authority, along with interest and penalty, is correct or otherwise.

7. The dispute, as is evident revolves around Rule 6 of the CCR '04. The adjudicating authority, while confirming the demand, has held as follows:

(a) the activity of the appellant was not merely clearance of input under Rule 3(5) of the CCR '04 as claimed, but trading; that no documentary evidence to the effect is produced to substantiate these claims that these were clearances of inputs as such; that their ledgers clearly show that they had engaged in trading of goods which were non excisable;
(b) that trading activity was defined as exempted services, prior to 1.4.2011 and subsequently, thereafter under notification No. 3/2011-CE(NT) dated 1.3.2011, till the introduction of negative regime. CBEC vide circular no. 943/4/2011-Cx has clarified that even prior to 1.4.2008, trading was an exempted service; that subsequent to the introduction of the negative list regime, vide Section 66D(e), trading of goods has been included in the negative list of services; that the option under rule 6(3A) of CCR '04 is not available to the appellant at this juncture.

8. Rule 6(1) of CCR '04, clearly states that CENVAT credit shall not be allowed on input service used in manufacture of exempted goods or provision of exempted services except in the circumstances mentioned in sub-rule(2). Rule 6(2), *ibid*, puts an obligation on a manufacturer who avails CENVAT credit in respect of inputs and input services, used in both dutiable and exempted final products, to maintain separate records. Rule 6(3), *ibid*, a non-obstante clause, gives a facility to a manufacturer, opting not to maintain separate accounts to either

[a] pay an amount of 6% [appropriate rate] of the value of exempted goods; or
[b] pay an amount as determined under rule 3A; or
[c] maintain separate accounts and take CENVAT credit as per conditions therein and thereafter, pay an amount as per sub rule 3A of CCR '04.

9. The undisputed fact is that the appellant was engaged in trading activity in addition to manufacturing. There is also no dispute as far as the allegation of non maintenance of separate accounts, is concerned. Hence, it was imperative on the appellant, to either, not take CENVAT credit in respect of input service used in trading activity or maintain separate accounts as per Rule 6(2), *ibid.* However, as is already mentioned, the appellant took CENVAT credit in respect of input service used in trading activity and also failed to maintain separate accounts.

10. Now, since applicability of Rule 6 of the CCR '04, is the bone of contention, I would like to address the averments raised by the appellant. The first contention raised by the appellant is that trading activity is not a service and that therefore it cannot be termed as an exempted service. The adjudicating authority has heavily relied upon Rule 2(e) of the CCR '04, notification No. 3/2011-CE(NT) dated 1.3.2011 and Section 66D(e) of the

Finance Act, 1994, to hold that trading activity is an 'exempted service'. The appellant has questioned the Act and the Rules, without giving any plausible reasoning. Governments can bring any activity within the purview of tax/remove the activity from the purview of the tax with a deeming fiction. In this case, trading activity has specifically been kept out of the service tax purview by deeming it as an 'exempted service'. The appellant is free to question the authority of the Government in this regard but, I am afraid he has chosen the wrong forum. Further, the case law of Krishna Auto Sales [2015(40) STR 1121], relied upon by the appellant, has already been distinguished in the impugned original order and I agree with the reasoning put forth by the adjudicating authority.

10.1 During the course of personal hearing, the advocate of the appellant relied on two case laws (i) Mahavir Cyliner Limited [2016(341) ELT 361] and UP Telelinks [2015(329) ELT 888]. I have gone through both the case laws which state that in respect of inputs removed as such under reversal of CENVAT credit, there was no need to again reverse 5%/6% of the value of goods traded. The reliance on these case laws, to put forth the argument that goods removed by the appellant was basically removal of inputs as such on reversal of CENVAT Credit, contradicts the table [in page 8, of the Grounds of appeal] which provides the figures relating to *trading sales without excise*. The case laws relied is of no help when it is admitted by the appellant himself that they had removed certain goods, without reversal of CENVAT credit, which was reflected in their trading account. The averment, therefore, is stands rejected.

11. The second contention raised is that the appellant can exercise the option at any point of time. I am aware of the fact that the adjudicating authority has negated the contention in para 21 of the impugned OIO. However, in keeping with the spirit espoused by the Government while bringing in Rule 6 of the CCR '04, I feel that the adjudicating authority should have condoned the delay and allowed the option available to the appellant in terms of sub rule 3A of Rule 6 of the CENVAT Credit Rules, 2004. My liberal interpretation, finds support in letter no. 334/8/2016-TRU dated 29.2.2016 of JS (TRU), CBEC, New Delhi, the relevant extract of which are reproduced below:

> *(h) Rule 6 of Cenvat Credit Rules, which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services, is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.*
>
> *(i) sub rule (1) of rule 6 is being amended to first state the existing principle that CENVAT credit shall not be allowed on such quantity of input and input services as is used in or in relation to manufacture of exempted goods and exempted service. The rule then directs that the procedure for calculation of credit not allowed is provided in sub-rules (2) and (3), for two different situations.*
>
> *(ii) sub-rule (2) of rule 6 is being amended to provide that a manufacturer who exclusively manufactures exempted goods for their clearance up to the place of removal or a service provider who exclusively provides exempted services shall pay (i.e. reverse) the entire credit and effectively not be eligible for credit of any inputs and input services used.*
>
> *(iii) sub-rule (3) of rule 6 is being amended to provide that when a manufacturer manufactures two classes of goods for clearance upto the place of removal, namely, exempted goods and final products,*

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excluding exempted goods or when a provider of output services provides two classes of services, namely exempted services and output services excluding exempted services, Page 33 of 38 then the manufacturer or the provider of the output service shall exercise one of the two options, namely, (a) pay an amount equal to six per cent of value of the exempted goods and seven per cent of value of the exempted services, subject to a maximum of the total credit taken or (b) pay an amount as determined under sub-rule (3A).

(iv) The maximum limit prescribed in the first option would ensure that the amount to be paid does not exceed the total credit taken. The purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted goods or exempted services and under no circumstances this part can be greater than the whole credit.

[emphasis supplied]

I understand that the amendment to CENVAT Credit Rules, is not retrospective. **However, this amendment reflects the interpretation and intent of the Government.** In-fact Joint Secretary himself states that the rules are *being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.* Even otherwise to demand an amount under Rule 6 which is more than the CENVAT credit availed would clearly be against the spirit of reversal. The appellant in his appeal memorandum has stated that his total trading sales without excise [ie trading] when compared to his manufacturing sales, in respect of the years for which demand has been raised is as follows :

2011-12	0.02%
2012-13	2.29%
2013-14	1.66%
2014-15	0.05%

The total input service credit availed during the entire period of the demand is Rs. 8,62,969/-, while the amount confirmed in terms of Rule 6 of the CCR '04 for the said period is Rs. 4,24,751/-. Surely, demanding such a huge amount for miniscule trading activity, on the grounds that it is exempted service, is definitely against the spirit of reversal under Rule 6 of the CCR '04.

12. The next contention raised by the appellant is that the notice is barred by limitation. The contention is not correct since the notice is issued invoking extended period. The adjudicating authority has given his reasoning for invoking the extended period. I do not find any infirmity in the finding, needing any interference at this stage.

13. In view of the foregoing, I find this a fit case for remand to the adjudicating authority in terms of my finding listed at para 11, supra. The adjudicating authority is directed to verify and determine whether the appellant has correctly discharged the amount in terms of Rule 6(3A of CCR '04 for the period under dispute. In respect of the amount so determined, the appellant is also liable for penalty and interest. The appellant is also directed to provide all the documents to the adjudicating authority, to substantiate his

claim. While remanding the case, reliance is placed on the case of M/s. Associated Hotel Limited [2015(37) STR 723 (Guj.)].

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: 25/01/2017.

Attested

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

BY R.P.A.D

M/s. Kastweel Foundries,
46/A, Near Kiran Bus Stop,
Phase I, GIDC, Vatwa,
Ahmedabad

Copy to:-

1. The Chief Commissioner, Central Excise Zone, Ahmedabad.
2. The Principal Commissioner, Central Excise, Ahmedabad-I
3. The Addl./Joint Commissioner, (Systems), Central Excise, Ahmedabad-I
4. The Dy. / Asstt. Commissioner, Central Excise, Division- II, Ahmedabad-I
5. Guard file.
6. P.A