



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015



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रजिस्टर्ड डाक ए.डी. द्वारा

- क फाइल संख्या : File No : V2(84)/24/Ahd-I/2017-18 / 10605 to 10609
Stay Appl.No. NA/2017-18
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-160-2017-18
दिनांक Date : 28-11-2017 जारी करने की तारीख Date of Issue 11-12-17
श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)
- ग Assistant Commissioner, केंद्रीय कर, Ahmedabad-South द्वारा जारी मूल आदेश सं MP/22/AC/Div.III/2016-17 दिनांक: 27/2/2017, से सृजित
Arising out of Order-in-Original No. MP/22/AC/Div.III/2016-17 दिनांक: 27/2/2017 issued by Assistant Commissioner, Central Tax, Ahmedabad-South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s Perfect Boring Pvt. Ltd.
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथार्थिथि 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 प्रक्रिया 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 ...

(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) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल हॉस्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.



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 अनुसूचि-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."



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ORDER IN APPEAL

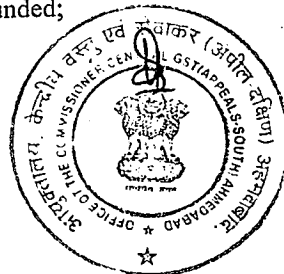
M/s. Perfect Boring Private Limited, Plot No. 3822/A, Phase IV, GIDC, Vatwa Industrial Estate, Ahmedabad- 382 445 [for short – ‘appellant’] has filed this appeal against OIO No. MP/22/AC/Div III/2016-17 dated 27.2.2017, passed by the Assistant Commissioner, Central Excise, Division III, of the erstwhile Ahmedabad-I Commissionerate [for short- ‘adjudicating authority’].

2. Briefly, the facts are that the appellant defaulted on duty payment of Rs. 9.00 lacs pertaining to the month of May 2014 which was subsequently paid on 22.7.2014. Therefore, in terms of Rule 8(3A) of the Central Excise Rules, 2002, the appellant was supposed to clear the goods by making consignment wise payment through PLA, during the period from 6.7.2014 to 22.7.2014. However, it was noticed that the appellant discharged duty of Rs. 16,04,140/- during the said period from his CENVAT account. The appellant met this obligation by payment of Rs. 16,04,140/- through TR 6 /GAR challan no. 00021 dtd 30.1.2015 on 28.2.2015. However, thereafter, the appellant took CENVAT credit of Rs. 16,04,140/- *suo moto* claiming that the duty was paid twice in respect of goods cleared during the period from 6.7.2014 to 22.7.2014. The department therefore, issued a show cause notice dated 22.2.2016 to the appellant inter alia proposing dis allowance of CENVAT credit of Rs. 16,04,140/- which was wrongly availed, along with interest. The notice further proposed penalty on the appellant under Rule 15(1) of the CENVAT Credit Rules, 2004 read with Section 11AC(1)(a) of the Central Excise Act, 1944.

3. This notice was adjudicated vide OIO dated 27.2.2017, wherein the adjudicating authority disallowed CENVAT credit; ordered recovery of interest. No penalty however was imposed on the appellant.

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

- it was never the intent to avail CENVAT credit wrongly and utilize it towards payment of duty and thereby defraud the Government;
- that the present case is of payment of excise duty twice; that they had availed CENVAT credit after intimation to the department; that at best it can be termed as a procedural infraction;
- that the department also cannot retain the excess payment made by the appellant;
- that they would like to rely on the case of M/s. Wires and Fabrics Ltd [2016(338) ELT 626] and Motorola India [2006(206) ELT 90];
- that in the present case the incidence of the duty has not been passed and hence the double payment should be refunded back;
- that they would like to rely on the case of Samrat Forging P Ltd [2017(346) ELT 296]; Vinayak Steels [2016(343) ELT 1110], Hari Narain Industries [2016(339) ELT 278], Sainsons Paper Ind Limited [2016(332) ELT 351], Krishna Engineering Limited [2016(331) ELT 391]; M/s. NOCIL [2015(329) ELT 912], Sopariwala Exports P Ltd [2013(291) ELT 70], Stummp, Schedule & Somappa P Ltd [2015(319) ELT 416];
- that in the above pronouncements the higher judicial forums have held that taking or availing credit *suo moto* is nothing but a procedural lapse and the appellant should not be debarred from its refund for a simple and bonafide mistake;
- that they would like to rely on the case of Duke Consumer Care Ltd [2012(285) ELT 475 (GOD)], wherein it is clearly held that if the appellant has paid duty on his own volition, the department cannot retain the same on any ground and the same must be refunded;
- that the show cause notice is barred by limitation.



5. Personal hearing in the matter was held on 6.11.2017 wherein Shri A.H.Oza, Authorized Representative, appeared on behalf of the appellant and reiterated the grounds of appeal.

6. I find that the appellant has filed the appeal on 26.5.2017 and there is a delay of 21 days in filing the appeal. The appellant has also filed a condonation of delay. In terms of proviso to Section 35(1) of the Central Excise Act, 1944, I condone the delay.

7. I have gone through the facts of the case, the grounds of appeal and the oral contentions raised during the course of appeal. The issue to be decided is whether the appellant was correct in availing *suo moto* CENVAT credit in respect of duty was paid twice in respect of the clearances made during the period from 6.7.2014 to 22.7.2014.

8. The facts are already mentioned in para supra and hence is not being repeated. The dispute is only whether the appellant is eligible for availing *suo moto* CENVAT credit in respect of duty that was paid twice during the period from 6.7.2014 to 22.7.2014. I find that the matter is no longer *res integra*. A dispute in the case of M/s. BDH was referred before the Larger Bench of the Tribunal on the question of *suo moto* credit. The Larger Bench of the Hon'ble Tribunal, held as follows:

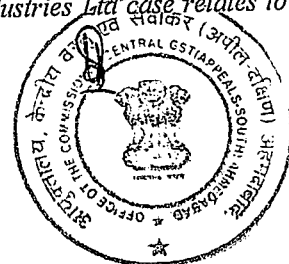
BDH Industries Ltd. [2008 (229) E.L.T. 364 (Tri. LB)]

12. *We find that there is no provision under Central Excise Act and Rules allowing suo moto taking of credit or refund without sanction by the proper officer. The appellant's contention that refund in respect of duty paid twice cannot be considered as refund of duty and is only the accounting error does not appeal to us as the debit entry made in the accounts is towards payment of duty only and therefore refund of these amounts has to be considered as refund of duty only. The PLA account and the credit accounts are required to be submitted to the department and any correction carried therein, need to have department's sanction. We also note that the law relating to refund has been fully analysed by the Apex Court in the case of Mafatlal Industries (cited supra) which makes it very clear that all types of refund claim be there of excess duty paid or otherwise are to be filed under Section 11B and have to pass the proof of not passing on the incidence of duty to others. The recent decisions of Hon'ble Supreme Court in the case of Sahakari Khand Udyog and Others clearly laid down that all refunds have to pass through doctrine of unjust enrichment, even if it is not so expressly provided for in the statute. From these decisions it clearly emerges that all types of refund have to be filed under Section 11B of the Central Excise Act and no suo moto refund can be taken unless and until the department is satisfied that the incidence of duty has not been passed on.*

13. *In view of above, we answer the reference made to us by holding that all types of refund have to be filed under Central Excise Act and Rules made thereunder and no suo moto credit of the duty paid in excess may be taken by the assessee. The matter is now sent back to the referral bench for passing appropriate orders on the appeal before it.*

Further, I find that the Hon'ble CESTAT Mumbai in appeal nos. E/849/07, E/92/05 and E/CO/185/05 and E/92/05 in the case of M/s. CEAT and M/s. Balkrishna Industries decided on 5.3.2010, [downloaded from the website of CESTAT], has held as follows:

The Tribunal answered the reference holding that all types of refund have to be filed under the Central Excise Act and Rules made thereunder and no suo- motu credit, of the duty paid in excess may be taken by the assessee. We find that the ratio of the BDH Industries Ltd case relates to



excess duty paid and the procedure to be followed for getting back such excess duty paid. Ratio of that case does not apply to the subject case.

9. The impugned credit had been legitimately earned by the assessee on procurement of inputs on payment of duty and used for payment of duty following the amendment of Cenvat Credit Rules under Budget 2003. Vide Circular No. 7/16/2003- CX dated 6.3.03, the CBEC had also clarified that it was considered appropriate not to put any cap on the use of the AED (GSI) credit accruing prior to 1.3.2003. In terms of the provisions enacted in Finance Act, 2004, the debits were held not amounting to payment of duty and the assessee was required to meet the same obligation by payment from PLA. In the instant case, the debits were held to be of no consequence when the assessee was required to pay duty initially discharged using AED(GSI) credit. Therefore, the credit needed to be restored and was correctly ordered so by the Commissioner. We find considerable merit in the finding of the Commissioner that but for the statutory changes introduced with effect from 1.3.03 following which the assessee had discharged the duty liability on tyres using AED(GSI), it would have continued to have the impugned credit in its account. We also find that the Commissioner correctly held that the respondent had taken the impugned credit under valid duty paying documents under cover of which inputs had been received. Accordingly, we sustain the impugned order and reject the appeal filed by the Revenue.

[emphasis supplied]

9. The appellant's case is not similar to that of M/s. CEAT, in as much as the duty debited through CENVAT account, during the period from 6.7.2014 to 22.7.2014, was held to be not amounting to payment of duty in terms of Rule 8(3A) of the Central Excise Rules, 2002, and the assessee was required to meet the same obligation by payment from PLA. In the instant case, the duty was paid through CENVAT account deliberately in violation of the statutory provisions. I find that in the case of M/s. CEAT, supra, the para 9 states that "*credit has been legitimately earned by the assessee.....*", while facts in the case is just the opposite and duty payment through CENVAT was not legitimate. Therefore, the ratio of CEAT is not applicable to the case. The appellant met this obligation by payment of Rs. 16,04,140/- through TR 6 /GAR challan no. 00021 dtd 30.1.2015 on 28.2.2015 and made good the statutory violation and thereafter he took *suo moto* CENVAT credit of the amount paid through CENVAT account. In view of the judgement of the Hon'ble Tribunal in the case of M/s. BDH Industries, I find that the appellant has wrongly taken the suo moto CENVAT credit because admissibility of re-credit will have to be examined by the authorities in view of the statutory violation and non payment of duty by the appellant. No legitimate right exists for suo moto credit in terms of the decision of CEAT, supra.

10. In view of the foregoing, the appeal is rejected and the impugned OIO dated 27.2.2017, is upheld.

11. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.


उमा शंकर
(उमा शंकर)

केन्द्रीय कर अधिकृत (अपील्स)



Date: 20.11.2017
10.2017

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Attested


(Vinod Lukose)
Superintendent,
Central Tax(Appeals),
Ahmedabad.

By RPAD.

To,

M/s. Perfect Boring Private Limited,
Plot No. 3822/A, Phase IV, GIDC,
Vatwa Industrial Estate,
Ahmedabad- 382 445

Copy to:-

1. The Chief Commissioner, Central Tax, Ahmedabad Zone .
2. The Principal Commissioner, Central Tax, Ahmedabad South Commissionerate.
3. The Deputy/Assistant Commissioner, Central Tax, Division III, Ahmedabad South.
4. The Additional Commissioner, System, Central Tax, Ahmedabad South Commissionerate.
5. Guard File.
6. P.A.

