

रजिस्टर्ड डाक ए.डी. द्वारा

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-165-2017-18 दिनाँक Date: 20-11-2017 जारी करने की तारीख Date of Issue \(\lambda \frac{1}{2} \rac{1}{2} \ra

श्री उमा शंकर आयुक्त (अंपील) द्वारा पारित Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Deputy Commissioner, केन्द्रीय उत्पाद शुल्क, Ahmedabad-l द्वारा जारी मूल आदेश सं 02/Div-I/O&A/16-17 दिनाँक: 31/3/2017, से सृजित

Arising out of Order-in-Original No. 02/Div-I/O&A/16-17 दिनाँक: 31/3/2017 issued by Deputy Commissioner, Central Excise, Ahmedabad-I

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent Shri Suresh BhaiC. Mistry 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।



- (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 अंतर्गतः—

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण <u>(सिस्टेट)</u> की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ—20, न्यू मैन्टल हास्पिटल 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. 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.

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

This is an appeal filed by Shri Shaileshbhai Devjibhai Patel (herein after referred to as the appellant), a partner in M/s Akshar Steel Industries (M/s ASI for brevity) against the OIO No. 02/Div-1/O&A/16-17 dtd. 31.03.2017 (herein after referred to as the impugned order) passed by the jurisdictional Dy. Commissioner (herein after referred to as the adjudicating author ty).

- 2. The brief facts of the case are that the appellant was a partner in the partnership firm M/s ASI which was not registered with central excise but was engaged in manufacture of excisable goods. It was also found that they had a frontline pseudo-manufacturing unit in the name of M/s Smart Cotton (M/s SC for brevity). M/s SC did not have a manufacturing premises and goods manufactured in the factory of M/s ASI were cleared under the invoices of M/s SC. Accordingly a search was conducted at the premises of both the units and in a statement, the appellant confessed that there was no physical existence of M/s SC and it got goods manufactured from M/s ASI and the central excise duty was evaded. He also made part payment towards duty liability. Consequently statements of their buyers were also recorded and a show cause notice demanding central excise duty of Rs. 46,27,192/- alongwith interest and proposed imposition of penalty. The adjudicating authority, after considering evidences and records, among other orders for notices and co-noticees, imposed a penalty of Rs. 1,00,000/- on the appellant.
- 3. Being aggrieved by the imposition of penalty, the appellant has filed this appeal on the following grounds:
 - (a) That the adjudicating authority has not given any findings on the judgements given by him;
 - (b) That the statement of the appellant was not recorded at material time and in the show cause notice, there is no allegation that the appellant has actively involved in disputed case and the day to day activity of M/s ASI and M/s SC;
 - (c) That when main appellant's case is settled before the Settlement Commission, no penalty is imposable on co-noticee and that when partnership firm is penalized, no penalty is imposable on partner;
 - (d) The appellants sought support from the following case laws:

Commissioner of Customs (Export), Mumbai vs. Mahendrakumar Darewala – 2016 (340) ELT-727 (Tri-Mum.) and Kinship Agency Pvt. Ltd. Vs. Commissioner of Customs, Nhava Sheva regarding when main appellant's case is settled before the Settlement Commission, no penalty is imposable on co-noticee and a case , Pravin N Shah vs. CESTAT – 2014 (305) ELT-480 (Guj) regarding when partnership firm is penalized, no penalty is imposable on partner.

4. The personal hearing in the case was held on 11.10.2017 in which Shri Naimesh K Oza, Adv. appeared on behalf of the appellants. He reiterated the grounds of appeal and pointed out that no statement was recorded and the show cause notice does not list that.

- I have carefully perused the documents pertaining to the case and submitted by the appellant alongwith the appeal. I have considered the arguments made by the appellants in their appeal memorandum as well as oral submissions during personal hearing.
- I find that the issue to be decided in the instant case is whether the penalty has been rightly imposed on the appellant in view of the circumstances of the case.
- From the findings given in the impugned order in para no. 12, I find that M/s ASI filed an application before the Settlement Commission -Mumbai Bench on 25.04.2012 and the Settlement Commission, vide its order No. 45/Final Order/CEX/NGG/2013 dated 30.04.2013 settled the case as per details in its order dtd. 30.04.2013. I find force in the argument given by the appellant that once the case of main appellant has been settled, no penalty action can be taken against the co-noticees. I have perused the cases cited by the appellant in his favour i.e. Commissioner of Customs (Export), Mumbai vs. Mahendrakumar Darewala - 2016 (340) ELT-727 (Tri-Mum.) and Kinship Agency Pvt. Ltd. Vs. Commissioner of Customs, Nhava Sheva regarding when main appellant's case is settled before the Settlement Commission, no penalty is imposable on co-noticee. I also hold the same that no penalty is imposable once the main appellant's case is settled.
- In view of the above findings, the appeal is allowed. 8.
- The appeal is disposed off accordingly with consequent relief. 9.

अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स) अहमदाबाद.

Date: 20:11.2017

एवं संवाकर क्या तक जिल्ह

ATTESTED

(D.Upadhyaya)

Superintendent (Appeals), Central GST, Ahmedabad.

BY R.P.A.D.

Shri Sureshbhai C. Mistry, 201, Spectrum Commercial Center, Opp. Relief Cinema, Ahmedabad

Copy To:-

(1) The Chief Commissioner, CGST, Ahmedabad Zone.

(2) The Commissioner, CGST, Ahmedabad (North). (3) The Asstt./Dy. Commissioner, CGST, Div-II (Naroda Road), Ahmedabad (North)

(4) The Asstt./Dy. Commissioner, Systems, CGST, Ahmedabad (North)

(ゟ) Guard File. (6) P.A. File.

