



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,
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Ambavadi, Ahmedabad-380015



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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)/42/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-220-2017-18
दिनांक Date : 27-12-2017 जारी करने की तारीख Date of Issue 27/12/2017

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

ग Deputy Commissioner, केन्द्रीय कर, Ahmedabad-South द्वारा जारी मूल आदेश सं MP/03/Dem/2017-18 दिनांक:
27/4/2017, से सृजित

Arising out of Order-in-Original No. MP/03/Dem/2017-18 दिनांक: 27/4/2017 issued by
Deputy Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s The Anup Engineering Ltd
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 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 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 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 मामले 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 मैनटल 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 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 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।

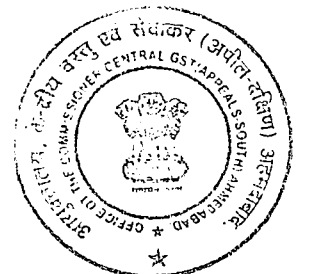
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 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 appeal is filed by M/s. The Anup Engineering Ltd., situated B/h 66 KVA Substation, Odhav Road, Odhav, Ahmedabad- 382 415 (for short "the appellant") against OIO No. MP/03/Dem/2017-18 dated 27.4.2017 passed by the Assistant Commissioner, Central Excise, Division V, Ahmedabad-I Commissionerate.

2. The facts briefly are that a show cause notice dated 21.12.2016 was issued to the appellant, *inter alia*, seeking inclusion of the additional consideration collected towards third party inspection charges to the transaction value for the period from December 2015 to August 2016; demanding duty along with interest and penalty and further proposing penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC(1)(a) of the Central Excise Act, 1944. This notice was issued in terms of the provisions of section 11A(7A) of the Central Excise Act, 1944.

3. The adjudicating authority vide his impugned OIO dated 27.4.2017 directed inclusion of the amount received as additional consideration towards third party inspection charges in the assessable value of the excisable goods; confirmed the duty on the additional consideration along with interest and further imposed penalty under Section 11AC(1)(a) of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002.

4. Feeling aggrieved, the appellant has filed the appeal against the impugned OIO dated 27.4.2017, raising the following averments:-

- (a) the demand is not made on actual recovery, but on presumptive basis;
- (b) that the appellant has neither charged nor recovered third party inspection charges and therefore it cannot be included in the assessable value on notional basis;
- (c) that the appellant delivered the goods at his factory and therefore the assessable value has to be decided at the time and place of removal ie factory gate of the appellant; that after taking delivery when the buyer undertakes at his own cost and desire, inspection from third party, such cost has no relation to manufacture and sale by the appellant and therefore it cannot form part of the assessable value;
- (d) the contract provides third party inspection by the agencies specified by the buyer in the contract at the cost of the buyer, which is to be reimbursed by the buyer;
- (e) the goods are marketable even without third party inspection; the marketability/sale of the goods does not depend upon third party inspection;
- (f) third party inspection is neither a condition for sale nor has any effect on the manufacturing process undertaken by the appellant;
- (g) the goods are ready for delivery after which inspection is done; thus the goods are marketable even before the inspection;
- (h) that when such inspection is not done by the appellant, the cost of it is not to be borne by the appellant;
- (i) that since the inspection is organized by the appellant for convenience sake, the payment at the first instance is made by the appellant and thereafter it is reimbursed by the buyer; and
- (j) that extended period cannot be invoked and the demand beyond the period of limitation is time barred.

5. Personal hearing in the matter was fixed on 18.12.2017, but since I was busy in a meeting with the Chief Commissioner, the personal hearing could not be held. Shri S. J. Vyas, Advocate, who was present for the personal hearing had to return without

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attending the personal hearing. However, thereafter vide his letter dated 18.12.2017, received on 20.12.2017, Shri Vyas, Advocate, requested that the matter may be decided on the basis of grounds of appeal. In the letter he further reiterated his submissions made in the grounds of appeal.

5. I find that the main issue to be decided is whether as alleged by the department, third party inspection charges would form part of the Assessable Value, for computing Central Excise duty or otherwise.

6. Before moving on to the facts of the case, the provisions, on which the case revolves, is reproduced below for ease of reference:

CENTRAL EXCISE ACT, 1944

Section [4. Valuation of excisable goods for purposes of charging of duty of excise. —

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;

(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

(2)....

(3)....

(d) "transaction value" means the price actually paid or payable for the goods, when sold, and includes in addition to the amount charged as price, any amount that the buyer is liable to pay to, or on behalf of, the assessee, by reason of, or in connection with the sale, whether payable at the time of the sale or at any other time, including, but not limited to, any amount charged for, or to make provision for, advertising or publicity, marketing and selling organization expenses, storage, outward handling, servicing, warranty, commission or any other matter; but does not include the amount of duty of excise, sales tax and other taxes, if any, actually paid or actually payable on such goods.

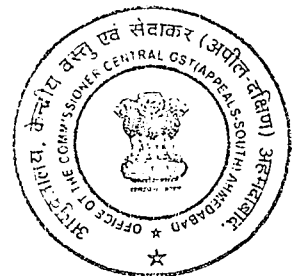
Central Excise Valuation (Determination Of Price Of Excisable Goods) Rules, 2000

Rule 6. Where the excisable goods are sold in the circumstances specified in clause (a) of sub section (1) of section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.

[Provided that where price is not the sole consideration for sale of such excisable goods and they are sold by the assessee at a price less than manufacturing cost and profit, and no additional consideration is flowing directly or indirectly from the buyer to such assessee, the value of such goods shall be deemed to be the transaction value.]

7. As is mentioned by the adjudicating authority in para 9 of his impugned OIO, the appellant manufactures large taylor-made machineries like heat exchangers, pressure vessels, etc. which are used in industries like petroleum refining, pharmaceutical manufacturing, power generation. I find as is mentioned in the impugned OIO that buyers had specified in the purchase orders that on completion of the manufacturing process of their machinery, a third party inspection and certification should be carried out, only after which delivery would be taken. It is also an admitted fact by the appellant in the grounds of appeal that since the inspection was organized by them, for the sake of convenience, the payment at the first instance was made by the appellant and thereafter reimbursed by the buyer.

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8. Valuation as is well known is governed by Section 4 of the Central Excise Act, 1944. In case of sale of goods, wherein delivery is at the time and place of removal and where the buyer and seller are not related and price is the sole consideration of the sale, the value of such goods would be the 'transaction value'. In other cases, resort is to be taken to Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Rule 6 of the Valuation Rules states that where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee. I find that in the present case, the buyer has collected *third party inspection charges* and had not included it in the assessable value. Therefore, the amount so collected is an additional consideration and would fall within the ambit of Rule 6 of the Valuation Rules, 2000, supra.

9. I find that what is significant in such cases is primarily the product in question. The appellant's products viz. heat exchangers, pressure vessels, are used in sensitive industries and hence are critical. The buyer, through third party inspection, ensures that the tailor-made product is as per the specification sought and adheres to safety standards. It is not a case wherein the product manufactured is of general nature, produced in mass, not tailor-made wherein some of the buyers insist on a third party inspection. The difference between a general product and a tailor-made product of such nature also negates the averment raised that even without the third party inspection the goods were marketable/saleable. I find it difficult to agree with the argument that [a hypothetical situation] even if a third party during the course of inspection would not grant a clearance, the product would be saleable. It would not only be difficult to find a new buyer since the product is tailor-made, but there is also a possibility that such a sale could result in mishaps.

10. The appellant in his grounds has raised a plea, that the third party inspection charges computed @ 0.5 % is on presumptive basis. I find that numerous notices have been issued in the matter. If as per the say of the appellant, the amount computed by the department, was based on assumption, the appellant it was expected should have come forward with the correct figures since the appellant himself in the grounds have stated that since the inspection is organized by them for the convenience of the buyer, the payment for such inspection in the first instance was made by them and was thereafter reimbursed by the buyer. Failure to share the data readily available with them and thereafter questioning the computation methodology adopted by the department, does not help the appellant's case. The argument questioning the computation, therefore, lacks coherence and is therefore rejected.

11. I find that the appellant in his grounds has stated that extended period cannot be invoked and that the demand is beyond the period of limitation. I find that the notice



pertains to the period from December 2015 to August 2016, and the show cause notice was issued on 21.12.2016. The argument of the appellant lacks merit since it is factually incorrect as the demand was issued well within the normal period.

12. In view of the foregoing , the appeal is rejected and the impugned OIO dated 27.4.2017, is upheld.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स)

Date: 27.12.2017

Attested

Vinod Lukose

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

BY R.P.A.D

M/s. The Anup Engineering Ltd.,
Behind 66 KVA Substation,
Odhav Road,
Odhav,
Ahmedabad- 382 415

Copy to:-

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



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