केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

केंद्रीय कर शुल्क भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
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क फाइल संख्या : File No : V2(39)/82/Ahd-I/2016-17
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-238-2017-18**
दिनाँक **29.12.2017** जारी करने की तारीख Date of Issue 16-1-2018

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

ग Asstt., Div-III केन्द्रीय उत्पाद शुल्क, Ahmedabad-I द्वारा जारी मूल आदेश सं **AC/08/Div.-II/2016-17** दिनाँक: **29/8/2016,** से सृजित

Arising out of Order-in-Original No. **AC/08/Div.-II/2016-17** दिनाँक: **29/8/2016** issued by Asstt. Div-III Central Excise, Ahmedabad-I

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

M/s. Pramukh Polypack
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 वताए गए मामलो 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 गाल 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।

केन्द्रीय कर आयुक्त (अपील-दक्षिण) अहमदाबाद

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या नाल 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 ड्यूटी 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.

सीगा 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) 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, अहगदाबाद 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 withstancing 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 anc penalty are in dispute, or penalty, where penalty alone is in dispute."

केन्द्रीय उत्पाद शुल्क एवं सेवाकर (अपील-दक्षिण) आयुक्तालय, अहमदाबाद. OFFICE OF THE COMMISSIONER (APPEALS-SOUTH), CENTRAL EXCISE & SERVICE TAX, AHMEDABAD

ORDER IN APPEAL

This appeal has been filed by M/s Pramukh Polypack (herein after referred to as the appellants) against the OIO No. AC/08/Div-II/2016-17 dtd. 29.08.2016 (herein after referred to as the impugned order) passed by the Assistant Commissioner, Division-II, Ahmedabad (herein after referred to as the adjudicating authority).

2. The brief facts of the case are that the appellants had availed and utilized cenvat credit on the inputs bought from M/s Castle Polymers Pvt. Ltd. (CPPL for the sake of brevity). M/s CPPL was not required to pay any duty on their final products under the Notification No. 04/2006-CE dtd. 01.03.2006, the present notification No. 12/2012-C.E. dtd. 17.03.2012 (herein after referred to as the said notification) which fully exempts without any condition the plastic material processed in India out of the scrap or the waste of goods. As per the said notification, the final products sold to the appellants by M/s CPPL were fully exempt and no central excise duty was required to be paid, however M/s CPPL paid duty on their products sold to the appellants and the appellants in turn availed and utilized cenvat credit thereon. It was also noted that the CBEC Circular No. 940/01/2011-CX dtd. 14.01.2011 also clarified that the manufacturer cannot opt to pay the duty in respect of unconditionally fully exempted goods and he cannot avail the cenvat credit of the duty paid on inputs. In such cases the duty paid has to be deposited with the Central Government in terms of Section 11D of the Central Excise Act, 1944. Accordingly a show cause notice dtd. 12.08.2015 was served upon the appellants demanding wrongly availed cenvat credit of Rs. 2,22,477/- along with interest and proposal of imposition of penalty. The adjudicating authority, vide the impugned order, confirmed the demand and also imposed penalty of Rs. 1,11,239/-.

3. Being aggrieved by the impugned order, the appellants have filed this appeal on the following grounds:

a) That the demand has been confirmed only on the basis of the CBEC Circular No. 940/01/2011-CX dtd. 14.01.2011;

b) That the issue of payment of duty on exempted/non-excisable goods and its subsequent availment of cenvat credit has been settled vide the case of Neuland Laboratories Ltd. Vs. CCE, Hyderabad – 2015 (317) ELT-705 (Tri.Bang.) and this case has been upheld by the Hon'ble high Court of Andhra Pradesh – 2015 (319) ELT-A181 (AP);

4. The personal hearing in the case was held on 08.11.2017 in which Shri R. Subramanya, Advocate appeared on behalf of the appellants. He reiterated the grounds of appeal and submitted that no SCN has been issued to the principal manufacturer and also submitted a copy of case cited on 2015 (317) ELT-705.

5. I have carefully perused the documents pertaining to the case and submitted by the appellants along with the appeal. I have considered the arguments made by the appellants in their appeal memorandum as well as oral submissions during personal hearing.

6. I find that the issue to be decided in the instant case is whether the demand has been rightly confirmed by the adjudicating authority on the ground mentioned in the impugned order.

7. The genesis of the dispute is that M/s. Castle Polymers, Ahmedabad, manufacturer of reprocessed plastic granules, which is absolutely exempted vide notification Nos. 4/2006-CE dated 1.3.2006 and 12/2012-CE dated 17.3.2012, had cleared the goods to the appellant, on payment of duty. A show cause notice dtd. 01.05.2015 was issued to M/s Castle Polymers for recovering the amount of duty and the show cause notice was adjudicated vide OIO No. AHM-EXCUS-001-COM-003-16-17 dated 15.2.2016 wherein the Principal Commissioner, Central Excise, Ahmedabad-I, has held that (refer para 32 of the impugned OIO) "M/s. Castle Polymers Pvt. Ltd., Ahmedabad had wrongly, and in contravention of the provisions of Section 5A(1A) of the CEA, 1944, paid an amount representing it as Central Excise duty on goods which were unconditionally and absolutely exempted from payment of Central Excise duty and collected the same from their buyers. Hence, no duty was required to be discharged by M/s. Castle Polymers Pvt. Ltd."

8. In this regard, I find that CBEC has issued circular no. 940/1/2011-CX., dated 14-1-2011, which clarifies as follows:

> *2. It is further clarified that in case the assessee pays any amount as Excise duty on such exempted goods, the same cannot be allowed as "CENVAT Credit" to the downstream units, as the amount paid by the assessee cannot be termed as "duty of excise" under Rule 3 of the CENVAT Credit Rules, 2004.*
>
> *3. The amount so paid by the assessee on exempted goods and collected from the buyers by representing it as "duty of excise" will have to be deposited with the Central Government in terms of Section 11D of the Central Excise Act, 1944 .* ***Moreover, the CENVAT Credit of such amount utilized by downstream units also needs to be recovered in terms of the Rule 14 of the CENVAT Credit Rules, 2004.***
>
> [emphasis supplied]

The departmental view in such situation is vividly clarified vide the above circular.

9. The appellants however has relied upon the below mentioned case.

[a] Neuland Laboratories Limited [2015(317) ELT 705 and 2015(319) A 140 (AP) – relevant extracts

> ***7.*** *Further, the Board's Circular No. 940/1/2011-CX, dated 14-1-2011 was also brought to my notice. In this Circular, it has been stated that where an assessee pays Excise duty on exempted goods, the amount recovered as Excise duty has to be deposited with the Central Government and Cenvat credit also needs to be recovered in terms of Rule 14 of the Cenvat Credit Rules, 2004. Rule 14 of the Cenvat Credit Rules, no doubt, provides for recovery of credit taken. The Board assumes that if an assessee takes credit of duty which was not required to be paid but paid, availment of credit would attract the provisions of Rule 14 of the Cenvat Credit Rules. The conclusion is that the credit which was taken wrongly would arise when an assessee is required to determine whether the inputs/capital goods received by him are liable to duty or not and whether duty is payable or not. There is no rule which puts an obligation on the receiver of goods. When we take note of the fact that the assessee may receive inputs/capital goods/services classifiable under almost all the headings, it is difficult to imagine that legislature would require the assessee to determine whether duty is payable for all these items or not and then take credit. Even a jurisdictional Central Excise officer may not have all the items listed in the Schedule for assessment. In fact, assessment has been taken away even from the Central Excise officer. That being the case, the Board's Circular which has been issued without taking into consideration and considering the implications of the provisions and implications of the instructions on the assessees cannot be applied blindly to arrive at a conclusion against the assessee.*

This case was upheld by the Hon'ble High Court of Andhra Pradesh, wherein the Court held as follows:

> "This appeal is sought to be preferred against the judgment and order of the learned Tribunal dated 5-9-2013 and sought to be admitted on the following suggested questions of law.
> "(i) Whether the Hon'ble Tribunal is correct in allowing the respondent to avail Cenvat credit on Ethanol, a non-excisable commodity, under Rule 3 of Cenvat Credit Rules, 2004, which provides that a manufacturer of final product shall be allowed to take the credit of duty of Excise specified in the First Schedule to the Central Excise Tariff Act, more so when the Central Excise Officer at the supplier's end has held the product to be wrongly classified and paid duty wrongly with intention to pass the unutilized Cenvat credit to customers?
> (ii) Whether the Hon'ble Tribunal is correct in setting aside the order of the Commissioner (Appeals-I), Hyderabad against the respondent (MLL), when they availed the credit contrary to the provisions of Rule 3 read with Rule 9(5) of the Cenvat Credit Rules, 2004?"
>
> We have heard the learned Counsel for the appellant and gone through the impugned judgment and order of the learned Tribunal.

We have noticed that the learned Tribunal on fact found that in this case duty levied on the raw material has actually been paid. Once it is found on fact and it is not challenged on the ground of any perversity, the exemption is applicable automatically. The learned Tribunal has relied on the decision of the Madras High Court in the case of *Commissioner of Central Excise, Chennai-I* v. *CEGAT, Chennai* - 2006 (202) E.L.T. 753 (Mad.) and recorded that the facts in that case and the present case are identical and therefore, the said decision is applicable to the present case.

Hence, we do not find any reason to interfere with the judgment and order of the learned Tribunal.

[b] However, I find that the High Court of Bombay in the case of Nestle India Limited [2012(275) ELT 49 (Bom)] decided a similar matter, by holding as follows:

> ***5.*** *Mr. Ferreira, learned Assistant Solicitor General for the appellant, submitted that the scheme of law is that if, excise duty is collected, a person at subsequent place is entitled to claim Modvat credit. According to Mr. Ferreira, learned Assistant Solicitor General, this can be so if, duty is validly collected at an earlier stage. In this case duty was not payable at all at the place outside Goa, since no duty can be levied on job work but only on manufacture and, therefore, the respondents are not entitled to claim any Modvat credit. Though this submission appears to be reasonable and in accordance with law, we find it not possible to entertain this submission in the facts of the present case since at no point of time the Revenue questioned the applicability of the excise duty at the place outside Goa. Those assessments have been allowed to became final and the goods have been removed from the jurisdiction of the Excise Officer at that place and brought to Goa. Now, in Goa it will not be permissible to allow the Revenue to raise the contention that the assessee in Goa cannot claim Modvat credit in Goa because duty need not be paid outside Goa.*
>
> ***6.*** *As we have observed that the assessment is allowed to be final, it would not be legal and proper to allow the Revenue to raise the question on the basis of Modvat credit. Indeed, now the payment of excise duty must be treated as valid, therefore, the claim of Modvat credit must be treated as excise duty validly paid.*
>
> [emphasis supplied]

I find that the High Court of Bombay has held that no credit is admissible in case the goods are not leviable to duty. The High Court allowed the credit in the above instance only because the assessment at the duty payment end had become final. The judgement upholds the rationale of the clarification, issued by the Board vide circular dated 14.1.2011. It is true however, that the assessing officer in-charge of the appellant, cannot sit in judgment as to whether the duty was payable or not on the goods supplied. Since it is on record that the _duty payment by M/s. Castle Polymers, Ahmedabad, [the supplier of the inputs in the instant case] was objected to by the Department by issuing a notice, which was subsequently confirmed by the Principal Commissioner, ibid, following the judgement of the Hon'ble High Court of

Bombay, I hold that CENVAT credit in such cases cannot be allowed, therefore, I uphold the impugned OIO dated 29.08.2016 wherein the adjudicating authority has ordered recovery of the CENVAT credit along with interest.

11. In view of the foregoing, the appeal is rejected and the impugned OIO dated 29.8.2016, is upheld.

11. The appeal is disposed off accordingly.

अपीलकर्ता द्वारा दर्ज की गयी अपील का निपटारा उपरोक्त तरीके से किया जाता है !

(उमा शंकर)
केंद्रीय कर आयुक्त (अपील्स)
अहमदाबाद
दिनांक: 29.12.2017

सत्यापित

(धर्मेंद्र उपाध्याय)
अधीक्षक (अपील्स),
केंद्रीय कर, अहमदाबाद

By R.P.A.D.

To:

M/s Pramukh Polypack,
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Copy to:-

(1) The Chief Commissioner, CGST, Ahmedabad Zone,
(2) The Commissioner, CGST, Ahmedabad (South),
(3) The Dy./Astt. Commissioner, CGST, Div.-III, Ahmedabad (South),
(4) The Dy./Astt. Commissioner(Systems),CGST, Ahmedabad (South),
(5) Guard File,
(6) P.A.File.