



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

केंद्रीय कर भवन,

7th Floor, GST Building,

Near Polytechnic,

सातवीं मंजिल, पोलिटेकनिक के पास,

Ambavadi, Ahmedabad-380015

आम्बावाडी, अहमदाबाद-380015

☎ : 079-26305065

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(29)/12/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

68470688

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-258-2017-18
दिनांक Date : 19-01-2018 जारी करने की तारीख Date of Issue

1-2-2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Asst. Commissioner, केन्द्रीय कर, Ahmedabad-South द्वारा जारी मूल आदेश सं AC/02/Div-II/2016-17 दिनांक: 28/4/2017, से सृजित

Arising out of Order-in-Original No. AC/02/Div-II/2016-17 दिनांक: 28/4/2017 issued by Asst. Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appel ant / Respondent
M/s Bodal Chemicals Ltd.
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथारिथति 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 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 :

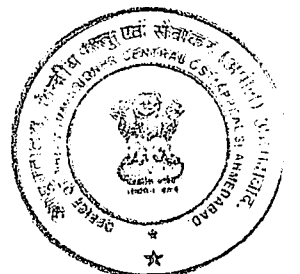
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(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 हैं।

(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 गान्य की गई है और ऐसे आदेश जो इस आदेश 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 दिनोंक 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.

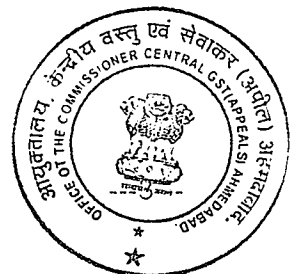
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 मेटल हॉस्पिटल कम्पाउण्ड, मेघानी 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 सं 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 दण्ड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अपील का मूल्य 1 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 होया "कर्तव्य की मांग" (Duty Demanded) :-

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेन्वैट क्रेडिट की राशि;
- (iii) सेन्वैट 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 का निराकरण करता है।

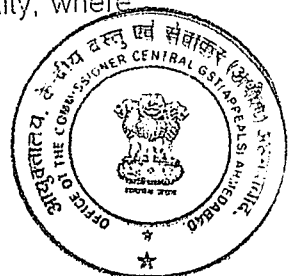
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 का 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 Bodal Chemicals Ltd, Unit-III, Plot No.2102, Phase-III, GIDC, Vatva, Ahmedabad 382445 (henceforth, "appellant") has filed the present appeal against the Order-in-Original No.AC/02/Div-II/2016-17 dated 28.04.2017 (henceforth, "impugned order") passed by the Assistant Commissioner, Central Excise, Div-II, Ahmedabad-I (henceforth, "adjudicating authority").

2. To state briefly, the facts of the case are that the appellant, a manufacturer of Dye Intermediates, was using coal in its boiler for generation of steam required for manufacture of finished products. Based on departmental audit, a show cause notice was issued on 10.09.2016 demanding central excise duty of Rs.2,126/- on the Fly Ash generated by burning of coal under heading 2611 of the Central Excise Tariff Act, 1985 (CETA, 1985) in terms of Notification No.2/2011-CE dated 01.03.2011. The adjudicating authority confirmed the duty demand alongwith interest and imposed equal penalty under section 11AC(c) of the Central Excise Act, 1944 read with rule 25 of the Central Excise Rules, 2002. The appellant has disagreed with the impugned order and has preferred this appeal.

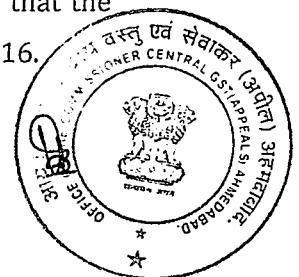
3. In the grounds of appeal, the main points, in brief, are as follows-

3.1 Appellant submits that impugned order has been passed in violation of principles of natural justice as the submissions made before adjudicating authority have not been considered.

3.2 Appellant states that for charging duty of excise, twin conditions of manufacture and marketability have to be proved by the department; that show cause notice as well as impugned order clearly testify that the Fly Ash was generated during the course of manufacture of excisable goods and no process of manufacture was undertaken by the appellant for manufacture of Fly Ash.; that therefore, Fly Ash cannot be considered as a manufactured product chargeable to duty of excise.

3.3 Appellant states that adjudicating authority has not recorded any findings as to why the decisions relied upon were not followed; that the adjudicating authority has also not given any findings on their plea of limitation.

4. In the personal hearing held on 30.11.2017, Shri N K Tiwari, Consultant represented the appellant and reiterated the grounds of appeal. He stated that the issue was covered in the Board's Circular 1027/15/2016-CX dated 25.04.2016.

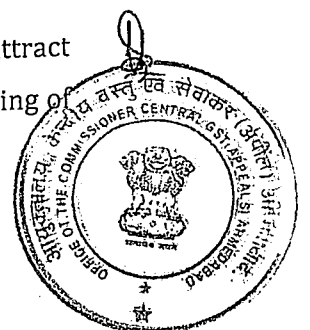


5. I have carefully gone through the appeal. The issue to be decided is whether Fly Ash generated from combustion of coal used in the boiler for generation of steam is leviable to duty of excise or not. As per adjudicating authority, where Cenvat credit was availed, central excise duty @ 6% was payable on Fly Ash vide Notification No.2/2011-CE dated 01.03.2011, as amended by Notification No.19/2012-CE dated 17.03.2012 and accordingly, appellant was liable to pay Rs.2,126/- during 2012-13 and 2013-14.

5.1 I find that the issue relating to excisability of Fly Ash has been specifically dealt with in Madras High Court's decision in the case of **Mettur Thermal Power Station v. C.B.E. & C., New Delhi** [2016(335) E.L.T. 29(Mad.)] whereby in a writ petition, Hon'ble High Court decided that Fly Ash cannot be said to have gone through any manufacturing process and hence cannot be subject to levy of excise duty. This case was further affirmed by Hon'ble High Court in writ appeal filed in the case of **C.B.E. & C., New Delhi v. Mettur Thermal Power Station** [2017(349) E.L.T. 708 (Mad.)]. I extract para 24 of the decision where it was clearly held that mere marketability of the product alone would not suffice to levy duty on the 'fly ash', there being no manufacturing process involved.

24. From the above judgment of the Supreme Court, it is clear that the first test in the process of levy of excise duty is that the product has to be produced or manufactured and the second test being that the product so produced or manufactured should be a marketable commodity. Further, the Supreme Court has also categorically held that levy of excise duty is on the manufacture or production of the goods and that leviability of duty is linked to its manufacture or production. Therefore, as propounded by the Supreme Court in a catena of decisions referred to above, the twin tests of manufacture and marketability should be satisfied in order to bring the goods within the ambit of excise duty and failure of even one of the test would render the product not liable for excise duty. In the case on hand, it is clear from the averments of either party and is also not in dispute that 'fly ash' is a by-product during the production of electricity and is not the main manufactured item. Further, the 'fly ash' is not a commodity which can be used as such in the market, but it is usable only as one of the materials in the production of other products. Therefore, there being no manufacture of 'fly ash', but 'fly ash' gets formed as a by-product during the production of electricity, merely because the goods 'fly ash' finds a place in the specific or residuary entry in the schedule it cannot be termed as an excisable commodity, since it satisfies the test of marketability. The twin tests have to be satisfied in order to bring a product within the ambit of excise duty and satisfaction of solitary test alone would not be sufficient to levy excise duty on the commodity. Therefore, mere marketability of the product alone would not suffice to levy duty on the 'fly ash', there being no manufacturing process involved.

5.2 Therefore, even if the Fly Ash is considered marketable, it would not attract levy of excise duty since it gets generated as a bye product during manufacturing of

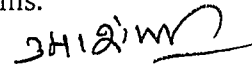


Dye Intermediates by the appellant and no manufacturing process for Fly Ash is involved.

5.3 I further find that Board vide Circular No.1027/15/2016-CX dated 25.04.2016 has rescinded its earlier Circular No.904/24/2009-CX dated 28.10.2009 wherein it was clarified that with amendment in section 2(d) of the Central Excise Act, 1944 in the Budget of 2008, the bagasse, aluminium/ zinc dross and other such products termed as waste, residue or refuse which arise during the course of manufacture and are capable of being sold for consideration would be excisable goods and chargeable to payment of excise duty. In view of this clarification, it becomes amply clear that bagasse, dross and skimmings of non-ferrous metals or any such by-product or waste are non-excisable goods and so is the case with Fly Ash which is nothing but a by-product or waste arising in the course of manufacture of final products by the appellant. I, therefore, find that issue is no more *res integra* and there is no reason to demand duty on Fly Ash. Further, since duty demand has failed to sustain, there is no question of charging interest or imposing penalty.

6. The impugned order is accordingly set aside and appeal is allowed.

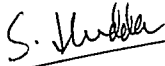
7. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
The appeal filed by the appellant stands disposed of in above terms.



(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Attested



(Sanwermal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
M/s. Bodal Chemicals Ltd, Unit-III,
Plot No.2102, Phase-III, GIDC, Vatva,
Ahmedabad 382445

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - South.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax, Division-II, Ahmedabad- South.
5. Guard File
6. P.A.

