

 सत्यमेव जयते	<b>केंद्रीय कर आयुक्त (अपील)</b> <b>O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,</b> केंद्रीय कर भवन, सातवीं मंजिल, पोलिटेकनिक के पास, आम्बावाडी, अहमदाबाद-380015	 7 <sup>th</sup> Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
टेलीफोन : 079-26305065		टेलीफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(29)/38/EA-2/Ahd-I/2017-18  
 Stay Appl.No. NA/2017-18

763 to 767

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-292-2017-18  
 दिनांक Date : 29-01-2018 जारी करने की तारीख Date of Issue

6/2/2018

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

ग Arising out of Order-in-Original No. 23to24/CX-I ahmd/JC/KP/2017-18 दिनांक: 20/06/2017 issued  
 by Deputy Commissioner, Central Tax, Ahmedabad-South

अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent  
**M/s Jainik Industries**  
**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 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, 4<sup>th</sup> 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।

... 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 मुख्याशीर्ष 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) को पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैटल 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. 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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.६.५० 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."



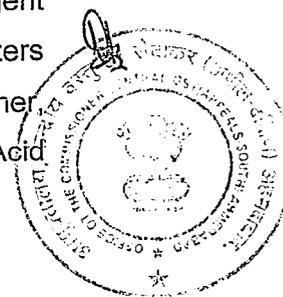
## ORDER-IN-APPEAL

The instant order covers a Revenue appeal filed by the Assistant Commissioner of Central G.S.T., Division-II, Ahmedabad South as authorized by the Commissioner, C.G.S.T., Ahmedabad South against **Order-in-original No. O.I.O. No. 23to24/CX-I/Ahmd/JC/KP/2017 dated 20/06/2017** (hereinafter referred to as 'the impugned order') passed by the Joint Commissioner, Central Excise, Ahmedabad-I (hereinafter referred to as 'the adjudicating authority').

2. Briefly stated the facts of the case are that M/s Jainik Industries, Plot No.605/A, Phase-IV, G.I.D.C., Vatva, Ahmedabad (hereinafter referred to as 'M/s Jainik')) was holding Central Excise registration No.AACFJ2151MXM001 for manufacture of excisable goods falling under Chapter 29 of the first schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as CETA, 1985). During the course of internal audit conducted by the officers of Audit wing of Central Excise, Ahmedabad-I for the period March-2012 to Februaruy-2014, it was noticed that the appellant had not discharged Central Excise duty on the by-product 'Spent Sulphuric Acid' classifiable under tariff heading No.2807 of CETA, 1985, cleared to M/s Novel Spent Acid Management. Several periodic show cause notices were issued for various periods, *inter alia* demanding duty on 'Spent Sulphuric Acid'. The appellant had preferred appeal against Order-in-original No. 18/CX-I Ahmd/JC/MK/2016 dated 21/03/2016 covering the period of 01/04/2010 to 31/05/2014 that was decided *vide* Order-in-appeal No.AHM-EXCUS-001-APP-060-2016-17 dated 25/02/2017 remanding the case back to the original authority to give specific findings with regard to marketability of Spent Sulphuric Acid and then decide the demand for duty, interest and penalty accordingly. In the impugned order, the proceedings initiated *vide* SCN F.No.V.29/15-75/Jainik/ADC/OA-I/2015 dated 07/05/2015 and SCN F.No.V.29/16-01/SCN-Jainik/2016-17 dated 13/04/2016 have been dropped on the basis of the finding that Spent Sulphuric Acid cleared by M/s Jainik was not a marketable product and has no commercial value.

3.. The main grounds of appeal in the Revenue appeal are as follows:

- As per Board Circular No. 729/45/2003-CX dated 30/07/2003, Spent Sulphuric Acid produced as a by-product in the form of waste / residue during the process of manufacture of acid slurry / detergent powder is to be considered as a manufactured product being a separate chemically defined compound or separate chemical element classifiable under S.H.No. 28.07 of CETA, 1985. In the case of CCE vs Ketil Chemicals – 1999 (113) ELT 689 (Tri-LB), Hon'ble Larger Bench of the Tribunal had held that in the case of Nirma Chemical Works, the Tribunal had observed that Spent Sulphuric Acid is produced as a by-product in the form of water / residue during the process of manufacturing of Nitrobenzene and acid slurry / detergent powder by sulphonation, which is sold and finds use in the manufacture of fertilizers and hence the by-product in the form of waste / residue has to suffer duty. Further, as per the main objective obtained from the website of M/s Novel Spent Acid



Management [www.novelwaste.com](http://www.novelwaste.com), it was crystal clear that the Spent Sulphuric Acid obtained from various units, including M/s Jainik was subsequently sold by M/s Novel Spent Acid Management. Therefore, once the by-product is having value in the form of waste / residue, it has to suffer duty of excise. In the challans issued by M/s Novel Spent Acid Management, the goods are described as 'spent Sulphuric Acid' and not as 'Waste'. Further, according to the earlier OIO No. 23to24/CX-I Ahmd/JC/KP/2017 dated 20/06/2017 passed by Joint Commissioner, Central Excise, Ahmedabad-I, it is clearly mentioned that the assessee had suppressed the material facts from the department as Spent Sulphuric Acid' was cleared without maintaining proper accounts of manufacture and clearance in its daily stock account and it had not furnished the details of such clearance in the monthly returns filed. As regards the value of Spent Sulphuric Acid, the adjudicating authority could not determine it and should have taken recourse to Central Excise Valuation Rules, 2000.

4. M/s Jainik filed cross-objections to the grounds adduced in the departmental appeal *vide* letter dated 04/12/2017 contending that the CBEC Circular was in the context of M/s Nirma Chemical Works Ltd., Ahmdeabad, in whose case the final product was detergent powder and the Spent Sulphuric Acid being separately classifiable under SH No. 28.07 was being used in fertilizers. In its own case the final product was Dye and Intermediates, where Spent Sulphuric Acid is a Industrial Waste. Similarly, the case law CCE vs Keti Chemicals – 1999 (113) ELT 689 (Tri-LB) is also distinguishable. As regards the reliance placed on the material in the website of M/s Novel Spent Acid Management, Ahmedabad, M/s Jainik had not sold the same but had to bear the expenditure in due discharge of the burden cast upon by the Gujarat Pollution Control board, Gandhinagar, as per Environment laws. The reliance on the earlier O.I.O in the departmental appeal is not legally permissible. The grounds of appeal are silent regarding the substantive points regarding quality and marketability brought out in the impugned order.

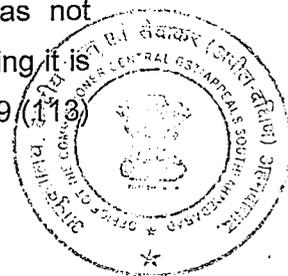
5. Personal hearing in the departmental appeal was held on 22/01/2018 attended by Shri J.T. Vyas, Advocate on behalf of M/s Jainik. The learned Advocate explained the case and submitted that their product is not marketable. He made additional written submissions submitting copies of Ledger Accounts for the years 2011-12 to 2014-15 of Novel Spent Acid Management showing that M/s Jainik was required to make payment to M/s Novel; copies of Analysis Report of 'spent Sulphuric Acid for the years 2010-11 to 2016-17 issued by Novel Spent Acid Management and copy of letters issued by Gujarat Pollution control Board, Gandhinagar evidencing that the Spent Sulphuric Acid is not a by-product but is an industrial affluent.

6. I have carefully gone through the facts of the case on records, the grounds of appeal in the departmental appeal and the submissions made by M/s Jainik in the cross-objections as well as during personal hearing. The impugned order is in line with



my earlier Order-in-appeal No.AHM-EXCUS-001-APP-060-2016-17 dated 25/02/2017 remanding the case back to the original authority to give specific findings with regard to marketability of Spent Sulphuric Acid and then decide the demand for duty, interest and penalty in accordance with the ratio of the order of Hon'ble Supreme Court in the case of CCE, Chandigarh-I vs Markfed Vanaspati & Allied Industries – 2003 (153) ELT 491 (SC) to the effect that *"It is not possible to accept the contention that merely because an item falls in a tariff Entry it must be deemed that there is manufacture. The law still remains that the burden to prove that there is manufacture and that what is manufactured is on the revenue."*

7. On examining the findings in the impugned order, I find that from paragraphs 11.2 to 11.6, the adjudicating authority has relied upon the test report and Analysis reports issued by M/s Novel Spent Acid Management to come to the conclusion that the Spent Sulphuric Acid in the case of M/s Jainik is beyond the prescription of Marketable / consumable product and as per the Gujarat Pollution control Board norms, the same has to be discharged as Waste. In the grounds of appeal of the departmental appeal, the veracity of the said test reports and analysis reports have not been challenged nor is there any alternate test report placed on record to refute the findings in the impugned order. The reliance placed in the grounds of appeal on C.B.E.C. Circular No. 729/45/2003-CX dated 30/07/2003 and the case law in CCE vs Ketji Chemicals – 1999 (113) ELT 689 (Tri-LB) is not sufficient to set aside the said findings. In paragraph 13.1 to 13.8 of the impugned order, the adjudicating authority has vividly established that no consideration flows from M/s Novel to M/s Jainik but on the contrary, M/s Jainik was paying M/s Novel for treatment of Spent Sulphuric Acid. The Challans issued by M/s Novel Spent Acid Management does not evidence any money value of Spent Sulphuric Acid but show charges recoverable from M/s Jainik. The grounds of appeal in the instant appeal does not succeed in contradicting the finding of the adjudicating authority that Spent Sulphuric Acid cleared by M/s Jainik to M/s Novel was for neutralization and not sold as a finished product and that as there was no sale, Section 4(1)(a)/(b) of CEA, 1944 does not come into picture. The ground in the departmental appeal to the effect that recourse should have been taken to Central Excise Valuation Rules, 2000 is not backed by any cogent argument evidencing that there was actual sale of Spent Sulphuric Acid by M/s Jainik to M/s Novel. On the other hand in paragraph 14, 14.1, 14.2 and 15 of the impugned order, the adjudicating authority has by way of analysis of a similar transaction between M/s Matangi Industries, Vatva, Ahmedabad and M/s Novel, clearly brought out by producing scanned copies of sample invoices that Spent Sulphuric Acid are of two types viz. highly hazardous and less hazardous and the less hazardous Spent Sulphuric Acid was sold by M/s Matangi to M/s IFFCO as raw material whereas the highly hazardous Spent Sulphuric Acid was sent to M/s Novel for treatment as per Gujarat Pollution Control Board norms. The departmental appeal has not commented on this finding of the adjudicating authority. On the basis of this finding it is seen that the ratio of the Larger Bench decision in CCE vs Ketji Chemicals – 1999



ELT 689 (Tri-LB) is distinguished as the Spent Sulphuric Acid discussed in the case of Keti Chemicals was sold to be used in manufacture of Fertilizers and not sent for any treatment before discharge as waste. Therefore, I find that as there is no dispute regarding the fact that the Spent Sulphuric Acid in the instant case was sent for treatment to M/s Novel by M/s Jainik who has incurred cost for the treatment before discharge of the same as waste, the impugned order holding that the Spent Sulphuric Acid cleared by M/s Jainik is not a marketable product and had no commercial value is correct and hence the dropping of proceedings against M/s Jainik is legally sustainable. The appeal filed by Revenue is rejected.

8. रेवेन्यू द्वारा दर्ज किया गया अपील का निपटारा उपरोक्त तरीके से किया जाता है।  
The appeal filed by Revenue is disposed of in the above terms.

*उमा शंकर*

(उमा शंकर)

आयुक्त (अपील्स-१)

Date: 29/01/2018

Attested

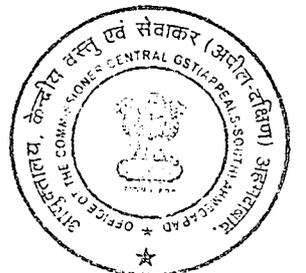
*(K. P. Jacob)*  
Superintendent (Appeals-I)  
Central Excise, Ahmedabad.

By R.P.A.D.

To  
M/s Jainik Industries,  
Plot No. 605/A, Phase-IV, G.I.D.C., Vatva  
Ahmedabad.

Copy to:

1. The Chief Commissioner of C.G.S.T, Ahmedabad.
2. The Principal Commissioner of C.G.S.T, Ahmedabad South.
3. The Joint Commissioner, C.G.S.T, Ahmedabad South.
4. The Deputy Commissioner, Service Tax Division-II, Ahmedabad South
5. Guard File.
6. P.A.



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