केंद्रीय कर आयुक्त (अपील)

सत्यमेव जयते

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
केंद्रीय कर भवन, 7th Floor, GST Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

8017060S

क फाइल संख्या : File No : V2(84)/20&21/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-294&295-2017-18**
दिनाँक Date : **29-01-2018** जारी करने की तारीख Date of Issue 8/2/2018

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

ग Addl Commissioner, केन्द्रीय कर, Ahmedabad-South द्वारा जारी मूल आदेश सं **06/Addlcommr./2008** दिनाँक: **22/01/2008,** से सृजित

Arising out of Order-in-Original No. **06/Addlcommr./2008** दिनाँक: **22/01/2008** issued by Addl Commissioner, Central Tax, Ahmedabad-South

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

Maxocrete Equipments
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।

... 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 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 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, 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.

⇨ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है .**

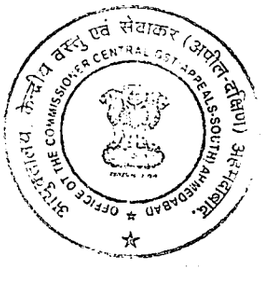
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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

Hon'ble CESTAT vide its order No. A/10176-10177/2017 dated 24.1.2017, in appeal Nos. E/855/2008 and E/856/2008, filed against OIA Nos. 76/2008 & 79/2008 dated 12.5.2008 & 28.5.2008, has remitted back the matter to the Commissioner(A) with the below mentioned directions:

> *"Therefore in our opinion, the matter needs to be remitted the ld. Commissioner(Appeals) to record a finding whether the appellant could be allowed to raise the said point of clubbing of both units on merit and if so, consider on merit, accordingly. All issues are kept open the appeal is allowed by way of remand."*

In pursuance to the aforementioned directions, both the appeals, as detailed below are being taken up for decision.

Sr. No.	Name of the appellant	Impugned OIO No. & date	Appeal No.
1	Maxocrete Equipments, 37/C, Phase-I, GIDC, Vatwa, Ahmedabad 382445	6/ADC/2008 dated 18.1.2008	V2(84)20/Ahd-I/2017-18
2	Shri Hitesh R Surelia, Partner, Maxocrete Equipments, 37/C, Phase-I, GIDC, Vatwa, Ahmedabad 382445	6/ADC/2008 dated 18.1.2008	V2(84)21/Ahd-I/2017-18

2. Briefly, the facts are that based on a search conducted at the premises of the appellant mentioned at Sr. No. 1 *supra*, a case was booked. Consequent to completion of investigation, a show cause notice dated 16.1.2007 was issued to both the aforementioned appellants, *inter alia* alleging that M/s. Maxocrete Equipments had fraudulently floated another firm by the name M/s. Macons Engineers, to wrongly avail the benefit of SSI exemption and to evade payment of Central Excise duty. The notice therefore, demanded Central Excise duty of Rs. 27,97,106/- along with interest and further proposed penalty on the appellant under section 11AC of the Central Excise Act, 1944. This notice was adjudicated vide the aforementioned impugned OIO dated 18.1.2008, wherein the adjudicating authority confirmed the demand along with interest and further imposed penalty on both the appellants mentioned *supra*.

3. Feeling aggrieved, both the aforementioned appellants, filed appeals before Commissioner(Appeals), raising the following averments:

Maxocrete Equipments

- that no show cause notice has been issued to M/s. Macons Engineers or to the proprietor of M/s. Macon Engineers; that in the absence of the firm being made party to the notice the entire proceedings can under no circumstances be sustained;
- that it is only M/s. Macons who could have brought on record the evidence of their activities;
- that it is only M/s. Macons Engineers who can answer whether they carried out manufacturing activity or not;
- that in the absence of any clarification coming from M/s. Macons Engineers, Shri Hitesh R Surelia could have had no option but to make statements as required by the department;
- that M/s. Macons Engineers was carrying out activities at the relevant point of time at the premises in question and the departmental officers have forced Mr. Hitesh to make statement to the effect that M/s. Macons was not in existence as he was threatened with arrest and dire consequences;
- that they have not had any opportunity to cross examine; Shri Hitesh Surelia being son of the Proprietor was merely helping his father in certain activities;
- that the statements of transporters have not been recorded; that the statements of suppliers of raw materials have also not been recorded;

- the evidence produced hereinabove demonstrates that M/s. Macons Engineers was carrying out manufacturing activities; that there can be no question of the said M/s. Macons not having carried out manufacture of the goods in question;
- that M/s. Macons is registered with various authorities and carrying out its manufacturing activities even subsequently at a new address; that the advantage of cum duty valuation ought to have been granted to the appellants;
- that there can be no question of imposition of any penalty; that the penalty imposed is too harsh and is on the higher side.

Shri Hitesh Surelia, Partner

- that penalty cannot be imposed on a partner and the partnership both; that penalty imposed is required to be quashed and set aside;
- that the findings do not merit imposition of penalty under Rule 26 of the Central Excise Rules, 2002;
- that the case against M/s. Maxocrete is not sustainable on merits.

4. These two appeals were decided vide OIAs dated 12.5.2008 & 28.5.2008, wherein the then Commissioner(A) upheld the impugned OIO dated 18.1.2008 and rejected the appeals. It is against this rejection, that the appellants filed this appeal before the Hon'ble Tribunal who vide its Order No. A/10176-10177/2017 dated 24.1.2017, remitted back the matter, with the direction mentioned in para 1 *supra*.

5. Based on the aforementioned directions, personal hearing in respect of both the appeals was held on 11.1.2018 wherein Shri H D Dave, Advocate, Shri Hirak P Ganguly, Advocate and Shri Bhavesh Rami, authorized person, appeared on behalf of the appellants. The Learned Advocate, reiterated the grounds of appeal and submitted copies of the following citations viz. Jehangir H C Jehangir [2015(317) ELT 237], R.K Herbals [2010(251) ELT 514], Utkarsh Corporate Services [2014(34) STR 35] and Chandra & Sons (P) Ltd [1992(57) ELT 537]. He further pointed out that M/s. Macons had a DIC certificate, CST registration, separate electricity connection, was issuing separate invoices. He also added that the investigation with the buyers had revealed that they had purchased the goods from M/s. Macons; that there were independent bills relating to purchase of machinery by M/s. Macons; that the Chartered Accountant had certified purchase of raw materials and sale by M/s. Macons.

6. I have gone through the facts of the case, the impugned OIO, the earlier OIAs, the order of the Hon'ble Tribunal, the grounds of appeal and the contentions raised by the advocate during the course of the personal hearing. The primary question to be decided in the matter is whether the appellant mentioned at Sr. No. 1 is liable to pay Central Excise duty along with interest on the clearances made by M/s. Macons Engineer, which they had knowingly floated to remain within the SSI exemption limit or otherwise.

7. Additionally, the Hon'ble Tribunal while remitting back the matter has also directed, that a finding be recorded as to whether *the appellant could be allowed to raise the said point of clubbing of both units on merit and if so, consider on merit, accordingly.* This assumes significance because on going through the order of the original adjudicating authority as recorded in para 3, it is observed that the appellants were not contesting the show cause notice demanding duty, on merits. The adjudicating authority further in para 3.1, goes on to add that,

"The only defence M/s. Maxocrete Equipments has put forth is a plea of giving them cum duty benefit on the sales effected on the invoices issued in the name and style of M/s. Macons Engineers which is not physically existing.". The appellant as I have already mentioned, relied upon certain case laws. On going through these cases, I find that the case of Jehangir H C Jehangir [2015(317) ELT 237], pertains to Income Tax Act, 1961, while the case R.K Herbals [2010(251) ELT 514] pertains to Tamilnadu General Sales Tax Act, 1959. However, I find that the case of M/s. Utkarsh Corporate Services [2014(34) STR 35], relied upon by the appellant has dealt with the issue in paras 5.1 and 5.2, which I would like to reproduce:

> *"5.1 At the outset, it would be profitable to reproduce Rule 5 of the Central Excise (Appeals) Rules, 2001 :*
>
> ***Rule 5. Production of additional evidence before Commissioner (Appeals). -***
> *(1) The appellant shall not be entitled to produce before the Commissioner (Appeals) any evidence, whether oral or documentary, other than the evidence produced by him during the course of the proceedings before the adjudicating authority except in the following circumstances, namely :-*
> *(a) where the adjudicating authority has refused to admit evidence which ought to have been admitted; or*
> *(b) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by adjudicating authority; or*
> *(c) where the appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal; or*
> *(d) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal.*
> *(2) No evidence shall be admitted under sub-rule (1) unless the Commissioner (Appeals) records in writing the reasons for its admission.*
> *(3) The Commissioner (Appeals) shall not take any evidence produced under sub-rule (1) unless the adjudicating authority or an officer authorized in this behalf by the said authority has been allowed a reasonable opportunity, -*
> *(a) to examine the evidence or document or to cross-examine any witness produced by the appellant; or*
> *(b) to produce any evidence or any witness in rebuttal of the evidence produced by the appellant under sub-rule (1).*
> *(4) Nothing contained in this rule shall affect the power of the Commissioner (Appeals) to direct the production of any document, or the examination of any witness, to enable him to dispose of the appeal."*
>
> *5.2 This rule, if examined closely, permits **under certain circumstances**, the Commissioner (Appeals) to take on record and examine additional evidence produced before it and, once those circumstances exist for so permitting evidences, the only requirement would be to allow a reasonable opportunity to the other side to produce any evidence in rebuttal. Eventualities narrated under the law which pave a way for additional evidence are : (i) denial to admit evidence by Assessing Officer (ii) existence of sufficient cause which prevented such admission, when called upon by Assessing Officer (iii) Sufficiency of reasons which prevented production (iv) absence of availing opportunity of adducing evidence when any of these grounds is established by assessee - such productions could be made permissible of evidence by the Commissioner (Appeals) whether oral or documentary. Thus, this rule itself provides for adducement of additional evidence, when necessary, as mentioned hereinabove. However, it is to be noted that in the instant case, we are concerned with raising of only new grounds and not the additional evidence by the appellant and thus, appellant is on a stronger footing."*
>
> [emphasis added]

Thus, as is evident the appellant can produce fresh evidence/ground before the Commissioner(Appeals) in terms of Rule 5 of the Central Excise (Appeals) Rules, 2001 **only where** (i) the adjudicating authority has refused to admit evidence which ought to have been admitted; (ii) where the appellant was prevented by sufficient cause from producing the evidence which he was called upon to produce by adjudicating authority; (iii) where the appellant was prevented by sufficient cause from producing, before the adjudicating authority any evidence which is relevant to any ground of appeal; (iv) where the adjudicating authority has made the order appealed against without giving sufficient opportunity to the appellant to adduce evidence relevant to any ground of appeal. None of the aforementioned grounds, exist in the present case. The appellant, except for producing copies of the case laws, has not adduced any grounds before

me to exhibit that the conditions mentioned in Rule 5, stands fulfilled. As is already mentioned, the appellant was given enough opportunity in terms of the principles of natural justice to put forth his case by the original adjudicating authority. However, rather than contesting, the appellant consequent to paying the entire amount demanded in the notice, requested only for cum duty benefit. Since the appellant had never questioned the clubbing of the clearances of M/s. Macon with his own clearances, this plea raised before Commissioner(Appeals) assumes the colour of an additional evidence and therefore in terms of Rule 5, I cannot permit raising of additional grounds before the first appellate authority, more so since the conditions stipulated under Rule 5, *supra* does not stand fulfilled. Hence, in terms of the directions of the Hon'ble Tribunal directing me to record my findings on whether *the appellant could be allowed to raise the said point of clubbing of both units on merit,* **I hold that the appellant cannot be allowed to raise the said point since while raising the said plea/additional ground, he has failed to fulfill the condition enumerated under Rule 5, supra.**

8. However, after having said this, I would still like to consider the contention because of two reasons, [a]as in the said order, the Hon'ble Tribunal has kept all the issues open and [b] to ensure that there is no miscarriage of justice. Considering the first contention, and the plea raised before me that M/s. Macons was a separate entity which had its own DIC certificate, CST registration, separate electricity connection, issued separate invoices; that the investigation with the buyers revealed that they purchased the goods from M/s. Macons; that there were independent bills of purchase of machinery by M/s. Macons; that the Chartered Accountant had certified purchase of raw materials and sale by M/s. Macons. All these arguments fail while examining only one basic fact i.e. of **registration**. The premises shown as M/s. Macons, was part and parcel of the premises of the appellant [M/s. Maxocrete Equipment] as per the floor plan submitted by the appellant while taking Central Excise registration. This was never changed by the appellant while renting out part of the premises to M/s. Macons Engineer. Even otherwise, legally the appellant could not have sub let the premises in terms of GIDA rules. Further, the appellant has further harped that M/s. Macon had its own DIC certificate, CST registration, IEC certificate, separate electricity connection. I am afraid this argument would not help the appellant's case since none of agencies/department giving the aforementioned certificate, conduct verification of the premise, before issuing the certificates, as is done in the case of Central Excise registration. Had the appellant made changes in his registration certificate by changing the floor plan, then this argument of separate units, would have appeared legitimate. Since that was not the case, I do not find the plea to be true. Even otherwise, the admission of the partner of the appellant that there was no such unit as M/s. Macon in existence; that the only unit that existed in the premises was M/s. Maxocrete Equipments; that M/s. Macons was a proprietary concern of his father Shri Ramnikbhai Surelia and actually there was no physical existence of M/s. Macons; that the entire plot 37/C was utilized by M/s. Maxocrete Equipments only, - I find has never been retracted. The contention of the appellant that M/s. Macons was carrying out activities at the relevant point of time at the premises in question and the departmental officers have forced Mr. Hitesh to make statement to the effect that M/s. Macons was not in existence as he was threatened with arrest and dire consequences, is not true more so,

because if it was he could very well have filed his retraction. Further, I find that Shri Hitesh, partner of the appellant, appeared on behalf of his father to give statement, which would not have been the case had the statement recorded earlier was under duress. It is also worth noting that Shri Hitesh Surelia, reiterated the same facts in his statement dated 27.7.2006 and 11.6.2007, clearing showing that the contention now made is nothing but an afterthought. Further, M/s. Macon as is evident from the facts, had not only taken the premises on rent but also the machinery of the appellant on rent thereby nullifying the averment that they had their own machinery. In-fact even the customers of M/s. Macon, stated that they were dealing only with Shri Hitesh even for M/s. Macons, clearly showing that this firm was created basically to stay within the SSI exemption limit and to evade Central Excise duty. Therefore, though legally I was not bound to consider the additional ground on clubbing, in the interest of justice, I have considered it and conclude that the averments raised in this regard are legally not tenable, as they belie facts, and appear to be an afterthought.

8.1 The appellant has also contended that no notice was given to M/s. Macons; that only M/s. Macons could have brought on evidence of their activities. These contentions ignore the fact that for the outside world, M/s. Macons meant Shri Hiteshbhai Surelia, partner of appellant mentioned at Sr. No. 1, because he was running the entire show. In-fact the non existant firm, was created on paper only to evade payment of Central Excise duty, to misuse the SSI exemption benefit. Therefore, the contentions appear far from truth. This is more so because it was Shri Hiteshbhai who had appeared to give statement based on the authorization received from the proprietor of M/s. Macons. Therefore, the claim that in the absence of any clarification coming from Macons Engineers, Shri Hitesh R Surelia could have had no option but to make statements as required by the department, appears to untrue since the appellant has tried to put averments contending that M/s. Macons was a separate entity. The appellant has also tried to put forth the flaw in the investigations, forgetting the fact that there was a clear cut admission on their part. Hence, I find that the averments raised are without merit and needs to be rejected because what is admitted need not be proved.

9. As far as benefit of cum duty is concerned, I agree with the findings of the adjudicating authority and uphold the rejection of the benefit of cum duty. Even otherwise, the appellant has not produced anything which calls for interference in the original order, as far as benefit of cum duty is concerned.

10. Now coming to the contention raised by the appellant mentioned at Sr. No. 2 of para 1, *supra*, that penalty cannot be imposed on a partner and the partnership both; that penalty imposed is required to be quashed and set aside; that the findings do not merit imposition of penalty under Rule 26 of the Central Excise Rules, 2002. I do not agree with the contentions since I have already upheld the demand. Further, the role of the partner is clearly documented in the original order. Even otherwise, the partner Shri Hiteshhai Surelia, was the main person for the appellant and was also handling the functioning/was the main contact person [as per the

statement of various customers] for M/s. Macons, which was physically non existant, created solely to evade Central Excise duty. The contentions of the appellant therefore, that findings do not merit imposition of penalty under Rules 26, is not tenable.

11. In view of the foregoing, I uphold the original order dated 18.1.2008 and reject the appeal filed by both the appellants.

12. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

12. The appeal filed by the appellants stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)

Date : .1.2018

Attested

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

By RPAD.

To,

1	Maxocrete Equipments, 37/C, Phase-I, GIDC, Vatwa, Ahmedabad 382445
2	Shri Hitesh R Surelia, Partner, Maxocrete Equipments, 37/C, Phase-I, GIDC, Vatwa, Ahmedabad 382445

Copy to:-

1. The Chief Commissioner, Central Excise, Ahmedabad Zone .
2. The Principal Commissioner, Central Excise, Ahmedabad South.
3. The Deputy/Assistant Commissioner, Central Excise Division-II, Ahmedabad South.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad South.
5. Guard File.
6. P.A.

केन्द्रीय वस्तु एवं सेवाकर (अपील-दक्षिण) आयुक्तालय
OFFICE OF THE COMMISSIONER CENTRAL GST (APPEALS-SOUTH) AHMEDABAD