केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

केंद्रीय उत्पाद शुल्क भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(28)/99/Ahd-I/2016-17 4140 4144
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-030-2017-18**
दिनाँक **25.07.2017** जारी करने की तारीख Date of Issue 8/8/17

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

ग **Asst. Commissioner,** Div-V केन्द्रीय कर, Ahmedabad-I द्वारा जारी मूल आदेश सं **MP/04-05/Dem/2016** दिनाँक: **24/10/2016,** से सृजित

Arising out of Order-in-Original No **MP/04-05/Dem/2016** दिनॉक: **24/10/2016** issued by **Asst. Commissioner,** ,Div-V Central Tax, Ahmedabad-I

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

M/s Sagar Drugs & Pharmaceuticals Ltd.
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person 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 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 मान्ट की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद मे 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) नेयम, 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

M/s Sagar Drugs & Pharmaceuticals Ltd., 38/3 & 46/1, Kanbha Kuha Road, Singarwa, Ahmedabad- 382 430 (hereinafter referred to as 'the appellant') has preferred the present appeal, being aggrieved by Order-in-Original No. MP/04-05/Dem/2016 dated 24/10/2016 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise, Division-V, Ahmedabad-I (hereinafter referred to as 'the adjudicating authority'). The appellant is holding Central Excise registration No.AADCS9311EXM001 for manufacture of excisable goods falling under Chapter 28 & 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 April-2012 to August-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, Vatva, on the pretext that the impugned product was waste water generated during the manufacture of excisable goods. However, it was noticed by the audit officers that Spent Sulphuric Acid, though being waste, was a by-product capable of being reused, commercially saleable, marketable and classifiable under Chapter sub-heading 2807 of CETA, 1985. In a statement recorded under Section 14 of Central Excise Act, 1944 (CEA, 1944), Shri Pravin Bhanubhai Patel, Manager & Authorised Signatory for the appellant, inter alia, confirmed that Spent Sulphuric Acd generated during the course of manufacture is waste and is no use in their factory and the same was sent to M/s Nova Spent Acid Management for treatment for which the appellant was incurring transportation expenses.. As the appellant disagreed with the Audit object, two Show Cause Notices (hereinafter referred to as SCNs) (i) SCN No. V.28/3-34/Sagar/Dem/15-16 dated 18/02/2016 covering the period of **March-2011 to June-2015** and from **01/03/2012 to 31/05/2014**, demanding **Rs.4,76,692/-** under Section 11A(1)(4) of CEA, 1944 along with interest under Section 11AA of CEA, 1944 and proposing penalty under Section 11AC(1)(c) of CEA, 1944 as well as (ii) SCN No.AR-I/Sagar Drugs/FAR-239/2013-14 dated 21/04/2016 for further period of **July-2015 to March-2016** demanding **Rs.82,798/-** under Section 11A(1) of CEA, 1944 along with interest under Section 11AA of CEA, 1944 and proposing penalty under Section 11AC(1)(a) of CEA, 1944 were issued to the appellant. Both these SCNs were adjudicated vide the impugned order, where both demands have been confirmed along with interest equivalent penalties as proposed in the SCNs.

2. The main grounds invoked by the appellant in the present appeal are as follows:

- The adjudicating authority had erred in relying upon the case law CCE, Ahmedabad vs Ketki Chemicals – 1999 (113) E.L.T. 689 (Tri.LB) that was given in a different factual and legal context considering Rule 57F of the erstwhile Central Excise Rules, 1944, where a deeming fiction was created rendering waste as deemed manufacture. In the present case Rule 57 F was not applicable for the period from 2011-2016. Further in the said citation the Larger Bench had considered

classification and not relating to manufacture, whereas in the present case there was no question of classification but only a question regarding manufacture. Spent Sulphuric Acid in the instant case is emerging as a waste product during the manufacture of final products and hence the ratio of the order of Hon'ble Madras High court in the case of Mettur Thermal Power Station vs CBE&C – 2016 (335) E.L.T. 29 (Mad.) holding that when a commodity had not undergone any process of manufacture the same was not exigible to excise duty. The Apex Court in the case of UOI vs Ahmedabad Electricity Company Ltd. – 2003 (158) E.L.T. 3 (S.C.) has held that onus to prove that a commodity was manufactured was on the Revenue. The ratio derived from the said citations is that for goods to be exigible to Excise duty, it has to undergo both the important test of manufacture as well as marketable, both of which are equally important. A commodity cannot be exigible to Excise duty just because it was marketable.

- The adjudicating authority had erred in applying provisions of Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Even if the duty was leviable it would be on the basis of the price at which the appellant had sold the goods, which was 'zero' that makes the duty to be NIL. Rule 11ibid is not an independent Rule and is invoked only in cases where the preceding Rules are not applicable. The Spent Sulphuric Acid was cleared for the purpose of being neutralized to M/s Novel Spent Acid Management as without being neutralized the same could not be cleared. The appellant and M/s Novel Spent Acid Management were not related persons and hence the value at which the Spent Sulphuric acid was cleared by the appellant has to be treated as the transaction value, which was zero.

- The adjudicating authority had grossly erred in invoking extended period of limitation holding that there was suppression of facts. Only in such cases where the assessee knew that certain information was required to be disclosed and yet the assessee deliberately had not disclosed such information, the case would be that of suppression of facts. Even in cases where certain information was not disclosed as the assessee was under a bona fide impression that it was not duty bound to disclose such information, it would not be a case of suppression of facts as held by Hon'ble Supreme Court in the cases of Padmini Products – 1989 (43) ELT 195 (SC) and Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC). Further as there was no suppression or mis-declaration in the present case, penalty and interest were unjustified.

- The spent sulphuric acid was generated during manufacturing process as waste water / industrial waste that had no further use or commercial value and was required to be drained only after treatment in terms of the pollution control regulations. The adjudicating authority has failed to understand this contention. The appellant had not sold the spent acid for any value or consideration but they had rather paid service charges to M/s Novel Spent Acid Management for treatment of such spent acid. Even if the spent acid was sold for some purpose, it does not make the goods excisable as held in the case of *M/s CHEMPLAST SANMAR LTD. – 2015 (317) ELT 495,* distinguishing the decision in the case of *M/s KETI CHEMICALS* relied upon by the adjudicating authority. The adjudicating authority has surprisingly justified the action of the Audit offices in adopting the value of the spent acid as Rs.0.50 per kg. Neither any market survey has been conducted nor any data has been disclosed for arriving at the value of spent acid and the impugned order is not tenable and is required to be set aside.The appellant is registered with Central Excise since 1995 and the records were comprehensively audited on number of occasions and spent acid generated even in those periods was cleared to M/s Novel Spent Acid Management. Therefore, it cannot be said that the facts were suppressed with intent to evade payment of any duty. When the element of intent is absent, extended period of limitation cannot be invoked and the demand prior to 01/04/2013 was hit by law of limitation.

3. Personal hearing in the case was held on 20/06/2017 when Smt. Shilpa Dave, Advocate appeared and reiterated the grounds of appeal. The learned Advocate

submitted that there was no manufacturing and the earlier decisions were with respect to Section (2f), which was not applicable. It is a waste as clarified by Gujarat Pollution Control Board. She explained the process letter from M/s Novel and submitted that they are not selling but spending money on waste management. She said that the actual quantity was different and submitted citations. She also stated that larger period cannot be invoked as there was no suppression.

4. I have carefully gone through the facts of the case on records and submissions made by the appellant. The issue covered is whether 'Spent Sulphuric Acid' attracts Central Excise duty by virtue of being an excisable product. The adjudicating authority has followed the earlier O.I.O. No. 18/CX-IAhmd/JC/MK/2016 dated 21/03/2016 passed by Joint Commissioner Central Excise, Ahmedabad-I where the decision of Hon'ble Larger Bench of the Tribunal in the case of COLLECTOR OF C. EX., AHMEDABAD Versus KETI CHEMICALS - 1999 (113) E.L.T. 689 (Tribunal) has been relied upon. The appellant has disputed M/s KETI CHEMICALS and M/s NIRMA CHEMICAL WORKS LTD., on the ground that these decisions pertained to the Section (3f) which was not relevant to the period covered in the instant case. It has also been contended that in Keti Chemicals, the Larger Bench was confronted with the issue of classification and not whether the emergence of Spent Sulphuric Acid during the manufacture of finished goods amounted to manufacture or not.

5. On studying the decision in the case of ***COLLECTOR OF C. EX., AHMEDABAD Versus KETI CHEMICALS - 1999 (113) E.L.T. 689 (Tribunal)***, it is clear that Hon'ble Larger Bench of CESTAT have exhaustively dealt with the 'Spent Sulphuric Acid' emerging in that case by way of discussing its characteristics as a by-product emerging during the process of manufacture with reference to Explanatory notes to HSN; by way of confirming its classification under chapter 28 of CETA, 1985; and distinguishing it from non-excisable waste and scrap akin to dross and skimming and establishing as to how it emerges as excisable goods exigible to Central Excise duty. Much water has flown down the Ganges since decision of Keti Chemicals in 1993. In the following cases, Hon'ble Courts have held as follows:

1) In the case of METTUR THERMAL POWER STATION – 2016 (335) ELT 29 (Mad.),

> *it has been held that fly ash cannot be subjected to levy of Excise duty because it is not an item of goods which has been subjected to process of manufacture as per Section 2(d) and 3 of Central Excise Act, 1994.*

2) In the case of NIRLON LTD. vs CCE, MUMBAI-V – 2016 (332) ELT 734 (Tri. – Mumbai) ,

> *Waste products i.e. impure dowtherm diphyl, old damaged PTA scrap, wash water, old and used sludge and other oils and old assorted bearings arising during process of*

manufacture of yarn were held not manufactured and not distinct products.

3) The Hon'ble Supreme Court in the case of GRASIM INDUSTRIES LTD. vs UNION OF INDIA – 2011 (273) E.L.T. 10 (S.C.)

have held with regards to Metal, scrap & waste specified under Heading 74.02 of Central Excise Tariff that Section Note 8(a) to Section XV of Central Excise Tariff has very limited purpose of extending coverage to the particular item to the relevant tariff entry in the Schedule for determining the applicable rate of duty and this note cannot be construed to have any deeming effect in relation to the process of manufacture as contemplated by Section 2(f) of CEA, 1944. The Apex Court further held that Goods are not exigible to Excise duty merely because of their specification in a particular tariff entry unless they are manufactured in India and charge of levy of Excise duty under Section 3 of CEA, 1944 is attracted when goods are excisable under Section 2(d) ibid and are manufactured goods in terms of Section 2(f) ibid. The conditions contemplated under Section 2(d) and Section 3 ibid has to be satisfied conjunctively in order to entail imposition of excise duty under Section 3 of the Act.

4) In the case of U.OI. vs AHMEDABAD ELECTRICITY CO. LTD. – 2003 (158) E.L.T. 3 (S.C.),

it has been held by Hon'ble Supreme Court that in Section 3 of CEA, 1944, the words 'excisable goods' have been qualified by the words 'which are produced or manufactured in India'. Therefore, simply because goods find mention in one of the entries of the First Schedule does not mean that they become liable for payment of Excise duty. Goods have to satisfy the test of being produced or manufactured in India, which is sine quo non for imposition of duty.

In the case of Keti Chemicals *supra*, Hon'ble Tribunal has held that Spent Sulphuric Acid is a 'by product'. The Tribunal has relied on the decision in the case of DCW Ltd. – 1996 (81) E.L.T. 381, where Spent Sulphuric Acid finds a regular market with industrial users and as such it is goods and would not fall under the category of rubbish materials thrown away in the process of manufacturing. In the case of the appellant, there is nothing on record to show that the Spent Sulphuric Acid was marketable or had regular users. Further in Keti Chemicals, the decision in the case of INDIAN TUBE CO. LTD. – 1988 (37) E.L.T. 418 (Tribunal) has been distinguished on the ground that the waste, involved in this case (waste pickle liquor) was not marketable or saleable since the manufacturers were paying transport charges to deliver it free. On considering the facts of the instant case, the appellant is clearing the impugned product as waste incurring expenses for its treatment as waste fit for disposal under the stipulations of Gujarat Pollution control board and also incurring the transportation cost. Thus spent Sulphuric Acid in the present case is treated as waste by Gujarat Pollution Control Board, which is a statutory body. It must be noted here that whether a product (or by product) is a waste or not should be rightly decided by an expert. I find that in this case "Gujarat Pollution

Board" being a statutory body has clarified it as "Waste". Further, whether it is dutiable or not will now depend upon its marketability and I find that the appellants are disposing it of, after treatment and not selling it. Had this product been marketable, a prudent businessman will try to fetch whatever little price it can by selling it. The adjudicating authority has not examined this distinguishing aspect before applying the ratio of Keti Chemicals in the present case while Keti Chemicals has based its decision on the aspect after considering the case of Indian Tube Ltd (supra). Further, in Keti Chemicals, the Tribunal has examined and distinguished the Apex Court decision in the case of INDIAN ALUMINIUM COMPANY, where it was held that Aluminium dross and skimmings lack not only metal body but also metal strength, formability and character making it distinct from scrap which is metal as good a quality as the prime metal from which it arises. In the present case, the appellant has pleaded on the strength of a letter from M/s Novo Spent Acid Management to whom they were clearing the impugned goods for treatment, that the quality of Spent Sulphuric Acid in the present case is not suitable for further use. This aspect has not been examined in the impugned order, which is vital because as per this claim the ratio of Keti Chemicals would be distinguishable.

Thus in the impugned order there is no discussion or finding establishing that Spent Sulphuric Acid was a manufactured and marketable by-product arising during the course of manufacture. There is no mention of any buyers or prospective users for this very product (as per its strength). It is settled law as per the Apex Court decision in the case of UNION OF INDIA vs. AHMEDABAD ELECTRICITY COMPANY LTD. -2003 (158) E.L.T. 3 (SC) that the onus to establish that the goods emerge during the process of manufacture is on the department. Further, the impugned product is cleared by the appellant as waste under the laws of pollution control administered by Gujarat State Pollution Control Board (G.P.C.B.), in accordance with the statutory norms prescribed by G.P.C.B. As regards the marketability of the impugned product, the appellant claims that the Spent sulphuric acid in their case contains more than 10000 mg/l of COD, which is not suitable for further use and the same is disposed off as waste after treatment by N/s Novo Spent Acid Management for which the appellant is incurring expenses. The valuation of the product is required to be determined factually especially in view of the contention of the appellant that if the impugned product fetches value, why would they not sell it for a consideration instead of incurring expenses for its disposal. In paragraph 40 of the impugned order it has been held that while it may be true that the notice are not charging any amount for the said goods cleared to M/s Novel Spent Acid Management, that does not in any way render the goods as not having any value. It has been concluded on the basis of the information available on the website of M/s Novo Spent Acid Management and its possession of VAT number that the impugned product cleared by the appellant to M/s Novo Spent Acid Management is carrying a value. Such an assertion does not suffice and the confirmation of demand in

the present case is not sustainable unless evidence is adduced with regards to the valuation of the impugned goods cleared by the appellant.

6. In the case of ***COMMISSIONER OF CENTRAL EXCISE, CHANDIGARH-I vs. MARKFED VANASPATI & ALLIED INDUSTRIES – 2003 (153) E.L.T. 491 (S.C.),*** Hon'ble Supreme Court has held 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 marketable is on the Revenue. Following this ratio, I find that the confirmation of demand in the impugned order is not sustainable unless the twin test of manufacture and marketability is confirmed and hence I remand the case back to the adjudicating authority for giving specific findings as to whether the 'Spent Sulphuric Acid' in the present case is a waste as claimed by the appellant or is a marketable by-product emerging during the process of manufacture as claimed in the impugned order. The decision on the demand of duty, interest and penalties is required to be based on such findings. The appellant must be given adequate opportunity to present its case in accordance with the principles of natural justice.

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

(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)

Date: 25/07/2017

Attested

(K. P. Jacob)
Superintendent, Central Tax (Appeals)
Ahmedabad.

By R.P.A.D.
To
M/s Sagar Drugs & Pharmaceuticals Ltd.,,
38/3 & 46/1, Kumbha Kuha Road, Singarwa,
Ahmedabad – 382 430

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad.
2. The Principal Commissioner of Central Tax, Ahmedabad-I.
3. The Additional Commissioner, Central Tax (System). Ahmedabad-I.
4. The Assistant Commissioner, Central Tax, Division-V, Ahmedabad-I.
5. Guard File.
6. P.A.