केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

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

क फाइल संख्या : File No : V2(38)/114/Ahd-I/2017-18 / 1769 - 1773.
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-375-2017-18**
दिनाँक Date : **27-02-2018** जारी करने की तारीख Date of Issue _____

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

ग Arising out of Order-in-Original No. **MP/15/Dem/2017-18** दिनाँक: **8/9/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

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

Mellow Chemplast
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 गें 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

This appeal is filed by M/s. Mellow Chemplast, 103/6, GIDC, Prakash Pipe Compound, Opp. Mesto Mineral, Odhav, Ahmedabad 382 415 [for short –'appellant'] against OIO No. MP/15/Dem/2017-18 dated 8.9.2017, passed by the Assistant Commissioner, Central GST & Central Excise, Division V, Ahmedabad South Commissionerate [for short – 'adjudicating authority'].

2. Briefly, the facts are that CERA raised an objection that the appellant was selling 90% of their manufactured goods to M/s. Duplast; that since both these units were related persons the appellant should have valued their goods in terms of Rule 9 of the Central Excise Valuation (Determination of the price of excisable goods) Rules, 2000, read with Section 4 of the Central Excise Act, 1944. Consequent to investigation, a show cause notice dated 8.6.2016, was issued to the appellant *inter alia* proposing re-determination of the value of the goods in terms of Rule 9 of the Central Excise Valuation (Determination of the Price of excisable goods) Rules, 2000; demanding central excise duty of Rs. 21,84,993/- covering the period from May 2011 to October 2014 by invoking the extended period, along with interest; proposing penalty under Section 11AC(1)(c) of the Central Excise Act, 1944.

3. This notice was adjudicated vide the aforementioned OIO dated 8.9.2017, wherein the adjudicating authority re-determined the value of the goods; confirmed the demand of duty along with interest and further proposed penalty on the appellant.

4. Feeling aggrieved, the appellant has filed this appeal raising the following averments:

- the impugned order is passed without examining the facts and law involved in the matter and therefore is misconceived and the same deserves to be quashed and set aside;
- that the appellant and M/s. Duplast, were working separately and carrying out the business independently; that the concept of related party transaction would not be applicable in the present case; that the transactions between both the entities were on principal to principal basis and therefore Rule 8 of the Valuation rules would not be applicable;
- that there was no mutuality of interest in both the entities and both the entities were running independently to each other; that both the entities were separately registered and discharging their legitimate tax dues independently; that they would like to rely on the case of H L Papers [2017(345) ELT 644], Indus Fabricons P Ltd [2012(282) ELT 417], Electronic Calculator & Company [2008(224) ELT 54], Heera Electronics [2006(205) ELT 381];
- the adjudicating authority failed to appreciate that M/s. Duplast is not selling the same goods which were purchased from the appellant; that the chemicals[plasticizer] were used as raw materials for the final production of the goods and M/s. Duplast has paid appropriate Central Excise duty on such final production and therefore Rule 9 of the Valuation Rules would not be applicable;
- that merely because the key persons of the appellant and M/s. Duplast are related or are members of a HUF is not a ground to hold that the appellant had sold the goods at a price below transaction value;
- that the Revenue has not placed any evidence on record to show that there was any flow back of money from M/s. Duplast to the appellant revealing the case of undervaluation of goods on account of having relationship between the parties; that the relationship never influenced the price;
- that the demand prior to 1.12.2013 is without jurisdiction and ought to be discarded without going in to the merits of the case; that they would like to rely on the case of ELGI Equipments ltd [2001(128) ELT 52(SC)], Bundy India Ltd [2009(236) ELT 500];

- that the benefit of cum-duty ought to have been granted; that they would like to rely on the case of Shri Chakra Tyres [1999(108) ELT 361], Rohit Detective and Security Agency[2009(14) STR 689] and Gem Star Enterprises [2007(7) STR 342];
- that since this was a case of revenue neutrality there could have been no incentive or benefit accruing to the appellant to undervalue the final goods;
- that extended period could not have been invoked;
- that penalty is not imposable.

5. Personal hearing in the matter was held on 24.1.2018. Shri Hardik Modh, advocate, appeared on behalf of the appellant and reiterated the grounds of appeals. He also submitted copies of the case laws Indus Fabricons P Ltd [2012(282) ELT 417], Electronic Calculators & Computer [2008(224) ELT 559], Heera Electronics [2006(205) ELT 381], AGP Engg P Ltd [2016(336) ELT 186], Gem Star Enterprises [2007(7) STR 342], Trinity DIC Forgers Lt. [2017(348) ELT 467], Kansai Nerolac Paints Ltd [2016(339) ELT 467], Special Steel Ltd [2015(329) ELT 449], Special Steel Ltd [2016(334) ELT A 123], Atul Ltd [2009(237) ELT 287], Akash Optifibre Ltd [2010(261) ELT 404], Himson Textile Engineering Inds P Ltd [2013(298) ELT 568] and H L Papers Ltd [2017(345) ELT 644].

6. I have gone through the facts the case, the impugned OIO, the grounds of appeal and the oral averments raised during the course of personal hearing. The primary question to be decided in the present appeal is whether the value of the goods sold by the appellant to M/s. Duplast, needs to be re-determined in terms of Rule 9 of the Central Excise Valuation (Determination of the Price of excisable goods) Rules, 2000, read with Section 4 of the Central Excise Act, 1944 or otherwise.

7. Before going into the merits of the matter, it would be prudent reproduce the relevant text of Section 4 of the Central Excise Act, 1944 and Rule 9 of the Central Excise Valuation (Determination of the Price of excisable goods) Rules, 2000,

Section 4. Valuation of excisable goods for purposes of charging of duty of excise —

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -
(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;
(b) in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.

[***Explanation.*** — For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,-
(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;
(b) persons shall be deemed to be "related" if -
(i) they are inter-connected undertakings;

(ii) they are relatives;
(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or
(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

COMPANIES ACT, 1956

(41) "relative" means, with reference to any person, any one who is related to such person in any of the ways specified in section 6, and no others ;

6. Meaning OF "RELATIVE"
A person shall be deemed to be a relative of another, if, and only if,
(a) they are members of a Hindu undivided family ; or
(b) they are husband and wife ; or
(c) the one is related to the other in the manner indicated in Schedule IA.

Schedule IA [See section 6(c)] List Of Relatives

1. Father.
2. Mother (including step-mother).
3. Son (including step-son).
4. Son's wife.
5. Daughter (including step-daughter).
6. Father's father.
7. Father's mother.
8. Mother's mother.
9. Mother's father.
10. Son's son. Page 284 of 332
11. Son's son's wife.
12. Son's daughter.
13. Son's daughter's husband.
14. Daughter's husband.
15. Daughter's son.
16. Daughter's son's wife.
17. Daughter's daughter.
18. Daughter's daughter's husband.
19. Brother (including step-brothers).
20. Brother's wife.
21. Sister (including step-sister).
22. Sister's husband.
23-49. [Omitted by the Companies (Amendment) Act, 1965, w.e.f. 15-10-1965.]

Central Excise Valuation (Determination of the Price of excisable goods) Rules, 2000

Rule 9. **Prior to 1.12.2013**

When the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in the manner specified in either of sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of the goods shall be the normal transaction value at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail : Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.

Rule 9 **from 1.12.2013**

Rule 9. Where whole or part of the excisable goods are sold by the assessee to or through a person who is related in the manner specified in any of the sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of such goods shall be the normal transaction value] at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail :

Provided that in a case where the related person does not sell the goods but uses or consumes such goods in the production or manufacture of articles, the value shall be determined in the manner specified in rule 8.

[The present dispute covers the period from May 2011 to October 2014]

8. The adjudicating authority has held that both the *appellant* and *M/s. Duplast* are related in terms of Section 4(3)(b)(ii) of the Central Excise Act, 1944. It is a fact that the appellant is a 'proprietary concern' of Shri Jagdishkumar T Chopra while M/s. Duplast is an HUF being looked after by a karta of HUF of Shri Siddharth J Chopra, who is the son of the proprietor of the appellant. Hence, it is clearly evident that both the firms the proprietary firm and the HUF, are related persons in terms of Section 4(3)(b)(ii) of the Central Excise Act, 1944 and therefore as a natural corollary, the valuation of the goods should be done under the Central Excise Valuation Rules, 2000. The appellant's contention that the appellant and M/s. Duplast were working separately and carrying out the business independently, is not a legally tenable point. I find that the appellant has relied upon the following case laws to buttress their argument, which I would now like to discuss:

[a] Indus Fabricons P Ltd [2012(282) ELT 417]. This case law examines whether M/s. Indus and M/s. Moijj were related under Section 4(4)(c) of the Central Excise Act, 1944, Further, the question of related persons was between two different companies. In the present case, the dispute is relating to a proprietary concern and a HUF and the relation is sought to be established under Section 4(3)(b)(ii) of the Central Excise Act, 1944 and therefore the case law stands distinguished.

[b] Electronic Calculators & Computer [2008(224) ELT 559]. This case covered the dispute for the period from 1991-92 to 1995-96 when the present Section 4 of the Central Excise Act and the Valuation Rules, 2000 was not in vogue and therefore this case stands distinguished. Even otherwise, the central question in the dispute was about whether two limited companies were related or otherwise, which is not the dispute in the present case.

[c] Heera Electronics [2006(205) ELT 381]. This case also covers a period prior to new Section 4 of the Central Excise Act, 1944 and therefore is distinguished.

[d] AGP Engg. P Ltd [2016(335) ELT 186]. This case pertains to allegation in respect of two companies being related. Since facts are different from the present dispute, the case law stands distinguished.

In view of the foregoing, I uphold the findings of the adjudicating authority in so far as he has held that both the appellant and M/s. Duplast are related in terms of section 4(3)(b)(ii) of the Central Excise Act, 1944. The appellant has further raised a plea that merely because the key persons of the appellant and M/s. Duplast are related or are members of a HUF it should not be taken as a ground to hold that the appellant had sold the goods at a price below transaction value. However, this averment falls flat since the duty is being demanded only because the price at which the goods were sold were below the price at which M/s. Duplast cleared the said goods. The appellant has further contended that the Revenue failed to place any evidence to show that there was any flow back of money from M/s. Duplast to the appellant, revealing undervaluation of goods and that the relationship never influenced the price. In this connection I find that since their case is covered under section 4(3)(b)(ii) of the Central Excise Act, 1944, both the appellant and M/s. Duplast are related.

PERIOD PRIOR TO 1.12.2013

9. As I have already mentioned the demand stands confirmed against the appellant on the grounds that they had sold 90 % of the goods through M/s. Duplast, and since the appellant and M/s. Duplast was related in terms of Section 4(1)(b) and 4(3)(b)(ii) of the Central Excise Act, 1944, these goods should have been valued in terms of Rule 9 of the Central Excise Valuation (Determination of the Price of excisable goods) Rules, 2000. As is already

mentioned, Rule 9, *supra*, was amended. Board vide its two circular had explained the Rule which was in vogue, as follows:

Circular No. 643/34/2002-CX., dated 1-7-2002

12.	*How will valuation be done when goods are sold **partly to related persons and partly to independent buyers ?***	*There is no specific rule covering such a contingency. Transaction value in respect of sales to unrelated buyers cannot be adopted for sales to related buyers since as per Section 4(1) transaction value is to be determined for **each removal.** For sales to unrelated buyers valuation will be done as per Section 4(1)(a) and for sale of the same goods to related buyers recourse will have to be taken to the residuary Rule 11 read with Rule 9 (or 10). Rule 9 cannot be applied in such cases directly since it covers only those cases where **all the sales** are to related buyers only.*

Circular No. 975/9/2013-CX, dated 25-11-2013

2. Rules 8, 9 and 10 of the Central Excise Valuation Rules, 2000 dealing with determination of assessable value in case of captive consumption and sale to related person have been amended vide notification no. 14/2013-Central Excise (N.T.), dated 22-11-2013 to clearly state that these rules apply irrespective of whether the whole or a part of the clearances of manufactured goods are covered by the circumstances given in these rules. Each clearance is required to be assessed according to section 4(1)(a) or the relevant rule dealing with the circumstances of clearance of the goods, as the case may be.

3. For example, if an assessee clears his goods in such a way that first removal of goods is to an independent buyers, some goods are captively consumed, second removal is to such a related person who is covered under rule 9 and third removal is to a person who is covered under rule 10, then the first removal should assessed under section 4(1)(a), captively consumed goods should be assessed under rule 8, second removal should be assessed under rule 9 and third removal should be assessed under rule 10 of these rules. It may be noted that Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 are not required to be followed sequentially. Each of these rules provide for arriving at the assessable value of goods under different contingencies as noted by Hon'ble Supreme Court at paragraph 70 in case of Commissioner of Central Excise, Mumbai v. M/s. FIAT India Pvt. Ltd. [2012 (283) E.L.T. 161 or 2012-TIOL-58-SC-CX].

4. Serial no. 5, 12 and 14 of the Circular No. 643/34/2002-CX, dated 1-7-2002 [2002 (143) E.L.T. T39] are deleted in view of the amendments in the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, as these amendments address the issues on which these clarifications were issued. The amended rules and accordingly this circular shall apply with effect from 1st December, 2013.

Since only 90% of the goods were sold by the appellant through M/s. Duplast, the question of valuation of the said goods under Rule 9 of the Central Excise Valuation Rules, 2000, does not arise for the period upto 1.12.2013, in view of the clarification issued vide Circular No. 643/34/2002-CX., dated 1-7-2002, *supra*. Hence, the confirmation of the demand in this respect for the period from May 2011 to 1.12.2013 is not tenable and is therefore, set aside.

PERIOD POST 1.12.2013

10. For the period post 1.12.2013, I find that the valuation should have been done under Rule 9 of the Valuation Rules, 2000 in terms of the clarification of the Board, *supra*. However, since the same has not been done, the demand stands confirmed which I find is correct. The appellant however, has raised various contentions in this regard viz.

11. The appellant has stated that M/s. Duplast was not selling the same goods which were purchased from the appellant and hence the question of valuation under Rule 9 does not arise. I do not find this to be true on account of the fact that the appellant vide his letter dated 25.6.2014 addressed to the Superintendent, AR IV, Division III, had informed as follows:

"We would further like to inform you that we have not sold 100% goods to M/s. Duplast. And also would like to inform you that M/s. Duplast is also registered under Central Excise and have already paid the Central Excise duty on his sale price of the goods purchased from us. For example M/s. Duplast has

purchased from us vide our invoice no. 117 dated 31.3.2012 1000 kgs Ecocizer at the rate of Rs. 94/Kg plus Excise and VAT. The said material M/s. Duplast has sale by using their brand name BFLEX 79 at the rate of Rs. 101/Kg plus Excise and VAT. For the period 2012-13 we have sold 10000 kgs vide our invoice no. 207 dated 28.3.2013 at the rate of Rs. 94/Kg plus Excise and VAT. The said material M/s. Duplast has sale by using their brand name BFLEX 79 at the rate of Rs. 104/Kg. plus Excise and VAT. For the period 2013-14 we have sold 9000 kgs vide our invoice no. 257 dt 29.3.2014 at the rate of Rs. 101/kg plus excise and VAT. The said material M/s. Duplast has sale by using their brand name BFLEX 79 at the rate of Rs. 111/Kg plus Excise and VAT. Copy of the invoices of M/s. Mellow Chemplast and M/s. Duplast enclosed herewith for your reference. "

This clearly depicts that what was purchased was the same goods that was sold by M/s. Duplast consequent to using their brand name. Hence, the averment fails.

12. The other argument of the appellant is that they should have been granted the cum duty benefit. They have relied upon three case laws to put forth their argument viz. Shri Chakra Tyres [1999(108) ELT 361], Rohit Detective and Security Agency[2009(14) STR 689], and Gem Star Enterprises [2007(7) STR 342]. However, I find that the request for cum duty has been made before me for the first time. Since new grounds can be raised before the Commissioner(Appeals) only in terms of Rule 5 of the Central Excise (Appeals) Rules, 2001, and since the conditions enumerated in the said rule does not stand satisfied, I reject the new plea/ground raised before me for the benefit of cum duty.

13. The appellant has further contended that since this was a case of revenue neutrality there could have been no incentive or benefit accruing to the appellant to undervalue the final goods. However, it has been held by the Hon'ble Tribunal /Courts that it cannot be held as a general rule that the assessee need not pay tax if the same is available as a credit to them. Further a purported revenue neutral situation cannot, by any means, mitigate a tax liability of the appellant which ought to have been paid in view of clear legal position. The scheme of CENVAT credit as envisaged by the CENVAT Credit Rules, 2004 will otherwise be left redundant, if the proposition of revenue neutrality is invoked for non-payment of Central Excise duty. Such an interpretation of law will be against the very basis of value added taxation and leave the discharge of tax liability to the discretion of the appellant. I therefore reject the plea of revenue neutrality raised by the appellant.

14. The appellant has further stated that extended period cannot be invoked. I do not agree with the contention since the above relationship was never known to the department and would have escaped the tax net if CERA had not pointed it out. There appears to be a clear cut case of suppression and contravention of various provisions of the Act and the rules, with the intention to evade payment of duty and therefore this is a fit case for invocation of extended period and imposition of penalty.

15. In view of the foregoing, it is ordered that the demand upto the period 1.12.2013 cannot be upheld since during the said period Rule 9 of the Valuation Rule was not applicable. The demand for the period from 1.12.2013, the upheld along with interest and penalty. However, since the demand needs to be re-determined along with the penalty, the adjudicating

authority is directed to re-determine the amount of duty for the said period, along with the interest and penalty and intimate the appellant about the same.

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

16. The appeal filed by the appellant stands disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)

Date :27.12.2018

Attested

(Vinod Lukose)
Superintendent (Appeal),
Central Tax,
Ahmedabad.

By RPAD.

To,

M/s. Mellow Chemplast,
103/6, GIDC,
Prakash Pipe Compound,
Opp. Mesto Mineral,
Odhav,
Ahmedabad 382 415

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-V, Ahmedabad South.
4. The Assistant Commissioner, System, Central Excise, Ahmedabad South.
5. Guard File.
6. P.A.