

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

रजिस्टर्ड डाक ए.डी. द्वारा

- क फाइल संख्या : File No : V2(30)/49/Ahd-I/2017-18 / 1763-1763
Stay Appl.No. NA/2017-18
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-387-2017-18
दिनांक Date : 16-03-2018 जारी करने की तारीख Date of Issue 22-03-18
- श्री उमा शंकर आयुक्त (अपील) द्वारा पारित
Passed by Shri. Uma Shanker, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. 22/CX-I Ahmd/JC/KP/2017 दिनांक: 4/5/2017 issued by Joint Commissioner, Central Tax, Ahmedabad-South
- घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s. Gujarat Medcraft Pvt. 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 aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

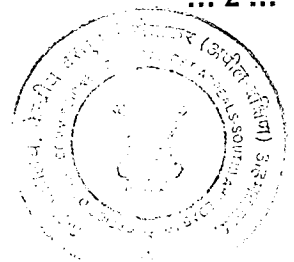
(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रक्रिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

... 2 ...



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित 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 मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

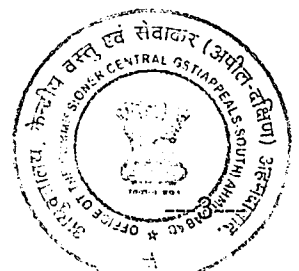
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू 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. 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 अनुसूचि-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

- (5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं 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 has been filed by M/s. Gujarat Medicaft Private Limited, Plot No. 3726-27, Phase-IV, GIDC, Vatwa, Ahmedabad- 382445 [for short – ‘appellant’] against OIO No. 22/Cx-I/Ahmd/JC/KP/2017 dated 4.5.2017, passed by the Joint Commissioner, Central Excise, Ahmedabad-I [for short – ‘adjudicating authority’].

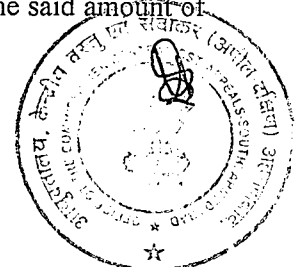
2. Briefly, the facts are that the appellant vide his letters dated 30.6.2005 & 4.7.2005, intimated Assistant Commissioner, Division II, Ahmedabad-I Commissionerate, that relying on the case of M/s. Vinayaka Mosquito Coil Manufacturing Company [2004(174) ELT 107], they will be supplying free goods [medicines falling under chapter 30] to parties [wholesale dealers, distributors, etc.] without payment of Central Excise duty. A show cause notice dated 9.6.2006, was therefore issued *inter alia* alleging that the appellant was printing MRP on the goods supplied free of cost; that there was no special packing or marking to depict that the goods were not for sale; that no mention was made on the invoices issued that the goods were supplied free of cost; that the goods were cleared free of cost, without payment of duty. The notice therefore, demanded Central Excise duty of Rs. 11,97,753/- + education cess of Rs 23,955/- along with interest and further proposed penalty under section 11AC of the Central Excise Act, 1944, read with Rule 26 of the Central Excise Rules, 2002, on the appellant.

3. This notice was adjudicated vide OIO No. 50/JC/2006 dated 28.12.2006 wherein the then adjudicating authority, confirmed the demand along with interest and further imposed equivalent penalty on the appellant. Feeling aggrieved, the appellant filed an appeal before the Commissioner(Appeals), Appeals-I, Central Excise, Ahmedabad, who vide his OIA No. 105/2007 dated 20.3.2007, allowed the appeal and set aside the OIO dated 28.12.2006. Feeling aggrieved, the department approached the Hon’ble CESTAT who vide its Order No. A/10809/2015 dated 17.6.2015 passed the following orders[relevant portion]:

“5. Accordingly, we set aside the impugned order passed by the Commissioner(Appeals) and uphold the demand of duty along with interest and set aside the penalty. The Adjudicating authority is directed to re-quantify the demand of duty extending the benefit of the CENVAT credit after verification of records in accordance with law. “

4. In pursuance to this direction from the Hon’ble Tribunal, the matter was adjudicated vide the impugned OIO dated 4.5.2017, wherein the adjudicating authority confirmed the demand along with interest and further imposed equivalent penalty on the appellant. Feeling aggrieved, the appellant has filed this appeal raising the following averments:

- that the adjudicating authority erred both on facts and in law in passing the impugned OIO;
- that the impugned order was passed ex parte;
- that the impugned order has been passed contrary to the directions of the Hon’ble Tribunal dated 17.6.2015;
- that in terms of the directions of the Hon’ble Tribunal the appellant has furnished all relevant records for the purposes of working out the eligibility to CENVAT credit and the said amount of CENVAT credit was liable to be deducted from the total duty;



- that the appellants had vide their letter dated 28.7.2016 and 25.4.2017 furnished all the information /records to the adjudicating authority to arrive at the eligibility of CENVAT credit and reduce the demand accordingly;
- that the appellant had offered to submit further information that may be required to adjudicate the matter as is evident from the correspondence with the department;
- that the imposition of penalty in the matter is in direct defiance of the order passed by the Tribunal as the department and the appellant had not filed any appeal against the said order.

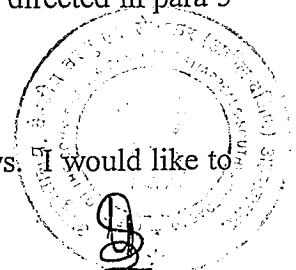
5. Personal hearing in the matter was held on 13.3.2018 wherein Shri Parth Contractor, Advocate appeared on behalf of the appellant and reiterated the grounds of appeal. He also submitted copies of citations viz. Surya Food & Agro Ltd [2003 taxmann.com1130], Vinayak Mosquito Coil Manufacturing Co. [2005 tamann.com 1397], Indica Laboratories P Ltd [2007(120) ECC 113] and Tuton Pharmaceuticals [[SCA No. 14068/2007, 1030/2008, 28490/2007, 15858/2007, 15853/2007 and 28540/2007].

6. I have gone through the facts of the case, the show cause notice, the earlier original order, the orders issued by the Appellate authorities, the impugned OIO and the grounds raised in the appeal and during the course of personal hearing. I find that the issue to be decided is whether the adjudicating authority was correct in confirming the demand along with interest without granting the benefit of CENVAT credit. Further, the second point of determination is whether the adjudicating authority was correct in imposing penalty when the Hon'ble Tribunal had set aside the penalty.

7. On going through the order of the Hon'ble Tribunal, I find that the Tribunal **upheld the demand of duty along with interest** after setting aside the penalty. However, the adjudicating authority was directed to only re-quantify the demand of duty extending the benefit of the CENVAT credit after verification of records, in accordance with law.

8. On going through the first issue to be decided, as to whether the adjudicating authority was correct in confirming the demand along with interest without granting the benefit of CENVAT credit, I find that the appellant has not provided copies/records as listed in para 15.3 of the impugned OIO. Moreover, the appellant failed to attend the personal hearing granted by the adjudicating authority, over a period spanning six months. The appellant however, in his appeal papers stated that they had offered to submit any further information, required to adjudicate the matter. So in the interest of justice, I am of the view that the matter may be remitted back to the adjudicating authority, with a direction that the appellants will provide the copies/records as listed in para 15.3, within a period of three months from the receipt of this order. The adjudicating authority is directed to re-quantify demand of duty extending the benefit of the CENVAT credit after verification of records, in accordance with law as directed in para 5 of the order dated 17.6.2015 of the Hon'ble Tribunal.

8.1 I further find that the appellant has relied upon certain case laws. I would like to discuss the same.



(i) Surya Food & Agro Ltd [2003 taxmann.com 1130]. The Hon'ble Tribunal held that quantity discounts given, irrespective of manner of administering, are eligible for deduction while fixing the assessable value which are subject to duty on advalorem basis. The principle remains clarified in regard to goods bearing MRP under Board's circular dated 28.10.2002.

(ii) Vinayak Mosquito Coil Manufacturing Co. [2005 tamann.com 1397]. The Hon'ble Tribunal in this case set aside the impugned order and allowed the appeal of the appellant upholding the contention that in case of free supply, there is no sale and the provisions of Section 4A are not attracted.

(iii) Indica Laboratories P Ltd [2007(120) ECC 113]. In this case the Larger Bench of the Tribunal held as follows:

- (a) Sale is not a necessary condition for charging to excise duty. Duty becomes payable (unless otherwise exempted) in respect of every removal of excisable goods.
- (b) The concept of quantity discount applicable in the context of valuation under Section 4 is not applicable in determining value under Section 4A, for the forgoing reasons.
- (c) In the present case, the sale is for the gross quantity at the net price and the claimed free supply is not meant for the ultimate customer; such quantity claimed to be given also carried MRP. Therefore, duty shall be discharged on the entire quantity including goods covered as "the quantity discount" on the basis of value arrived at under Section 4A after giving the abatement provided

(iv) Tuton Pharmaceuticals [[SCA No. 14068/2007, 1030/2008, 28490/2007, 15858/2007, 15853/2007 and 28540/2007]. The Hon'ble High Court of Gujarat in this case held as follows: [relevant extracts]:

26. We may recall, counsel for the petitioners during the course of arguments had dropped the issue of non-charging of the duty under section 4A of the Act on the trade-discount provided to the dealers on the extra medicines supplied to the dealers free of cost by way of trade-discount on bulk purchases. In that view of the matter, two issues need to be decided. First is of constitutional validity of section 4A of the Act and second is whether upon clearance of the medicines for supplying to the doctors by way of free samples, any duty can be charged, and if so, the same would be leviable under section 4A or section 4 of the Act?

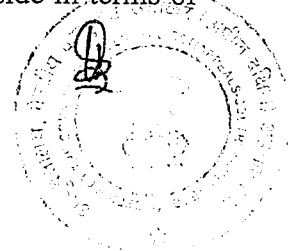
40. In the result, these petitions are disposed of with following directions:

- 1. The petitioner's challenge to the vires of section 4A of the Act fails.*
- 2. It is clear that the excise duty on the doctors' free samples can be levied only under section 4 of the Act and not under section 4A.*
- 3. Any instructions and directions to the contrary is set aside.*

8.2 However, as is mentioned in para 3 supra, the Tribunal in this case has already upheld the demand of duty along with interest and the adjudicating authority was only directed to re-quantify the demand of duty after extending the benefit of CENVAT. Therefore, the reliance on the aforementioned case laws would be of no help to the appellant.

9. Going to the second issue as to whether the adjudicating authority was correct in imposing penalty when the Hon'ble Tribunal had set aside the penalty. I do not find any merit in what has been mentioned in para 19 of the impugned OIO dated 4.5.2017. The question of imposition of penalty simply does not arise since this was not the issue which was to be dealt with by the adjudicating authority. The penalty imposed therefore, is set aside.

10. In view of the foregoing, the matter is remitted back to the adjudicating authority in terms of para 8, *supra*. The penalty imposed vide the impugned OIO is set aside in terms of the direction of the Hon'ble Tribunal vide its order dated 17.6.2015.



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

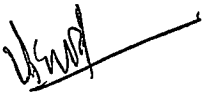
उमाशंकर

(उमा शंकर)

आयुक्त (अपील्स)

Date : .3.2018

Attested



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

By RPAD.

To,
M/s. Gujarat Medicroft Private Limited,
Plot No. 3726-27,
Phase-IV, GIDC,
Vatwa,
Ahmedabad- 382445

Copy to:-

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

