केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

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

7th Floor, GST Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

☎: 079-26305065 टेलेफैक्स : 079 - 26305136

2242 to 2246.

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(39)/64/Ahd-I/2017-18 & V2(39)63/Ahd-I/17-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-405 to 406-2017-18**
दिनाँक Date : **22-03-2018** जारी करने की तारीख Date of Issue 9/4/2018

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

ग Arising out of Order-in-Original No. **MP/06/DEM/2017-18** दिनाँक: **25/5/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

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

(i) **M/s. Maruti Polyplast** & (ii) Shri Hiralal A. Patel
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।

केन्द्रीय उत्पाद शुल्क आयुक्त (अपील-I) OFFICE OF THE COMMISSIONER (APPEALS-I) CENTRAL EXCISE AHMEDABAD अहमदाबाद

(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.

3---

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 .**

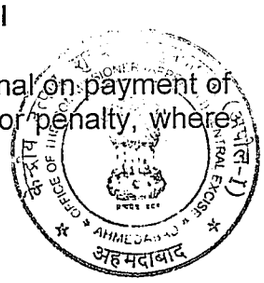
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

The below mentioned two appeals have been filed against OIO No. MP/06/Dem/2017-18 dated 25.5.2017 passed by the Assistant Commissioner, Central Excise, Division V, Ahmedabad-I Commissionerate:

Sr. No.	Name of the appellant	Appeal No.
1	M/s. Maruti Polyplast, Plot No. 192/204-A, GVMM, Odhav, Ahmedabad 382415	64/Ahd-I/2017-18
2	Shri Hiralal A Patel, Partner, M/s. Maruti Polyplast, Plot No. 192/204-A, GVMM, Odhav, Ahmedabad 382415	63/Ahd-I/2017-18

2. A preventive case was booked against the appellant mentioned at Sr. No. 1 *supra*, and consequent to completion of investigation, a show cause notice dated 5.8.2015 was issued *inter alia* alleging that the appellant had illicitly cleared the excisable goods; that in the FY 2011-12 despite clearing goods valued at Rs. 2.20 crores, the appellant had failed to get themselves registered and had thereby evaded Central Excise duty of Rs. 7,27,491/-. The notice therefore, demanded the duty evaded along with interest and further proposed penalty on both the appellants mentioned at Sr. No. 1 and 2 and certain other persons. This notice was adjudicated vide the impugned OIO dated 25.5.2017, wherein the adjudicating authority confirmed the duty demand along with interest and further imposed penalty on both the appellants, in addition to imposing penalty on certain other persons.

3. Both the aforementioned appellants, feeling aggrieved by the impugned OIO, have filed appeals, on the below mentioned grounds:

M/s. Maruti Polyplast

- that the value has to be considered as cum duty price and the adjudicating authority erred in not granting the benefit;
- the appellant has not recovered any amount towards central excise duty; that the price charged is inclusive of excise duty and therefore the benefit of cum duty value ought to have been extended;
- that the cum tax benefit is available as a general principle and is available irrespective of whether or not there is any provision under the Act;
- that they would like to rely on the case of Maruti Udyog Ltd [2002(141) ELT 3] and Bata India Ltd [1996(4) SCC 563];
- that the total sales of M/s. Maruti Polyplast, also contains trading sales of goods purchased from the other manufacturers; that the said goods were cleared without issuing invoices and are not goods manufactured by the appellant;
- that the manufacturer should be allowed to take CENVAT credit of duty paid on inputs lying in stock on the date on which the goods cease to be exempted goods;
- that the adjudicating authority has not followed the principles of natural justice and has not added his own finding beyond the findings of the investigating officer;
- that there is no case of malafide as made out against the appellant in respect of availment of notification No. 8/2003;
- that no penalty can be imposed on the appellant.

Shri Hiralal A Patel, Partner,M/s. Maruti Polyplast.

- that no penalty is imposable on the partner since penalty has been imposed on the partnership firm;
- that they would like to rely on the case of M/s Sharp Engineers and Pravin N Shah.

4. Personal hearing in respect of both the appeals was held on 15.3.2018, wherein Shri Vipul Khandhar, CA appeared on behalf of the appellants. He reiterated the grounds of appeal and further stated that the adjudicating authority did not consider the submissions. He also submitted unsigned additional written submissions raising the following averments:

- that the duty could not have been sustained without having corroborative evidence of the procurement, production and clearance; that they wish to rely on the case of ABS Metals P Ltd [2016(341)ELT 425], Sri Sukra Spinning Mills [2018(359) ELT 176], Rama Spinners P Limited [2017(348) ELT 321] and Krishna Sales [2016(344) ELT 111];
- that no finding was given in respect of differential turnover in relation to trading;
- that since this is a matter of interpretation, penalty cannot be imposed u/s 11AC;
- that in respect of the second appellant, it was contended that he had not acted in any manner which was harmful for the revenue in his personal capacity.

5. I have gone through the facts of the case, the grounds of appeal and the contentions raised during the course of personal hearing along with the additional written submissions. I find that the question to be decided in the present appeals are whether the appellant is liable for payment of Central Excise duty [calculated under para 16.1 of the show cause notice] of Rs. 7,27,491/-, which stands confirmed against the appellant along with interest and penalty. Consequently, the second issue to be decided is whether the appellant mentioned at Sr. No. 2, *supra,* is liable for penalty or otherwise.

6. Before moving any further, I find that the appellant during the course of personal hearing before the Joint Commissioner, stated that they had paid the amount of Rs. 8.00 lacs and were ready to pay the dues as per the rules and regulation. Thereafter, when personal hearing was held before the adjudicating authority, the appellant stated that they had nothing to give in writing and reiterated that they had already paid the amount of Rs. 8.00 lacs. It is in background of this fact, that I have to decide this appeal.

7. I find that two primary contentions are raised before me [a] that they are eligible for cum duty benefit; and [b] the total sales contains trading sales also. Now I find that the appellant has raised two additional/fresh grounds before me, which were not raised before the adjudicating authroity. I find that in the case of M/s. Utkarsh Corporate Services [2014(34) STR 35], the Hon'ble High Court of Gujarat, 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]

Hence, I find that 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 grounds as mentioned above, exist in the present case. Therefore, ideally, the contentions raised before me for the first time should be summarily rejected since they were not raised before the adjudicating authority. However, after having said so, I would still like to give my findings on the fresh grounds raised before me in the interest of justice.

8. As I have already mentioned, the first ground is that the appellant should be granted the benefit of cum duty. The issue is no longer *res integra*. The Hon'ble Tribunal in the case of Sarla Polyster Ltd [2008(222) E.LT 376 (Tri. - Ahmd.)], has stated as follows [the relevant extracts]

7.1 The next issue to be considered is whether the sale price of the clandestinely removed goods should be treated as cum-duty value. The issue has been considered by the Tribunal in the case of Asian Alloys Ltd. v. CCE, Delhi-III reported in 2006 (203) E.L.T. 252 (Tri.-Del.) and the relevant portions of the order are reproduced below :

"18. It was contended that the amounts worked out for the values of job work, clandestine removal, and shortage, totalling Rs. 28,92,32,753/-, even if taken to be true and correct should be considered as the total price received by the said unit of the appellant company inclusive of duty. In other words, the said amount should be considered, as "cum-duty" price and the duty liability should be worked out on that basis. In this context, it appears from the decision of the Mumbai Bench of the Tribunal in Nagreeka Exports Ltd. v. Commissioner of Central Excise, Pune reported in 2003 (159) E.L.T. 891 (Tri.-Mumbai), that in Paragraph 11 of the judgement it has been held that if duties and taxes have not been realized separately, the sale price has to be treated as cum-duty price and duties and taxes have to be deducted to arrive at the assessable

value in such case. The Tribunal was dealing with the contention that the price which was realized by the appellants on DTA sales be taken as cum-duty price and the assessable value and the duty amount have to be worked out from the same. It however, appears that the issue of clandestine removal and its impact on the claim for treating price as cum-duty was neither raised nor considered by the Tribunal in that order. In the present case, there is absolutely no material on record to indicate that the price charged by the 100% EOU unit of the appellant was a cum-duty price. Even in the decision of the Hon'ble Supreme Court in Commissioner of Central Excise, Delhi v. Maruti Udyog Ltd. reported in 2002 (141) E.L.T. 3 (S.C.) (supra), in Paragraph 5 of the judgment the Hon'ble Supreme Court held as under :-

"A reading of the aforesaid section clearly indicates that the wholesale price which is charged is deemed to be the value for the purpose of levy of excise duty, but the element of excise duty, sales tax or other taxes which is included in the wholesale price is to be excluded in arriving at the excisable value. This section has been so construed by this Court in Asstt. Collector of Central Excise and Others v. Bata India Ltd. - 1996 (4) SCC 563, and it is thus clear that when cum-duty price is charged, then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded. The Tribunal has, therefore, rightly proceeded on the basis that the amount realized by the respondent from the sale of scrap has to be regarded as a normal wholesale price and in determining the value on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price, must be excluded. There is nothing to show that once the demand was raised by the Department, the respondent sought to recover the same from the purchaser of scrap. The facts indicate that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller, namely, the respondent. In such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(4)(d)(ii) and this is precisely what has been directed by the Tribunal. There is also nothing to show that the sale price was not cum-duty". (emphasis added).

18.1 In the present case, all the sales to the DTA were clandestinely done in contravention of the provisions of the EXIM Policy and the rules applicable to such 100% EOU unit. The appellant-company adopted a studied course of non-co-operation and did not raise any contention that the price which was charged, included the component of excise duty as contemplated by the proviso to Section 3(1). On the contrary exemption from duty was claimed, meaning thereby whatever price was realized by the said EOU unit was realized on the footing that no duty was payable because of the exemption notification. Obviously, therefore, such a price can never include any duty amount, because when the appellant-company had itself proceeded on the footing that no duty was payable, there was no question of its having recovered any "cum-duty" price from these customers in the DTA. Therefore, the facts of the present case fall on totally a different footing than the cases on which reliance was sought to be placed on behalf of the appellant. There is no scope in the present case to treat the sale price worked out for assessment as "cum-duty" price."

7.2 In view of the above, the decision of the Commissioner in not accepting the contention that the sale price of the clandestinely removed goods cannot be treated as cum-duty price is legal and proper. Therefore the valuation adopted by the Commissioner for demand of duty is in order.

Hence, the question of granting *cum duty* benefit in this case where the appellant himself during the course of statement dated 23.2.2012 had stated that the manufactured goods were illicitly cleared without issuing invoices, is out of question, being legally not tenable. Hence, the averment made is rejected.

9. Coming to the second contention of the appellant that the total sales of M/s. Maruti Polyplast included trading sales, is quite surprising. I find that in the statement dated 23.2.2012, the partner of the appellant stated that the clearances mentioned in Annexure D pertains to clearances of excisable goods during the FY 2011-2012. The show cause notice while demanding duty also extended the SSI benefit of notification No. 8/2003, on the value of clearances. Therefore, I find that raising such an averment at this stage, is indeed surprising and

nothing but an afterthought. Even otherwise, no supporting documents etc are provided to even substantiate the claim.

10. The appellant has also stated that the adjudicating authority did not follow the principles of natural justice. The claim appears to be incorrect primarily because no defence was given by the appellant. The appellant in his additional written submissions has stated that the duty could not have been sustained without having corroborative evidence of the procurement, production and clearance of demand of duty. The contention is not correct since it is from the appellant's computer that the illicit clearances were traced. In-fact, the statements of buyers also corroborated to the fact that the clearances were illicitly made to evade duty payment. Even otherwise, the averment that there is no corroborative evidence, would not help their case in light of the fact that the appellant from the very beginning did not put forth any defence and was ready to pay the duty. The appellant from the day of investigation till the adjudication stage was only chanting one line *that he had nothing to state and that he had already deposited Rs. 8.00 lacs*. In-fact, the legal maxim states *that what is accepted need not be proved.* Therefore, now to argue that principles of natural justice, was not followed, is not tenable. Hence, the averment raised is rejected.

11. The appellant has relied upon certain case laws in the additional written submissions, to substantiate his averments, which I would now like to discus:

- ABS Metals P Ltd [2016(341)ELT 425]. The Hon'ble Tribunal in this case held that there was virtually no other evidence to reflect upon the manufacture of appellant's final product, their transportation, recognition of the buyers and receipt of sales proceeds by allegedly clandestine removal of goods; that shortages by itself cannot be held to be clandestine removal of goods. The case stands distinguished since in the present dispute [a] the clandestine removal was detected based on entries found in the computer of the appellant;[b]the buyers have corroborated that they had received the goods without any invoices; and [c] the financial flow back to the account of the appellant no. 2's daughter has also been traced.

- Sri Sukra Spinning Mills [2018(359) ELT 176]. On going through the judgement of the Hon'ble High Court of Madras, I find that one of the question to be decided was whether the entries in the private record, namely, "Broker's Commission file" can be made the basis for upholding the charge of clandestine removal of goods in the absence of corroborative evidences, such as, stock difference, purchase of raw materials without invoice, seizure of unaccounted finished goods while transporting, etc?. However, the present dispute before me differs totally in facts. Hence, the case law relied upon stands distinguished.

- Rama Spinners P Limited [2017(348) ELT 321]. The Hon'ble Tribunal in this case held that since the allegation was based mainly on statements and some records recovered from third party and since four buyers had back-tracked during their cross-examination, the demand were set aside. The present dispute before me, as is evident differs solely on facts and therefore the reliance on this case law stands distinguished.

- Krishna Sales [2016(344) ELT 111]. The Hon'ble Gujarat High Court in this case dismissed the departmental appeal on the ground that nothing is pointed out in Revenue's appeal to assail findings of no evidence against dealer, as recorded in Tribunal's order. Since facts are not the same, the reliance placed on the said case law is not correct.

11.1 In view of the foregoing, the confirmation of the demand of duty along with interest is upheld.

केन्द्रीय उत्पाद शुल्क आयुक्त (अपील) OFFICE OF THE COMMISSIONER (APPEALS) AHMEDABAD अहमदाबाद

12. The appellant has further stated no penalty can be imposed upon them. It is further stated that *"....there is no case of any malafide or ill intention as made out against the appellant in respect of availment of 8/2003, it was only because the account was maintained in separate which lost site to monitor the exemption limit of 1.5 crore prescribed under the said exemption."* I am not able to understand what the appellant means, while making this averment. Even otherwise, it is on record that the appellant has cleared the goods without even issuing the invoices, a basic requirement for recording any transaction. The appellant in this case clearly wanted to evade payment of duty. Just to ensure, that the turnover did not cross the SSI limit, the invoices were not issued. The goods were cleared by issuing delivery challan of a fictitious firm and by recording it under a folder to evade tax authorities. Now to come up with an argument that since these were recorded in the books/computer, there was no malafide, does not reflect the true picture. The averment made is rejected being legally untenable. The penalty imposed on the appellant mentioned at Sr. No. 1 is therefore, upheld.

13. Now I come to the averments raised by the appellant mentioned at Sr. No. 2. I find that the appellant has relied upon the case of M/s. Pravin N Shah [2014 (305) ELT 480 (Guj.)]. The Hon'ble Gujarat High Court in the said judgement ordered as follows:

> **3.** It is not disputed that penalty has been imposed on the firm. The Tribunal [2010 (261) E.L.T. 515 (Tri. - Ahmd.)] has imposed penalty on the partner only on the ground that total amount of duty involved was approximately Rs. 88 lacs and equal amount of penalty has been imposed on the appellant firm. Therefore, penalty imposed on Mr. P.N. Shah, partner of the firm was on the higher side and it has reduced it to Rs. 10 lacs. Penalty of Rs. 87,96,398/- has been imposed on the firm under Section 11AC of the Central Excise Rules, 1944. It has been held by the Division Bench of Gujarat High Court in *Commissioner of Central Excise* v. *Jai Prakash Motwani*, 2010 (258) E.L.T. 204 (Guj.) that where no specific Rule is attributed to the partner in the firm, then once firm has already been penalised, separate penalty cannot be imposed upon the partner because a partner is not a separate legal entity and cannot be equated with employee of a firm. From the order of the Tribunal or other orders on record, we do not find that any specific role has been assigned as provided by Rule 26 of Central Excise Rules. The Division Bench of this Court in *Commissioner of Central Excise* (supra) has held that where penalty has been imposed on the firm, no separate penalty can be imposed on its partner. We agree with the view taken by the Division Bench. Therefore, we find force in the submission of the learned counsel for the appellant and the question is answered in the negative, in favour of the assessee and against the department. The appeal is allowed. Penalty imposed on the appellant is set aside.

However, penalty was not imposed under Rule 26 in the aforementioned case by the Hon'ble High Court on the ground that the partner of the firm had no specific role as provided by Rule 26 of the Central Excise Rules, 2002. Rule 26(1) Central Excise Rules, 2002, states as follows:

> ***RULE 26. Penalty for certain offences.*** *— [(1)] Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or [two thousand rupees], whichever is greater.*

Now, the role of the appellant mentioned at Sr. No. 2 of the table in para 1 is documented in para 42 of the impugned OIO. He was the main person who orchestrated the entire evasion. Therefore, the question of non imposition of penalty on the appellant mentioned at Sr. No. 2 does not arise. However, I find that when the appellant mentioned at Sr. No. 1 [firm] has been

imposed a penalty of Rs. 1.09 lacs under Section 11AC read with Rule 25, the appellant mentioned at Sr. No. 2, has been imposed a penalty of Rs. 7,27,491/-, which is clearly disproportionate. I therefore, reduce the penalty imposed on Shri Hiralal A Patel, Partner of M/s. Maruti Polyplast, to Rs. 1,00,000/- only.

14. In view of the foregoing, the impugned OIO is upheld except for the relief granted to appellant mentioned at Sr. No. 2 in terms of para 13, above.

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

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

उमा शंकर

(उमा शंकर)
आयुक्त (अपील्स)

Date :22.3.2018

Attested

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

By RPAD.

To,

M/s. Maruti Polyplast, Plot No. 192/204-A, GVMM, Odhav, Ahmedabad 382415
Shri Hiralal A Patel, Partner, M/s. Maruti Polyplast, Plot No. 192/204-A, GVMM, Odhav, Ahmedabad 382415

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.