केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

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

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रजिस्टर्ड डाक ए.डी. द्वारा

2158 to 2162

क फाइल संख्या : File No : V2(40)/67/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-416-2017-18**
दिनाँक Date : **23-03-2018** जारी करने की तारीख Date of Issue 6/4/2018

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

ग Arising out of Order-in-Original No. **MP/06/AC/Div-III/2017-18** दिनाँक: **23/5/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

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

M/s. Shree Umiya Surgicals
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...

केन्द्रीय उत्पाद शुल्क आयुक्तालय (अपील-I) OFFICE OF THE COMMISSIONER (APPEALS-II) 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.

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 होगां "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

Shree Umiya Surgical Pvt. Ltd. [*hereinafter referred to as the 'appellant'*], situated at 4704, Phase-IV, GIDC Vatva, Ahmedabad, are engaged in the manufacture of disposable surgical products used in medical/surgical science and latex surgical gloves falling under sub-heading No.90183100 & 40151100, respectively of Central Excise Tariff Act, 1985, and hold Central Excise Registration No. AAFCS0228NXM001. The appellant had not assessed their goods namely Latex Surgical gloves under Section 4A from 24.03.2011, as per Notification No. 11/2011-CE dt.24.03.2011, on the abated value of the declared MRP and instead cleared them under Section 4 of the Central Excise Act, 1944. The appellant wrongly availed the benefit of Notification No. 1/2011-CE dt. 1.03.2011, as the condition therein did not allow them to avail Cenvat Credit on the inputs and input services used in the manufacture of latex surgical gloves. Therefore, a Show Cause Notice was issued to the appellant for recovery of Central Excise duty short paid and wrong availment of the benefit of Notification No. 1/2011-CE dt.1.03.2011, amounting to Rs. 47,36,304/-, for the period from March, 2011 to February, 2015. The Adjudicating authority vide Order-in-Original No. MP/06/AC/Div.III/2017-18 dt.23.05.2017 [hereinafter referred as the 'impugned order'], confirmed the demand of Rs.47,36,304/-, along with interest and also imposed penalties on the appellant. Being aggrieved by the impugned order, the appellant has filed this appeal before me. There has been a delay of one day in the filing of the appeal by the appellant and the appellant has requested for condonation of delay, which is hereby granted.

2. The facts of the case, in brief are that, one of the appellant's products i.e. Latex surgical gloves falling under Chapter heading No.4015 of the Central Excise Tariff Act, 1985, attracted effective rate of duty @ 5% under Notification No. 2/2011-CE which was increased to 6% advalorem by Notification No. 19/2012-CE dt. 17.03.2012. As per Section 4A of the Central Excise Act, 1944 –

> *"**SECTION 4A.** — The Central Government may, by (1) notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the [Legal Metrology Act, 2009 (1 of 2010)] or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply.*
>
> *(2) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette."*

The appellant's product Latex surgical gloves were brought under the above-mentioned Section 4A(2) of the Central Excise Act, 1944, by an amendment in the Notification No. 49/2008-CE(NT) dt.24.12.2008. Notification No. 49/2008-CE(NT)

specified the goods to which the provisions of Section 4A (2) shall apply alongwith the abatement granted to such products. Latex Surgical Gloves were covered under Section 4A(2) of the Central Excise Act, 1944, vide Notification No. 11/2011-CE(NT) dt.24.03.2011, which amended the Notification No. 49/2008-CE(NT). Therefore, w.e.f. 24.03.2011, Latex Surgical Gloves were required to be assessed for valuation with reference to their retail sale price under Section 4A(2) of the Central Excise Act, 1944. Accordingly, from 24.03.2011, Central Excise duty was leviable at the effective rate of duty on the value of Latex Surgical Gloves and such effective rate of duty is determined after allowing an abatement of 35% of the Maximum Retail Price which is affixed on the packages of such Latex Surgical Gloves. During the audit of the records of the appellant it was noticed that they were not assessing and clearing their goods namely Latex Surgical Gloves under Section 4A of the Central Excise Act, 1944, but were instead clearing the same under Section 4 of the Central Excise Act, 1944. It was also noticed that they were wrongly availing benefit of Notification No. 1/2011-CE dt.1.03.2011, as they did not fulfill the condition of the notification regarding non-availment of Cenvat credit of inputs and input services used for the manufacture of Latex Surgical Gloves. The appellant was availing Cenvat credit on inputs and input services, even though the condition in Notification No. 1/2011-CE debarred them from availment of the same. Therefore, it appeared that the appellant had short paid Central Excise duty on the clearances of Latex Surgical Gloves during the period from March, 2011 to February, 2015. On their clarification being sought, the appellant submitted that they had affected all their clearances to hospitals and the provisions of Legal Metrology Act do not Apply to 'Institutional Customers' and hospitals are 'Institutional Customers'. So, they have assessed Latex Surgical Gloves under Section 4 of the Central Excise Act, 1944. The appellant also provided sample copies of invoices and letters & affidavits by several dealers indicating that the Latex Surgical Gloves supplied to them by the appellant, were supplied to institutions like Hospitals without the Maximum Retail Price and printed 'Not for Sale' on the packed bags of the Latex Surgical Gloves. The Department however felt that the appellant had contravened the provisions of Section 4A of the Central Excise Act, 1944, and several other rules with an intention to evade duty by way of fraud, willful mis-statement, suppression of facts and contravention of the provisions of the Central Excise Act, 1944. A Show Cause Notice was issued to the appellant demanding Rs.47,36,304/-, alongwith interest and penalty clauses. The Adjudicating Authority found that majority of their clearances were not direct but through traders/dealers, which do not fall under the exclusion clause indicated in Rule 3 of the Legal Metrology (Packaged Commodities) Rules, 2011, and hence such goods should have been cleared by applying the RSP under

Section 4A of the Central Excise Act, 1944. The Adjudicating Authority therefore, based on the factual evidence confirmed the demand of Central Excise duty of Rs. 47,36,304/-, alongwith interest and also imposed a penalty of Rs. 47,36,304/-, vide OIO No. MP/06/AC/Div.III/2017-18 dt.23.05.2017.

3. Being aggrieved by the said OIO dt. 23.05.2017, the appellant has filed this appeal before me on the grounds that (i) the goods sold by the appellant to Hospitals, through their agents/traders is institutional sale and the adjudicating authority's impugned order to assess Latex Surgical gloves in accordance with Section 4A of the Central Excise Act, 1944, was erroneous; (ii) the goods sold by them to M/s. Karnatak State Drug Logistic Warehousing Society is sale to a 'institutional customer'; (iii) the benefit of Notification No. 1/2011-CE dt.1.03.2011, should be available to the Latex Surgical Gloves cleared by the appellant, if the Cenvat credit availed earlier was debited later on by them; (iv) the extended period cannot be invoked on the appellant for raising the demand; and (v) the provisions of Section 11AC of the Central Excise Act, 1944, cannot be invoked in the case of dispute pertaining to interpretation of any provision of law.

4. During the personal hearing, Shri M.K. Kothari, Consultant, authorised by the appellant, appeared before me and reiterated the grounds of appeal. He also made additional written submission in the matter.

5. I have carefully gone through the facts of the case on record, grounds of appeal in the Appeal Memorandum and submissions made by the appellant.

6. At first, let me decipher Section 4A of the Central Excise Act, 1944, in the context of this case. Sub-section (1) of Section 4A mentioned above, says that the Central Government may specify any goods, in relation to which it is required under the provisions of the Legal Metrology Act, 2009 or the Rules made thereunder, to declare on the package thereof the Retail Sale Price of such goods, to which the provisions of sub-section (2) shall apply. As such, for the goods to be covered under Section 4A, the basic requirement is that for such goods, the declaration of the Retail Sale price on its package is a necessity as per the Legal Metrology Act, 2009 or the Rules made thereunder. In the appellant's case for the goods involved i.e. Latex Surgical Gloves requires the declaration of the Retail Sale price on its package. But, there are exceptions in this law which are prescribed in Chapter 3 of The Legal Metrology (Packaged Commodities) Rules, 2011, issued on 7.03.2011, which states that :

> ***'RULE 3. Application of Chapter.*** *- The provisions of this chapter shall not apply to -*
>
> *(a) packages of commodities containing quantity of more than 25 kilogram or 25 litre excluding cement and fertilizer sold in bags up to 50 kilogram; and*

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

(b) packaged commodities meant for industrial consumers or institutional consumers.

Explanation :- For the purpose of this rule, -

i) "institutional consumer" means the institutional consumer like transportation, Airways, Railways, Hotels, Hospitals or any other service institutions who buy packaged commodities directly from the manufacturer for use by that institution.
ii) "industrial consumer" means the industrial consumer who buy packaged commodities directly from the manufacturer for use by that industry.'

A further amendment in The Legal Metrology (Packaged Commodities) Rules, 2011, vide the Legal Metrology (Packaged Commodities) Amendment Rules, 2013, dated 6.06.2013, whereby in the Legal Metrology (Packaged Commodities) Rules, 2011, in Rule 2, after clause (b) the following clauses were inserted, namely :-

'(bb) "industrial consumer" means the consumer who buys packaged commodities directly from the manufacturer for use by that industry;

(bc) "institutional consumer" means any institution which hires or avails of the facilities or service in connection with transport, hotels, hospitals or such other service institutions which buy packaged commodities directly from the manufacturer for use by that institution'.

Therefore, the definition or meaning of an 'institutional consumer' is not directly within the purview of the Central Excise Act, 1944. It is as per the requirement of the Legal Metrology (Packaged Commodities) Rules, 2011 (as amended). The Legal Metrology (Packaged Commodities) Rules very categorically states that the provisions of Rule 3 mentioned above would be applicable to only those institutional consumers who buy packaged commodities directly from the manufacturer. In the appellant's present case, the dealers to whom the appellant had sold the goods would not be covered under the definition of 'institutional consumer', even if they may be selling it further to any institution for the simple reason that the sale is indirect and not direct to the institutes as envisaged in the Rule 3 of The Legal Metrology (Packaged Commodities) Rules. In the case of Prism Cement Ltd. v/s. CCE, Bhopal [cited at 2017(357)ELT 1003(Tri. Del.)], the Hon'ble Tribunal stated in Para 4 that –

"The institutional consumer means those consumers who buy cement directly from the manufacturers for service industry like transportation including airway, railway, hotel or any other similar service industry. We find that educational institutions and hospitals are directly buying cement from the assessee-appellant and rightly eligible for concessional rate of duty as service institution."

As such, the sale made by the appellant through dealers would certainly not qualify as direct sale to any institutional consumer as required under Rule 3 of The Legal Metrology (Packaged Commodities) Rules, 2011, and therefore, the Adjudicating Authority has correctly held that the appellant cannot escape from

the provisions of mentioning RSP on such goods and consequently provisions of Section 4A are explicitly applicable to such transactions of the appellant made through traders.

7. As regards to the supplies made by the appellant to Karnataka State Drug Logistic Warehousing Society (KSDLWS), it is noticed that they are a Government of Karnataka initiative. On going through the website of KSDLWS, its main objective is of establishing an efficient, cost effective and decentralized Drug Logistics and Warehousing System in the State. The Society procures drugs, chemicals and miscellaneous items for use in the health institutions in the State. The Adjudicating Authority has confirmed the fact that KSDLWS are a centralized procurement agency and not the end user. The Adjudicating Authority's exclusion of the appellant from the category of Institutional Consumers, with regard to the sale to KSDLWS, is based on non-submission of proof of consumption of goods by that Institution. No procurement agency consumes or uses the goods. The consuming or using agencies in the present case are institutes like Hospitals, Health Centers, Health departments of civic bodies, etc. Therefore, I agree with the Adjudicating Authority's stance that KSDLWS does not fulfil the condition as explained in Rule 3 of The Legal Metrology (Packaged Commodities) Rules, 2011.

8. As regards the appellant's contention that they should get the exemption benefit of Notification No. 01/2011-CE dt.1.03.2011, as amended, even though they have reversed the Cenvat credit later on, for which they have cited the judgement of the Allahabad High Court in the case of Hello Minerals Water (P) Ltd. In the Hon'ble High Court's judgement at Para 17 to 30, this aspect has been explicitly discussed, which is stated below :

> *"17.The question as to whether manufacturer can be treated as not having taken credit on the inputs used in the manufacture of final product, even though it was originally taken but subsequently reversed, has been decided by a five Member Bench of the Tribunal in the case of Franco Italian Company Pvt. v. CCE, 2000 (120) E.L.T. 792. The aforesaid five members Bench of the Tribunal after taking into account the ratio laid down by the Supreme Court in the case of Chandrapur Magnet Wire (P) Ltd. v. CC, Nagpur, 1996 (81) E.L.T. 3 has held as under :-*
>
> *"6. Drawing similar analogy we consider that subject to the reversal of Modvat credit taken with regard to the inputs which were utilised in the manufacture of duty free goods, the manufacturer could avail of the Modvat credit as well as full duty exemption under applicable small scale exemption notification with regard to some specified goods. Reference is answered accordingly.*
>
> *7. As a result the impugned order-in-appeal dated 28-1-1999 passed by the Central Excise is set aside and the appeal of Franco Italian Company (supra) is allowed subject to the conditions that Modvat credit taken of the duty paid on the inputs which were utilised in the manufacture of duty free goods, is reversed."*
>
> ***18.**In view of the above decision we are of the opinion that reversal of Modvat credit amounts to non-taking of credit on the inputs. Hence the benefit has to be given of the notification granting exemption/rate of duty on the final product since the reversal of the credit on the input was done at the Tribunal's stage.*
>
> ***19.**The Tribunal while passing the impugned order dated 1-10-2003 [2004*

(163) E.L.T. 55 (Tri. - Del.)] has not referred to the larger Bench decision of the Tribunal and other binding decisions. In Chandrapur Magnet Wire Limited v. Collector Central Excise, 1996 (81) E.L.T. 3 the Supreme Court has held :-

"If debit entry is permissible to be made, the credit entry for duties paid on the inputs utilised in manufacture of final exempted product will stand deleted in the account of the assessee. In such a situation it cannot be said that the assessee has taken credit for the duty paid on the inputs utilised in the manufacture of final exempted product under Rule 57-A. In other words the claim of exemption of duty on the disputed goods cannot be denied on the plea that the assessee has taken credit of duty paid on the inputs used in manufacture of these goods."

***20.** The Tribunal while passing the impugned order dated 1-10-2003 instead of following the principles of law and the ratio of the decision of the Supreme Court in Chandrapur Magnet Wires Ltd. (supra) and also the decision of the larger five Members Bench of the Tribunal in the case of Franco Italian Company (P) Limited (supra) and other larger bench decision in the case of ICON Pharma and Surgical (P) Ltd. - 2000 (40) RLT 918 has held that reversal on inputs credit should have been done before removal of the bottles. In our opinion the Tribunal has completely misunderstood the decision in the case of Chandrapur Magnet Wires Ltd. (supra) in which the Supreme Court has quoted the Circular issued by the Ministry of Finance, being Circular No. 22/8/86, dated 10-4-1986. In Para 5 of the said Circular it was mentioned that the duty paid in the inputs used should be debited, before removal of such exempted final products. Since the Circular in that case required reversal of the credit before removal of the final product, hence the Supreme Court interpreting the said circular has mentioned that they see no reason why the assessee cannot make debit entry before removal of exempted final products.*

***21.** In the present case for the purposes of claiming the benefit of the Notification No. 15/94-C.E., dated 1-3-1994 neither any circular has been issued nor the said circular of 1986 has been made applicable in the notification, which has been issued in 1994.*

***22.** Hence in our opinion the Tribunal was not justified in taking a view that reversal of the credit having been made by the petitioner after removal of the final products the petitioner was not entitled to the benefit of Notification No. 15/94-C.E., dated 1-3-1994.*

***23.** This view of the Tribunal is in our opinion patently erroneous and contrary to the decision of the five Member Larger Bench of the Tribunal as well as three member bench of the Tribunal, and is also contrary to the ratio of the decision of the Supreme Court in the case of Chandrapur Magnet Wire (supra).*

***24.** In fact the decision of the five Member Larger Bench of the Tribunal in Franco Italian Company (supra) was followed by three Member Bench of the Appellate Tribunal in the case of ICON Pharma and Surgical (P) Ltd., 2000 (40) RLT 918.*

***25.** The Tribunal again in a three Member Bench decision in the case of Tube Investment of India, Final Order No. 795/2002, wherein the specific issue was whether the reversal of credit subsequent to removal of goods, was fetal to the extension of benefits of the notification considered the matter at length. The majority decision upheld the argument of the assessee therein and held that reversal of credit subsequent to the clearance of exempted product is in line with the ratio of the Supreme Court judgment laid down in Chandrapur Magnet Wires Co. (supra).*

***26.** Thus all the Division Benches of the Tribunal have been following the larger Bench decision and have taken a consistent view that reversal of the credit can be made even subsequent to the clearance of the final products. The impugned order dated 1-10-2003 appears to be the only order which is contrary to the consistent view taken so far.*

***27.** In another case of M/s. High Line Pen v. CCE Final Order No. 359/2003-NBA, dated 24-7-2003 [2003 (158) E.L.T. 168 (Tri.)] the appellate Tribunal again took a view that reversal of credit should be done for availing the benefits of the notification and the time of reversal was not material.*

***28.** The Tribunal in the case of Kitply Industries Limited Eastern Bench at Calcutta, 2001 (130) E.L.T. 236 has again held that reversal of credit would amount to no credit being taken. Hence the assessee was entitled to the benefit of notification. The Appellate Tribunal followed the decision in the case of Chandrapur Magnet (supra). The Appellate Tribunal Southern Bench in the case of Bharat Earth Limited v. CCE, Bangalore, 2001 (136) E.L.T. 225 again applying the ratio of the Supreme Court judgment in the case of Chandrapur Magnet Wires Company (supra) held that reversal of credit was sufficient for*

availing the benefits of the notification. In fact the Tribunal has directed the assessee therein to reverse the credit. In other words, the credit was directed to be reversed at the Tribunal stage.

***29.**The aforesaid decision of the Tribunal has followed the ratio of the decision of the Supreme Court in the case of Chandrapur Magnet Wires (supra).*

***30.**In these circumstances the order of the Tribunal dated 1-10-2003 in so far as it relates to denial of the benefit of Notification No. 15/1994-CE is liable to be, and is hereby, set aside. The petitioner is thus entitled to the benefit of the said Notification No. 15/1994-CE, dated 1-3-2004 and reversal of Modvat credit on the inputs namely PVC granules used in the manufacture of PVC/PP bottles, which have been admittedly reversed by the petitioner, even though after clearance of the final product."*

I agree with the contention of the appellant in this regard that the benefit of Notification No.1/2011-CE dt.1.03.2011, could not be denied to them, once they have subsequently reversed the Cenvat credit, inadvertently availed by them earlier, in the light of the above-mentioned decision of the Hon'ble High Court. As such, I set aside the Adjudicating Authority's impugned order to that extent and remand it back to the Adjudicating Authority for the limited purpose of confirming whether the appellant has reversed fully the Cenvat credit availed on inputs and input services on Latex Surgical Gloves during the concerned period. The extended period of limitation can also be surely invoked in the present case in the matter pertaining to Exemption Notification No. 1/2011-CE dt. 1.03.2011, if the appellant does not reverse the Cenvat credit availed by them for Latex Surgical Gloves for the concerned period.

9. The appellant has contended that the extended period of limitation is not invokable in this case as they were all along declaring in their ER-1 returns that the valuation of goods was made under the provisions of Section 4 of the Central Excise Act, 1944. The appellant had specifically mentioned Latex Surgical Gloves in their ER-1 Returns, indicating their clearance under Section 4 of the Central Excise Act, 1944, but that does not wipe out the allegation that the appellant suppressed the information pertaining to the clearance of Latex Surgical Gloves. I don't buy this argument of the appellant that once all the statutory records have been properly maintained and all the returns are filed before the department, there cannot be any ground for invoking extended period of limitation. If an assessee manufactures some goods, which could be denoted in the returns as either x goods or y goods, depending on the manner of sale, it is not obligatory on the Central Excise officer examining the monthly returns in a range office to doubt the authenticity of the self-assessment done by that assessee. The fact that the self assessment is correct or wrong will only come to light when the appellant's records are investigated in detail and it is brought out that as per the manner of the sale, he should have assessed the goods as x only and that it was wrongly assessed as y by the assessee. A similar circumstance is visible in the appellant's current case. The appellant had mentioned Latex Surgical

Gloves in their ER-1 Returns, indicating their clearance under Section 4 of the Central Excise Act, 1944, and also notifying the exemption notification No. 16/2012-CE. As regards the Assessable value, the same tallied with the rate of duty and duty payable & paid by the appellant. The Central Excise officer who normally examines the ER-1 returns filed by the appellant, had no reason to doubt the facts mentioned in the return. The appellant having two products, one falling under Section 4 and the other falling under Section 4A of the Central Excise Act, 1944, could only mention the taxable value on which the duty was payable. The ER-1 return did not provide any columns to specify whether the goods assessed were falling under Section 4 or under Section 4A of the Central Excise Act, 1944. So, in the case of the appellant, even if the appellant had assessed the goods under Section 4A, he would only mention the taxable value in the column meant for assessable value. As such, the Central Excise officer could not have realised from the appellant's ER-1 return for the relevant period, whether the appellant is clearing the goods under Section 4 or under Section 4A of the Central Excise Act, 1944, and he had no reason to doubt in the appellant's case, as it was customary for all assessee's to project the taxable value (Value after deduction of abatement) in the Column meant for assessable value. As such, whether the appellant was not assessing his goods under Section 4A or whether he was selling it to institutions and therefore availing any benefit under the provisions of The Legal Metrology (Packaged Commodities) Rules, 2011, could never be traced by the Department, unless they visited the factory and verified his assessment procedure pertaining to Latex Surgical gloves. Therefore, it was for the appellant to bring out the facts before the department at the relevant period rather than suppress the information to evade payment of Central excise duty under Section 4A of the Central Excise Act, 1944. Hence, I uphold the demand confirmed by the Adjudicating authority against the appellant by the impugned order with regard to the extended period pertaining to applicability of Section 4A of the Central Excise Act, 1944.

10. As regards, the penalty imposed on the appellant under Section 11AC of the Central Excise Act, 1944, I agree with the Adjudicating Authority that when the demand and recovery of Central Excise duty is established then provisions of demand of interest and penalty are also sustained. In the present case, the demand of Central Excise duty, interest and penalty to be imposed has to be re-calculated by the Adjudicating Authority, if required, in the light of the remanding of the matter, pertaining to eligibility of the appellant for exemption under Notification No. 1/2011-CE dt.1.03.2011, back to the Adjudicating Authority for the limited purpose of confirming whether the appellant has reversed fully the Cenvat credit availed on inputs and input services on Latex Surgical Gloves during the concerned period.

11. The appeal is partly allowed by way of remand as indicated above.

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

12. The appeals filed by the appellant stands disposed off on above terms.

(उमा शंकर)

आयुक्त (अपील्स)

ATTESTED

(R.R. NATHAN)
SUPERINTENDENT,
CENTRAL TAX APPEALS,
AHMEDABAD.

To,

M/s. Shree Umiya Surgical Pvt. Ltd.,
4704, Phase-IV, GIDC Vatwa,
Ahmedabad.

Copy to:

1) The Chief Commissioner, Central Tax, GST, Ahmedabad Zone.
2) The Commissioner, CGST, Commissionerate-Ahmedabad (South) .
3) The Dy./Asst. Commissioner, Divn-III, CGST, Commissionerate- Ahmedabad (South).
4) The Asst. Commissioner(System), CGST, Hqrs., Commissionerate- Ahmedabad (South).
5) Guard File.
6) P.A. File.

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