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,
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रजिस्टर्ड डाक ए.डी. द्वारा

24880 to 2892

क फाइल संख्या : File No : V2(32)/145/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-459-2017-18**
दिनाँक Date : **27-03-2018** जारी करने की तारीख Date of Issue 17/4/2018

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

ग Arising out of Order-in-Original No. **MP/10/AC/DIV-IV/17-18** दिनाँक: **2/11/2017** issued by Assistant Commissioner, Central Tax, Ahmedabad-South

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

Vibfast Pigments
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 ...

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.

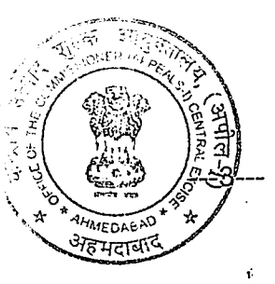
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 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

1. M/s. Vibfast Pigments, (100%EOU) situated at 110/1 &110/2, Behind Ambuja Synthetics, Narol, Ahmedabad (hereinafter referred to as 'the appellant') is having Central Excise Registration No. AAGFV9140CXM001 and is engaged in the manufacturing of excisable goods viz. Pigment Copper Phthalocyanine Beta Blue, Pigment Copper Phthalocyanine Green and Pigment Ultramarine Blue falling under Chapter 32 of the First Schedule to the Central Excise Tariff Act, 1985. The appellant has filed the present appeal being aggrieved by Order-in-original No.MP/10/AC/Div-IV/17-18 dated 2.11.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central GST, Division-IV, Ahmedabad-South (hereinafter referred to as 'the adjudicating authority').

2. Facts of the case are that the Central Excise Revenue Audit (CERA) has conducted the audit of the said appellant from 27.07.2015 to 30.07.2015 for the period from 2011-12 to 2014-15, it was noticed by the CERA that the said appellant had not maintained separate accounts for indigenous (procured through CT-3) and imported inputs (procured through Procurement Certificate). As per the report of CERA, the said appellant was unable to produce separate records for indigenous and imported material; therefore the said appellant is not eligible for the benefits of exemption as prescribed in SI.No.3 of the Notfn.No.23/2003-CE. Hence, the said appellant is liable to pay the excise duty in terms of Sr. No. 2 of the said notification. Therefore a Show Cause Notice No. F.No.V.39/15-01/OA/JC/2016-17 dated 19.10.2016, was issued to the said appellant for demanding the Central Excise duty short paid amounting to Rs. 38,31,281/- for violation of condition Sl. No. 3 of the Notfn.No.23/2003-CE.

3. The said SCN was adjudicated vide OIO No. MP/10/AC/Div-IV/17-18 dated 2.11.2017 wherein Central Excise duty amounting to Rs. 38,31,281/-was confirmed under Section 11 A (4) of the Central Excise Act, 1944;Ordered for confiscation of excisable goods cleared during the period from June-2014 to January-2016 under Rule 25(1)(d) of the Central Excise Rules, 2002. Since the said goods are not available for confiscation as already cleared, imposed redemption fine of Rs.80,42,963/-upon M/s Vibfast Pigments(100% EOU), Narol, Ahmedabad in lieu of confiscation; Ordered for Recovery of interest at the prescribed rate on the duty confirmed under Sction 11AA of the Central Excise Act, 1944. Imposed penalty of Rs. 38,31,281/- on M/s Vibfast Pigments,(100%EOU), Narol, Ahmedabad under Section 11AC(1)(c) of the Central Act, 1944 read with Rule 25 of the Central Excise Rules, 2002; Ordered the B-17 Bond executed by M/s Vibfast Pigments (100%EOU) undertaking to observe all the provisions of the Act, Rules and regulations made there under, to be enforced and security, if any, furnished along with the Bond to be appropriated towards their duty liability.

4. Being aggrieved by the impugned Order-in-Original the appellants has filed the present appeal on the following grounds of appeal.

4.1 that they were filing ER-2 returns periodically within stipulated statutory date and all the relevant information required to be filled in these returns was duly filled in before filing with the department. The appellants in the ER-2 returns were disclosing the fact of having paid aggregate central excise duty in terms of serial number 3 of Notfn.No.23/2003-CE as amended; these returns were being scrutinized by the officers of the department and never any objection was raised by any Range Officer about non-maintenance of separate records in respect of inputs procured against CT-3 and imported inputs procured against

Procurement Certificate. Therefore, the observation that the appellants were not maintaining separate records for both the category of inputs is erroneous.

4.2 that Rule 17 of the Central Excise Rules, 2002, specifically requires that electronically periodical return should be filed, so for filing electronic return, the record was also required to be maintained in Excel sheet on computer which could be directly attached to the return file electronically. The said Rule also requires the Assistant Commissioner to assess whether the assessee has paid duty properly. When for several years together the appellants kept on filing ER-2 returns and returns were being scrutinized and assessed without any objection, the appellants were under the bonafide belief that they had correctly paid the duty. Hence, the department cannot now turn back and demand differential duty for several years backwards.

4.3 that in a 100% Export Oriented Unit, there is a physical presence of the central excise officers in the factory whenever any inputs are received in the factory or at the time of removal of the goods from the factory. In such a situation, there would not arise situation where though the appellants did not fulfill the requirement of condition for clearance as per sr.no.3 of the said notification, still the officers had allowed them the clearance under sr.no.3. This fact is per se sufficient to hold that separate records were being maintained by the appellants for both categories of inputs.

4.4 that in para 11.7 of the impugned order, the learned adjudicating authority has mentioned fact about some report called for from the Range Superintendent after verification of the facts and it is mentioned that Range Superintendent also categorically stated that the appellants had maintained separate records for indigenous and imported raw materials from 2011-12 to 2014-15. The adjudicating authority suomoto disbelieved the report of Range Superintendent on the ground that this record was an afterthought and prepared subsequent to visit of CERA officers.

4.5 that the fact regarding submitting record in MS Excel sheet before the CERA officers per se is not objectionable or it is not something which would prove that the separate records were not being maintained. In fact, for the ease of audit, the officers themselves had asked for a soft copy of record which was provided to them by the appellants, otherwise, the hard copy of record separate for both categories of inputs was always available with the appellants. The appellants submit that the only objection raised by CERA is that the separate record maintained by the appellants is not authenticated by the authorized signatory. Otherwise even in the statement of Shri Vipul Kumar Suravat, Manager, it has surfaced that signature of authorized signatory was taken at the end of every month after taking print out from the MS excel sheet. Even otherwise, this is a rectifiable defect, authentication by authorized signatory who is none other than employee of the company can be taken any time. But, it is not the allegation of CERA that the appellants have not maintained separate record. The objection of CERA is that because the record is not authenticated by the authorized signatory, it creates suspicion. It is a well settled legal principle of law that suspicion howsoever great it may be, it cannot take be replaced by truth. Some other cogent evidences are required to prove that what was being suspected by the CERA officers was actually the truth. They placed reliance on the decision in *D.P. Industries* v. *CCE*, 2007 (218) E.L.T. 242 (T-Del) wherein the Tribunal has held that the suspicion, however strong, cannot take the place of evidence and the clandestine clearance has to be established beyond reasonable doubt. The Hon'ble Supreme Court in the case of *Anjlus Dung Dung* v. *State of Jharkhand* reported in (2005) 9 SCC 765 observed that suspicion however strong cannot take place of proof. The decision of Honorable Tribunal in

the case of Shree Renuka Sugars Limited reported in 2013 (293) ELT 616 (Tri-Bang.).

4.6 Assuming without admitting that hard copy of records were prepared subsequently, does it change the position under the law. The basic fundamental for entitlement to pay duty as per sr.no.3 of Notfn.No.23/2003-CE as amended is that the goods must have been manufactured fully or wholly out of raw materials procured indigenously. In other words, no imported material which is procured duty free must be used for producing or manufacturing excisable goods cleared to DTA on payment of only central excise duty, in that aggregate duty of Customs as per sr.no.2 is required to be paid. The appellants have prepared and whatever record in MS Excel sheet was produced before the CERA officers was sufficient to prove that the appellants had used only indigenous material for manufacturing the goods which were cleared under DTA. Hence, the substantial condition remains fulfilled. It is also a trite of law that if there is substantial compliance of law, the procedural compliance should not be used as bar for withholding the benefit of notification. The appellants place reliance on the decision of Honorable Tribunal in the case of Pearl Insulations Pvt. Ltd. reported in 2016 (344) ELT 1022 (Tri-Bang) and in the case of 2017 (345) ELT 0280 (Tri-Chan). The Apex Court in *Mangalore Chemicals and Fertilizers Ltd.* v. *Dy. Commissioner*, 1991 (55) E.L.T. 437 (S.C). Thus, the law is settled now that substantive benefit cannot be denied for procedural lapses.

4.7 The learned adjudicating authority has also failed to appreciate the plea of the appellants that authenticity of record is mentioned under Rule 10 of the Central Excise Rules, 2002, whereas, provisions for maintaining records relating to production by 100% EOU and clearance to DTA are mentioned under Rule 17 of the said Rules where there is no mention that the record should be authenticated by the authorized signatory. The learned Assistant Commissioner has rejected this plea by stating that the issue involved in the present case is with regard to the fulfillment of condition No.3 of the said notification. So, the learned Assistant Commissioner has believed that there is no violation of Rule 10 or Rule 17 of the said Rules, but the issue circumvents only around non-fulfillment of conditions of Notfn.No.23/2003-CE, therefore, in humble submission of the appellants, the requirement to authenticate the record is not mentioned in the notification. Hence, even as per the own say of the learned Assistant Commissioner there is no requirement to authenticate the records relating to production and clearance of goods manufactured by 100% EOU and cleared to DTA.

4.8 After issue of Show Cause Notice, the relevant officers had checked our submitted Record for four times, the details given below:

1. The Range officers had checked record for the period April 2011 to March 2016 (2011-12 to 2015-16) on dtd.24.04.2017.This is evident from the Para 11.7 of the impugned O-I-O.
2. The Range officers had further verified the records and ER-2 returns on date 18.08.2017, with the documents which the CERA Audit Team collected from us at the time of Audit.

3. The Central Excise (EA 2000) audit team completed audit for the period of March 2014 to March 2017 (2013-14 to 2016-17) on dtd.30.10.2017 to 01.11.2017. While verification of our records four times as mentioned above, no one raised the question regarding DTA Sales of goods and removal from Imported Raw Material.

4.9 The appellants submit without prejudice to the above submissions that when the department has recorded statement of Manager of the appellant firm

under Section 14 of the Central Excise Act, 1944 and the same has been relied upon for issuing show cause notice, the department must have to accept the contents of the statement as true. The department has no choice to discard the statement.

4.10 As regards confiscation of excisable goods and imposing redemption equivalent to the value of the goods, it is to say and submit that the learned Assistant Commissioner has shown high prejudice against them. It is a well settled legal position that if the goods are not available for confiscation, the confiscation of the goods cannot be rendered. Besides, imposition of redemption fine equivalent to the value of the goods is the highest penalty which can be imposed. But, it is equally discretionary power of the adjudicating authority to impose penalty looking to the facts and circumstances of the case and even lesser penalty also could have been imposed. In this regards, the appellants place reliance on decision of Honorable Tribunal in the case of Shiv Kripa Ispat Pvt. Ltd. reported in 2009 (235) ELT 623 (Tri-LB), Premier Polyspin Pvt. Ltd. reported in 2010 (257) ELT 447 (Tri-Ahmd), S.B. & T International reported in 2016 (335) ELT 83 (Tri-Mum), Kiran Jewels reported in 2008 (230) ELT 0627 (Tri-Mum).

4.11 Regarding penalty of equivalent amount imposed under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002, it is to say and submit that first of all on merit the issue is in favor of the appellants, as per which no demand is sustainable against them under the law, consequently, the penalty would also be required to be set aside. Be that as it may, penalty under Section 11AC of the Central Excise Act, 1944, cannot be imposed on the appellants as these provisions are applicable only where the demand for larger period is sustainable under the law. Since in this case there is no mis-statement, or suppression of facts or contravention of any provisions of the law with intent to evade payment of duty, the demand for the larger period is not sustainable, consequently, penalty under Section 11AC cannot be imposed. Besides, it is to submit that penalty under Rule 25 is subject to condition of confiscation of the goods, when the goods are not available for confiscation, penalty under Rule 25 also cannot be imposed. The provisions of Rule 25 are read with Section 11AC and if the penalty under Section 11AC is not imposable, penalty under Rule 25 ibid also cannot be sustained. Hence, it is requested to set aside the penalty. The appellants place reliance on the judgment of the Honorable Larger Bench of Tribunal in the case of M.B. Laminators reported in 2013 (289) ELT 0497 (Tri-Ahmd) wherein it was held that as confiscation set aside penalty not imposable. The decision of Honorable Delhi Tribunal in the case of CCE, Kanpur v/s Concrete Udyog Limited reported in 2012 (280) ELT 0296 (Tri-Del), in the case of Shyam Traders reported in 2012 (278) ELT 0468 (Tri-Del).

4.12. The appellant has also submitted Annexure-D for the year 2014-15 and 2015-16 i.e Imported Raw material procured on procurement certificate, to finished goods, complete trail of material purchase to issue for production and manufacture of finished goods and its clearance has been submitted. On going through one sample purchase Invoice No. 2141000255 dated 05.11.2014 and Invoice No. 2141000257 dated 10.11.2014 for quantity of 10000 kgs each issued by M/s. Meghmani Organics Ltd. Dahej, SEZ, received on 6.11.2014 and 11.11.2014 in their factory respectively. Which were assigned G-228 to G237 were issued for grinding, subsequently it was sent for pigmentation vide Annexure II No.228,232,233,234,235,236 and 237 from 5.12.2014 to 12.12.2014. The said materials received back after job work from 13.12.2014 to 24.12.2014 vide subsidiary challan No. 334 to 349 in their factory. The said material was issued for blending vide Blend lot No. 1535 on 2.1.2015. The said goods after blending reached to finished goods which were assigned lot no. 7950 dtd.5.1.2015. The said finished goods were cleared vide Export Invoice No. 186

dated 5.1.2015 and Invoice No 187 dated 6.1.2015 of 10000 kgs. Each. In the aforesaid export invoice the duty shown as per condition of Notification No.23/2003 –CE. Such documents can in no imagination be prepared afterwords. Also they have submitted Annexure-E for the year 2014-15 and 2015-16 i.e. for inputs procured on CT-3 and duty paid.

5. Personal hearing in the appeal was held on 12/02/2018. Mr. Anil Gidwani Authorized representative appeared on behalf of the appellant and reiterated the grounds of appeal. He submits that the demand has been confirmed on presumption and no short fall has been alleged. He submits that (Pg.66) Para 11.7 shows that they are maintaining all the statutory records as reported by Range Supdt. Para 11.8 of O-I-O (Pg.67) without any reason assumes that maintaining records in excel sheet & also manually is with motive. Although their imported component is just 12.5% of their total consumption and export is 90% under C.Ex. Supervision. He shows me the statement of Shri Suravat dtd.28.01.2016 (Pg.No.4) which shows that they are maintaining records separately. He is submitting CA certificate and bills of purchase & Sales. He shows me invoice (for DTA & Export) to show that duty is calculated in different fashions, which is not possible unless they are maintaining records separately. Case laws submitted.

6. I have carefully gone through the facts of the case on records and submissions made by the appellant. Submissions made during the personal hearing. I have gone through the records submitted by them which shows the trail of input to finished goods using indigenous as well imported raw material, and clearance thereof on payment of duty. Now the question to be decided by me is that; whether the appellant has violated the condition Sl. No. 3 of the Notfn.No.23/2003-CE, or otherwise.

It is pertinent to discuss the Notification which read as under;

Notification No. 23 /2003 - Central Excise as amended vide Notification No. 10/2008 dated 01.03.2008 .

In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) (hereinafter referred to as the Central Excise Act), the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts excisable goods of the description specified in column (3) of the Table below, and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table, produced or manufactured in an export oriented undertaking or an Electronic Hardware Technology Park (EHTP) Unit or a Software Technology Park (STP) Unit and brought to any other place in India in accordance with the provisions of Export and Import Policy and subject to the relevant conditions specified in the Annexure to this notification, and referred to in the corresponding entry in column (5) of the said Table, from so much of the duty of excise leviable thereon under section 3 of the Central Excise Act as specified in the corresponding entry in column (4) of the said Table.

	Chapter or heading No. Or sub-heading No.	***Description of Goods***	***Amount of Duty***	***Conditions***
	2	***3***	***4***	***5***

	Any Chapter	*All oods other than those referred to in Sr. Nos. 5, 6 and 7 of this Table.*	*In excess of amount equal to aggregate of duties of excise leviable under Section 3 of the Central Excise Act or under any other law for the time being in force on like goods produced or manufactured in India other than in an export oriented undertaking, if sold in India.*	***3***

ANNEXURE

Sr. No.	***Conditions***
1	*If the goods being cleared into Domestic Tariff Area are not exempted by the State Government from payment of sales tax.*
2	*If,-* *(i) the goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy;* *(ii) exemption shall not be availed until Deputy Commissioner of Customs or Assistant Commissioner of Customs or Deputy Commissioner of Central Excise or Assistant Commissioner of Central Excise, as the case may be, is satisfied with the said goods including Software, Rejects, Scrap, Waste or Remnants;* *(a) being cleared in Domestic Tariff Area, other than scrap, waste or remnants are similar to the goods which are exported or expected to be exported from the units during specified period of such clearances in terms of Export and Import Policy;* *(b) the total value of such goods being cleared under sub-paragraphs (a), (b) (d) and (h) of Paragraph of the Export and Import Policy, into Domestic Tariff Area from the unit does not exceed 50% of the Free on Board value of exports made during the year (starting from 1st April of the year and ending with 31st March of next year) by the said unit;* *(c) the balance of the production of the goods which are similar to such goods under clearance into Domestic Tariff Area, is exported out of India or disposed of in Domestic Tariff Area in terms of Paragraph 6.9 of the Export and Import Policy;* *(iii) clearance of goods into Domestic Tariff Area under sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning ; and* *(iv) clearance of goods into Domestic Tariff Area under sub-paragraph (a) of Paragraph 6.8 of the Export and Import Policy,*

	in excess of 50% of free on board value of exports made by the said unit during the year (starting from 1st April of the year and ending with 31st March of the next year) shall be allowed only when the unit has achieved positive Net Foreign Exchange Earning.
3	**If-(i) *the goods are produced or manufactured wholly from the raw materials produced or manufactured in India;*** ***(ii) the goods are cleared into Domestic Tariff Area in accordance with sub-paragraphs (a), (b), (d) and (h) of Paragraph 6.8 of the Export and Import Policy; and*** ***(iii) such finished goods, if manufactured and cleared by the unit other than export oriented undertaking are not wholly exempt from duties of Excise or are not chargeable to "NIL" rate of duty.***

6.1 From the foregoing paras, as per SI. NO. 3 of the notification no. 23/2003 CX, an EOU can clear the goods in DTA on payment of only excise duty if the condition No. 3 is satisfied i.e. the goods are produced or manufactured wholly from the raw materials produced or manufactured in India. If the condition is not satisfied the DTA clearance should be done as per Serial No.2 of the said notification. Here in this case there is no violation of condition 3 of Notification No. 23 /2003 - Central Excise. As it is evident from the Para 11.7 of the impugned O-I-O, which states that;

> *"The jurisdictional range superintendent vide their letter dtd. 26.04.2017 has submitted that the assessee has maintained records in respect of raw material as well as finished goods **separately** for indigenous and imported raw material from 2011-12 to 2015-16 and also submitted the copies of the records furnished by the assessee viz. (1) Raw material Stock Register (Pt.I) Indigenous: 2014-15 (2) Daily Stock Account (RG-1)Indigenous:2014-15 (3) Raw material Stock Register (Pt.I) Imported: 2014-15 (4) Daily Stock Account (RG-1)Imported:2014-15 (5) R.M. Stock Register (Pt.I) Indigenous:2015-16 (6) Daily Stock Register (RG-1) Indigenous:2015-16 (7) R.M. Stock Register (Pt.I) Imported:2015-16 (8) Daily Stock Register (RG-1) Imported:2015-16."*

6.2 Para 11.8 of the impugned OIO states that;

> *"On going through the copies of the records submitted by the assessee to the jurisdictional Superintendent, I find that the said records are maintained manually, whereas during the audit the assessee has furnished the records maintained in MS-Excel format. From the above observations I find that the assessee has furnished different sets of records during the audit and during the verification by the jurisdictional Superintendent. I find that after pointing out by the audit the*

assessee has changed their records to take the undue benefit of Sr. No.3 of Notification No. 23/2003-CE. Further I find that during the time of audit the assessee has not maintained the separate records for the indigenous inputs and imported inputs and cleared the goods into DTA by availing the benefit of Sr.No.3 of Noti. No. 23/2003-CE by paying Central Excise duty only. Since the condition No. 3 of the Notification No.23/2003-CE was not fulfilled, the said assessee is required to pay the duty on the DTA clearance as per the Sr. No.2 of the Noti.No.23/2003-CE."

6.3 In above Paras the adjudicating authority has stated that records given to audit were manually maintained where as records verified by the range superintendent were maintained in M.S. excel format, but the adjudicating authority has not noted any variation in data, data on excel sheet has never been doubted. Further findings of adjudicating authority that the appellant has changed their records to take the undue benefit *Sr. No.3 of Notification No. 23/2003-CE,* but it is only a presumption on the part of Adjudicating authority not supported by any evidence to prove it. I find that in Para 11.7 of impugned O-I-O, quoted above, the Range Superintendent has very clearly writes to the Original authority that" *The jurisdictional range superintendent vide their letter dtd. 26.04.2017 has submitted that the assessee has maintained records in respect of raw material as well as finished goods* ***separately*** *for indigenous and imported raw material from 2011-12 to 2015-16 and also submitted the copies of the records furnished by the assessee...".* I donot find any material evidence on record to reject this finding of the jurisdictional range superintendent by the Original authority. I, therefore, have no hesitation to reject the findings of the Original authority that the records were not maintained separately. I also find similar assertion in para 11.13 of O-I-O "*...that by not maintaining proper accounts as provided under Rule 10 of the Central Excise Rules 2002 and thereby they have short paid the duty on DTA clearance....",* is devoid of legal backing. The Original Authority must state what was the proper format and in what format, the appellant have maintained their records and how non maintenance of records can lead to demand of duty? The Contitution of India in Article 265 has very clearly stated that "Taxes not to be imposed save by authority of law. No tax shall be levied or collected except by authority of law...the violation must be spelt out clearly to demand the duty. As regards imposition of redemption fine it is a well settled legal position that if the goods are not available for confiscation, the confiscation of the goods cannot be rendered. Here no goods were seized and released the question of imposition of redemption fine is undoubtedly not warranted. I find catena of decisions in this regard. In case of TATA CHEMICALS LTD. 2017 (357) E.L.T. 683 (Tri. - Kolkata)

No evidence that any quantity of phosphoric acid or ammonia diverted for other purposes - Confiscation of goods and imposition of penalties not proper - Goods not available for confiscation - Imposition of redemption fine also not proper - Sections 111 and 125 of Customs Act, 1962.

6.4 In view of above discussed facts and grounds of appeal and evidence produced by the appellant, also verification done by the jurisdictional range superintendent independently as well verification of The Range officers had further verified the records and ER-2 returns on date 18.08.2017, with the documents which the CERA Audit Team collected from the appellant at the time of Audit. It is quite clear that the appellant has maintained records separately as required under Notification No. 23/2003 - Central Excise. Thus they have fulfilled the aforesaid condition of the notification. As the documents which were taken by the CERA had been verified by the range officer on 18.08.2017 with the ER-2

returns filed by them. Though adjudicating authority has alleged that the records were maintained after CERA audit. The observation of adjudicating authority at para 11.8 of the impugned OIO, "I find that after pointing out by the audit the assessee has changed their records to take the undue benefit of Sr. No.3 of Notification No. 23/2003-CE. Further I find that during the time of audit the assessee has not maintained the separate records for the indigenous inputs and imported inputs and cleared the goods into DTA by availing the benefit of Sr.No.3 of Noti. No. 23/2003-CE by paying Central Excise duty only." This observation is not supported by any evidence to prove such allegations, which resulting into denial of substantial and legal benefit to the appellant, which is not warranted. If records were manipulated after CERA audit than those records which were submitted to the CERA team could have not been tallied/verified with the ER-2 returns, which had been verified by the range officer on 18.08.2017 with the ER-2 returns filed at the material time rather much before the CERA audit, as the returns are to be filed monthly.

6.5 In view of the above discussion, the impugned order is liable to be set aside. I set aside the impugned O-I-O. The appeal filed by the appellant is allowed with consequential relief.

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

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

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:- 27.3.2018

ATTESTED

(K.H.Singhal)
SUPERINTENDENT (APPEAL),
CENTRAL TAX, AHMEDABAD.

To,
M/s Vibfast Pigments, (100%EOU),
110/1 & 110/2,
Behind Ambuja Synthetics,
Narol,Ahmedabad.

Copy To:-

1. The Chief Commissioner, Central Tax, GST Ahmedabad zone, Ahmedabad.
2. The Principle Commissioner, Central Tax, GST Ahmedabad-South.
3. The Assistant Commissioner, Central Tax, GST Division-IV, Ahmedabad South.
4. The Assistant Commissioner, System-Ahmedabad South.
5. Guard File.
6. P.A. File.