



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

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

7th Floor, GST Building,
Near Polytechnic,

Ambavadi, Ahmedabad-380015

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टेलिफैक्स : 079 - 26305136



रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(29)/140/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

2578 to 2582

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-471-2017-18
दिनांक Date : 28-03-2018 जारी करने की तारीख Date of Issue

25/4/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. MP/07/AC/DIV-IV/2017-18 दिनांक: 21/09/2017 issued by
Assistant Commissioner, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Ashish Chemicals
Ahmedabad

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तु 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।

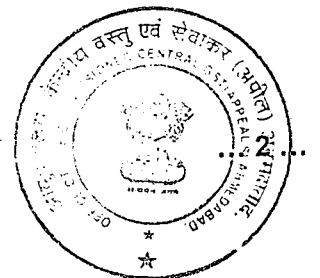
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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



(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

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

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

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर-6 चालान की प्रति भी होनी चाहिए।

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

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

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

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

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

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

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघाणी नगर, अहमदाबाद-380016

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथारिथति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the 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 यथारिथति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा 10 करोड़ रुपए है। (Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

- (i) (Section) खंड 11D के तहत निर्धारित राशि;
- (ii) लिया गलत सेनवैट क्रेडिट की राशि;
- (iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇒ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील दाखिल करने के लिए पूर्व शर्त बना दिया गया है।

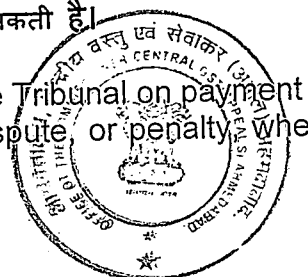
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

Under Central Excise and Service Tax, "Duty demanded" shall include:

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules.

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute or penalty where penalty alone is in dispute."



ORDER - IN - APPEAL

M/s. Ashish Chemicals, Plot No.C-1/45, 49, 50 & 51, Phase-II, GIDC Vatva, Ahmedabad 382 445 (henceforth, "*appellant*") has filed the present appeal against the Order-in-original No.MP/07/AC/Div-III/2017-18 dated 21.09.2017 (henceforth, "*impugned order*") issued by the Assistant Commissioner, Central Tax Division-III, Ahmedabad - South (henceforth, "*adjudicating authority*").

2. The facts giving rise to this appeal are that during audit of records of the appellant it was noticed that '**Spent Sulphuric Acid**', generated as a by-product in the process of manufacture of SO Dyes, was being cleared by the appellant to M/s. Novel Spent Acid Management without payment of central excise duty. A show cause notice dated 17.04.2017 was issued to the appellant proposing recovery of duty of Rs.11,92,164/- involved in the clearance of Spent Sulphuric Acid during Apr-2012 to Sep-2016. The adjudicating authority confirmed the demand alongwith interest and imposed penalty under section 11AC of the Central Excise Act, 1944. Appellant is in appeal against the order of adjudicating authority.

3. The main grounds of appeal, in brief, are as follows-

3.1 Appellant states that since their unit had already been audited under EA-2000 during Mar-2013 for the period Oct-2009 to Dec-2012, the entire transactions were known to the department and therefore suppression cannot be alleged; that demand for the period Apr-2012 to Dec-2012 is time barred considering that audit had been conducted for this period.

3.2 Appellant also objects to valuation of spend acid stating that the adjudicating authority could not provide the valuation of Spent Acid generated out of manufacturing of SO dyes; that theirs is a 100% EOU and valuation pertaining to a DTA unit cannot be considered.

3.3 As per appellant, Spent Acid could be excisable but not marketable; that it was nothing but an effluent contaminated with colour and could not be sold to fertilizer plants; that due to GPCB's directives, such effluents are prohibited to pass through their own sewerage system.

3.4 Appellant submits that being a 100% EOU, they were permitted under Notification No.22/2003-CE to dispose of such waste outside the user industry where it was not permissible or possible to destroy the same within the user industry; that upto 25.05.2015, there was no requirement of central excise officer's presence and for the period after that when customs authorities permissions was

required, they continued the same practice under the impression that no such permission was required.

3.5 With regard to larger bench's decision in the case of **Keti Chemicals** [1999(133) ELT 689(Tribunal-LB)], appellant states that in that case both the elements to levy duty –marketability and manufacture –were satisfied. According to appellant, Tribunal's decision in the case of Indian Tube Co. Ltd [1988(37) ELT 418(Trib.)], where pickle liquor was not marketable or saleable, was applicable.

3.6 Appellant contends that Spent Sulphuric Acid emerging out of production of Dispersion Blue or any SO dyes is different from that emerging out of production of detergent as the former is contaminated with colour; that colourless Spent Acid could be supplied to Fertilizer plants. Appellant adds that not only they but about 580 member industries of Vatva Industrial Estate have problem in selling the effluent and therefore it is definitely not marketable.

4. In the personal hearing held on 02.02.2018, Shri Jitendra Raval and Shri Piyush Shah represented the appellant and reiterated the grounds of appeal. Since there was delay in filing the appeal, they requested for condonation of delay.

4.1 As discussed during personal hearing, the appellant vide letter dated 20.02.2018 has also submitted a certificate from Novel Spent Acid Management.

5. I note that present appeal has been filed with a delay of about 25 days, however, considering that delay is not more than a month's delay and considering the request of condonation filed by the appellant, I allow the filing of appeal and take up for decision on merits.

6. Non-payment of central excise duty by the appellant on clearance of Spent Sulphuric Acid generated as a by-product in the course manufacture of SO dyes is the issue here. The adjudicating authority has confirmed the duty demand considering that classification and dutiability of Spent Sulphuric Acid is a settled issue having been decided by the larger bench of CESTAT in the case of **Collector of C. EX., Ahmedabad v. Keti Chemicals** [1999 (113) E.L.T. 689 (Tribunal)] and approved by the Supreme Court. The appellant, on the contrary, has mainly argued that Spent Sulphuric Acid generated in their case is a waste product not marketable or saleable and hence larger bench's decision is not applicable.

6.1 In the larger bench's decision in *Keti Chemicals* case, it was held that Spent Sulphuric Acid emerging as a by-product in the process of manufacture of another product is a manufactured product and has to suffer duty under heading 28.07 of



the Central Excise Tariff Act, 1985. The first head note of the case law reads as under-

Spent sulphuric acid emerging as a by-product in the process of manufacture of another product to be considered as having emerged as a result of process of manufacture - Hence spent sulphuric acid is a manufactured product - It is sold and finds use in the manufacture of fertilizers - Once it is a by-product in the form of waste/residue it has to suffer duty - Sections 2(d), 2(f) and 3 of Central Excise Act, 1944.

5.1.1 This case was in the context of manufacture of Detergent Powder and one of the relevant facts was that the Spent Sulphuric Acid emerging as a by-product was saleable and found use in the manufacture of fertilizers. Further, the case law of **Indian Tube Co. Ltd v. Collector of C.Ex.** [1988 (37) ELT 418(Tribunal)], where it was held that waste pickle liquor was in the nature of waste product and had neither marketability not saleability and hence not liable to duty, was distinguished on the fact that waste pickle liquor was not marketable or saleable.

5.2 Therefore, the product Spent Sulphuric Acid, in spite of being considered a manufactured product under tariff head 28.07, the fact of marketability or saleability cannot be ignored as the twin test of manufacture and marketability is an essential test to levy duty of excise. As decided by Hon'ble Supreme Court in the case of **Hindustan Zinc Ltd v. CCE, Jaipur** [2005(181) ELT 170(S.C.)], marketability of item and its emergence by process of manufacture - both these conditions have to be cumulatively satisfied to hold that item is excisable.

5.3 In the present matter, appellant's contention is that Spent Sulphuric Acid in their case is a waste product contaminated with colour and hence not usable in fertilizer plants; that as per pollution control norms they have to dispose of this waste after necessary treatment to render it non hazardous; that delivery of this waste and treatment in the treatment plant is a cost on them rather than a means of revenue. Appellant has produced a **certificate** from Novel Spent Acid Management certifying therein that Spent Sulphuric Acid collected from the appellant during 2012-13 to 2016-17 was hazardous and required treatment and that it was discharged into mega pipeline after treatment at common effluent treatment plant.

5.3.1 There is no denying the fact that Spent Sulphuric Acid was delivered to the treatment plant and was disposed of after necessary treatment. This in itself however does not establish that the effluent (Spent Sulphuric Acid) had no marketability, unless there are test results of the tests conducted on the effluent before and after the treatment in the treatment plant to show that the effluent was highly toxic and required treatment before final disposal. There must be GPCB norms with regard to levels of contaminants for safe disposal of the effluent, e.g. COD level in the effluent. The effluent with permissible levels of contaminants would

obviously not require any treatment before disposal and in that case it can be marketable depending upon its utility. This is an important aspect to decide the marketability of the Spent Sulphuric Acid in this case and therefore, I find it necessary to remit the matter back to the adjudicating authority to examine this aspect before reaching any conclusion with regard to marketability of the product in question.

6. The impugned order is accordingly set aside and appeal is allowed by way of remand.

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

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

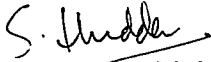


(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

Date:

Attested

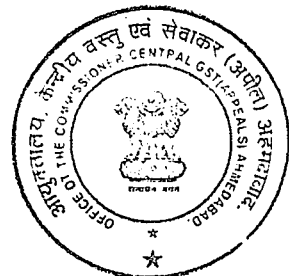

(Sanwarmal Hudda)
Superintendent
Central Tax (Appeals)
Ahmedabad

By R.P.A.D.

To,
M/s. Ashish Chemicals,
Plot No.C-1/45, 49, 50 & 51, Phase-II, GIDC Vatva,
Ahmedabad 382 445

Copy to:

1. The Chief Commissioner of Central Tax, Ahmedabad Zone.
2. The Commissioner of Central Tax, Ahmedabad - South.
3. The Additional Commissioner, Central Tax (System), Ahmedabad South.
4. The Asstt./Deputy Commissioner, Central Tax Division-III, Ahmedabad- South
5. Guard File.
6. P.A.



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