केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
7th Floor, Central Excise Building,
Near Polytechnic,
Ambavadi, Ahmedabad-380015

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

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(39)07/EA2/Ahd-I/2016-17/992 to 996
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-051-2017-18**
दिनाँक **31.07.2017** जारी करने की तारीख Date of Issue 25/9/17

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

ग **Joint Commissioner**, केन्द्रीय कर, Ahmedabad-I द्वारा जारी मूल आदेश सं **52/CX-I Ahmd/JC/KP/2016**
दिनाँक: **26/08/2016** से सृजित

Arising out of Order-in-Original No. **52/CX-I Ahmd/JC/KP/2016** दिनाँक: **26/08/2016** issued by **Joint Commissioner**, Ahmedabad-I

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

M/s. Mecab cables Pvt. Ltd
Ahmedabad

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

Any person 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 ...

(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) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

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 .**

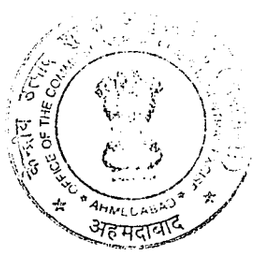
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT.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

This is a departmental appeal filed by Assistant Commissioner, Central Excise, Division II, Ahmedabad-I, on the basis of authorization granted by the Principal Commissioner of Central Excise, Ahmedabad-I. vide Review order No. 7/2016 dated 6.10.2016. The departmental appeal is filed against OIO No. 52/Cx-I Ahmd/JC/KP/2016 dated 26.8.2016, issued by the Joint Commissioner, Central Excise, Ahmedabad-I, [for short – 'adjudicating authority'] in the case of M/s. Mecab Cable Private Limited, Plot No. 635/A, Phase-IV, GIDC, Vatwa, Ahmedabad-382445 [for short - the respondent].

2. Briefly stated, a show cause notice dated 19.8.2015, was issued to M/s. Mecab Cable Private Limited, based on letter no. V(1)504/IAR/Gr.IX/2014/989 dated 12.1.2015 from Additional Commissioner, Central Excise Jaipur Commissionerate, which stated that M/s. Aroma Polymers, Jaipur, had cleared finished goods to the respondent, on payment of duty. These goods, however, were exempt from payment of Central Excise duty vide notification Nos. 4/2006-CE dated 1.3.2006, present notification No. 12/2012-CE dated 17.3.2012. The aforementioned show cause notice therefore, *inter-alia*, proposed disallowance of CENAVAT credit of Rs. 19,62,213/- wrongly availed along with interest and further proposed penalty on the respondent.

3. This notice, was adjudicated vide the impugned OIO dated 26.8.2016, wherein the adjudicating authority set aside the show cause notice, on the following grounds:

(a) that the respondent, had availed CENVAT credit on the PVC compound received from M/s. Aroma Polymers, Jaipur, based on invoices issued under Rule 9 of the CENVAT Credit Rules, 2004;
(b) the plain reading of the aforementioned notifications, reveal that the goods which fall under chapter 39 unconditionally exempted from Central Excise duty;
(c) that the PVC compound manufactured by M/s. Aroma is of various grades of which the one reprocessed out of PVC scrap and waste is fully exempted from central excise duty without condition;
(d) that the main issue to be examined is whether the PVC compound received from M/s. Aroma Polymers is dutiable or exempted;
(e) that the PVC compound received by the respondent, is made of not only PVC waste and scrap but also PVC resin; that as per notification PVC compound which is manufactured by using PVC waste and scrap alone is exempted unconditionally;
(f) that on verification of invoices and from the defense reply, it is clear that the entire quantity of PVC compound mentioned in 42 invoices received by the respondent is not manufactured exclusively with PVC waste and scrap;
(g) that from the plain reading of the notification it is clear that PVC compound manufactured by using PVC resin and PVC resin and waste/scrap along with/without additives as raw materials, are not exempted unconditionally;
(h) that 26 invoices related to PVC compound which were reprocessed by using PVC resin, PVC resin and PVC waste/scrap are dutiable; that based on the SCN dated 29.4.2015 issued by Jaipur Central Excise, it is proved that the 26 invoices are dutiable; that Rs. 11,38,294/- has not been wrongly availed by the respondent;
(i) that for the remaining 16 invoices, the supplier and respondent have accepted that the goods are exempted as those grades of PVC compound has used PVC waste and scrap as the basic inputs;
(j) that the receipt, the documents, nature of the goods being duty paid is not questioned;
(k)that but for the clarification sought by the respondent, they would not have known about different raw materials used to reprocess PVC compound and based on which CENVAT credit be availed;

(l)that as per the case of MDS Switchgear [2008(229) ELT 485 (SC)], the recipient manufacturer is entitled to avail the benefit of CENVAT credit based on duty paying documents; that this has been upheld even in the case of M/s. Nahar Granites Limited [2014(305) ELT 9(Guj)];
(m) that in the case of M/s. Arvind Limited [2014(300) ELT 481(Guj)], the Court declined to accept Department's view and allowed the rebate as there was no reason why rebate should be denied which the petitioner is otherwise entitled to;
(n) that taking respite to Board's circular no. 1006/13/2015 dated 21.9.2015, which states that all cases decided after the constitutional bench judgement of the Hon'ble Supreme Court in the case of M/s. Ratan Melting and Wire Industries [2008(231) ELT 22(SC)], should confine to the law laid down by the Hon'ble HC/SC;
(o) that as per the Circular dated 1.2.2016, a buyer may avail CENVAT Credit if supplier has paid duty;
(p) that the assesed duty determined by the jurisdictional officer is questioned by the said jurisdictional officer only in this case;
(q) that limitation clause is applicable in this case as mis-representation of facts is clearly demonstrated;
(r) that since duty is paid CENVAT credit is admissible.

4. The aforementioned impugned OIO dated 26.8.2016 was reviewed by the Principal Commissioner, Central Excise, Ahmedabad-I by raising the following grounds:

(a) that the impugned OIO is contrary to law, judicial evidence on record, proved facts and circumstances;
(b) that as per the observation of the Hon'ble High Court of Madras [Indian Organic Chemicals Limited (1983(12) ELT 34], it appears that nowhere does it say that no other material should be used and neither does it indicate that the plastic materials should be used and neither does it indicate that the plastic materials reprocessed should be exclusively out of scrap of waste;
(c) that taking recourse to Circular of 2015, as mentioned in para 49 of the impugned OIO under review appears not applicable in the present case;
(d) that the CENVAT credit of amount utilized by down-stream units needs to be recovered in terms of Rule 14 of the CENVAT Credit Rules, 2004;

5. Personal hearing in the matter was granted on 17.7.2017. However, it could not be held as I was attending Court as a witness in a case. On a telephonic request from the learned Consultant, personal hearing was granted on 18.7.2017. Shri Deepak Kumar, learned Consultant, appeared on behalf of the respondent. He explained in detail the cross objection filed by the respondent. He further stated that the demand in respect of 31 invoices pertains to fresh PVC materials. He further pleaded limitation; that grounds of appeal in para 18 of the review order is not applicable because it is related to demand of duty under Section 11D. He reiterated the points and grounds taken in the cross objection.

6. The grounds raised in the cross objection filed by the respondent, were as follows:

(a) that from para 13 of notice dated 29.4.2015 it is clear that out of the 4 categoriesmentioned at Sr. No. 1 and 2 were dutiable; that from para 5 of the notice it is clear that jurisdictional Central Excise authorities at Jaipur were of the view that PVC compound mentioned at Sr. No. 3 and 4 are unconditionally exempted from duty;
(b) M/s. Aroma Polymers, Jaipur, has vide its letter dated 7.10.2015 confirmed that of the total 42 invoices, 16 invoices involving Rs. 6,19,238/- were relating to exempted goods, while the rest of the 26 invoices were in respect of dutiable goods; that of the 42 invoices, only in respect of 16 invoices goods supplied were exempted and the rest were all dutiable;
(c) the contention of the department that the supplier were manufacturing exempted PVC compound which was made from PVC waste and scrap is only partially correct;

(d) that even the demand of Rs. 6,19,238/- in respect of 16 invoices cannot be sustained against the respondent as they were in receipt of duty paid goods;
(e)that CBEC's circular dated 14.1.2011 is illegal, arbitrary, capricious and oppressive in nature;
(f) that they would like to rely on the case of M/s. Arvind Limited wherein it was held that if the manufacturer has paid duty at his will on the exempted goods at the time of export, rebate claim cannot be denied;
(g)that in the case of Neuland Laboratories Limited [2015(317) ELT 705] it was held that assessing officer of the recipient unit cannot sit over the judgement whether the duty was payable or not on the goods supplied, which was affirmed by the Hon'ble High Court of Andhra Pradesh;
(h) that they woule like to rely on CBEC's circular no. 1006/13/2015 dated 21.9.2015 and case laws of MDS Switchgear Limited [2008(229) ELT 485(SC)], CCE Chennai V/s CEGAT [2006(202) ELT 753], Kerala State Electronic Corporation [1996(84) ELT 44], Everready Industries India Limited [2000(120) ELT 379], Aggarwal Iron Industries [2005(194) ELT 397], Anand Arc Electrodes Private Limited [2010(252) ELKT 411], Nahar Granites Limited [2014(305) ELT 9], Balakrishna Industries Limited [2014(309) ELT 354], Circular No. 1014/2/2016-Cx dated 1.2.2016;
(i) that on limitation, there is no provision under the law which requires them to produce duty paying documents before the Department on which credit has been taken; that the demand for the period prior to August 2014 is beyond normal period of limitation of one year and has been issued in the extended time limit.

7. I have gone through the facts of the case, the department's grounds of appeal in the Review Order, and the written and oral submissions made by the Learned Consultant of the respondent, during the course of personal hearing. The primary question to be decided in the present appeal is whether the respondent is eligible for CENVAT credit in respect of inputs supplied by M/s. Aroma Polymers, Jaipur, who had removed their goods on payment of duty, despite these goods being absolutely exempt from payment of duty, as alleged by the department.

8. The genesis of the dispute is that M/s. Aroma Polymers, Jaipur, manufacturer of PVC compound, falling under chapter sub heading 39042290, was issued a notice consequent to an audit objection, *inter-alia*, alleging that they had cleared exempted goods on payment of duty and that the duty paid in this case, cannot be treated as duty of excise.

9. It is based on the aforementioned clearances by M/s. Aroma Polymers to the respondent, that the show cause notice dated 19.8.2015 was issued which was subsequently adjudicated vide the impugned OIO wherein the demand was set aside. I will now examine the merits in the matter.

10. In this regard, I find that CBEC has issued circular no. 940/1/2011-CX., dated 14-1-2011, which clarifies as follows:

> *2. It is further clarified that in case the assessee pays any amount as Excise duty on such exempted goods, the same cannot be allowed as "CENVAT Credit" to the downstream units, as the amount paid by the assessee cannot be termed as "duty of excise" under Rule 3 of the CENVAT Credit Rules, 2004.*
>
> *3. The amount so paid by the assessee on exempted goods and collected from the buyers by representing it as "duty of excise" will have to be deposited with the Central*

Government in terms of Section 11D of the Central Excise Act, 1944 . Moreover, the CENVAT Credit of such amount utilized by downstream units also needs to be recovered in terms of the Rule 14 of the CENVAT Credit Rules, 2004.

[emphasis supplied]

The departmental view therefore, in such a situation is vividly clarified vide the above circular.

11. Before proceeding any further, the relevant extracts of the judgement of the Hon'ble Tribunal in the case of Bhushan Steel Limited [2015(323) ELT 618]. is reproduced below:

11. As regards the Cenvat credit demand of Rs. 1,20,48,313/- in respect of end cuttings of pipes received by the Sahibabad unit from various depots under the registered dealer invoices, we find that the various depots had transferred the end cuttings of pipes under invoices wherein the proportionate duty paid on the pipes at the time of clearance from their respective factories had been mentioned. The Department seeks to re-calculate this duty on the basis of the scrap value of the end cuttings, as mentioned in the depot invoices and restrict the Cenvat credit to that amount. In our view this stand of the Department is not correct in view of the Apex Court's judgment in the case of Commissioner of Central Excise & Customs v. MDS Switchgear Ltd. reported in 2008 (229) E.L.T. 485 (S.C.), wherein it has been held that the receiver manufacturer who had received the duty paid inputs from a supplier-manufacturer is entitled to Cenvat credit of the duty paid by the supplier-manufacturer and the Central Excise Authorities having jurisdiction for the recipient-manufacturer cannot review the assessment of the duty at the end of the supplier-manufacturer. In view of this, the Cenvat credit demand of Rs. 1,20,48,313/- is also without any basis.

It is therefore, clear that Central Excise authorities having jurisdiction over the recipient-manufacturer, cannot review the assessment of the duty paid at the end of the supplier-manufacturer. Hence, before deciding as to whether the CENVAT credit was wrongly availed by the respondent, it was imperative to know about the final outcome of the show cause notice dated 29.4.2015 issued to M/s. Aroma Polymers. However, I find that there is nothing on record, either in the impugned OIO or in the papers submitted by the respondent, about the present status of the said notice i.e. whether it has been finally adjudicated or otherwise. In-fact, I find that the adjudicating authority, in para 31 of the impugned OIO, erred, in formulating the main issue as *whether the PVC compound received by the appellant from M/s. Aroma Polymers, Jaipur, is dutiable or exempted.* The Central Excise authorities at Jaipur were the proper officer to determine whether the PVC compound, supplied to the respondent, was dutiable or otherwise.

12. I find that the issue therefore, as to whether CENVAT credit availed on 42 invoices which the notice proposed to disallow, can only be finalized once the proper officer, decides whether the duty paid by M/s. Aroma Polymers, Jaipur, was correct or otherwise.

13. I find that the law in such cases has been spelt out not only in the Circular but also in various judgements, some of which are as follows :

[a] Neuland Laboratories Limited [2015(317) ELT 705 and 2015(319) A 140 (AP) – relevant extracts

7. Further, the Board's Circular No. 940/1/2011-CX, dated 14-1-2011 was also brought to my notice. In this Circular, it has been stated that where an assessee pays Excise duty on exempted goods, the amount recovered as Excise duty has to be deposited with the Central Government and Cenvat credit also needs to be recovered in terms of Rule 14 of the Cenvat Credit Rules, 2004. Rule 14 of the Cenvat Credit Rules, no doubt, provides for recovery of credit taken. The Board assumes that if an assessee takes credit of duty which was not required to be paid but paid, availment of credit would attract the provisions of Rule 14 of the Cenvat Credit Rules. The conclusion is that the credit which was taken wrongly would arise when an assessee is required to determine whether the inputs/capital goods received by him are liable to duty or not and whether duty is payable or not. There is no rule which puts an obligation on the receiver of goods. When we take note of the fact that the assessee may receive inputs/capital goods/services classifiable under almost all the headings, it is difficult to imagine that legislature would require the assessee to determine whether duty is payable for all these items or not and then take credit. Even a jurisdictional Central Excise officer may not have all the items listed in the Schedule for assessment. In fact, assessment has been taken away even from the Central Excise officer. That being the case, the Board's Circular which has been issued without taking into consideration and considering the implications of the provisions and implications of the instructions on the assessees cannot be applied blindly to arrive at a conclusion against the assessee.

This case was upheld by the Hon'ble High Court of Andhra Pradesh, wherein the Court held as follows:

"This appeal is sought to be preferred against the judgment and order of the learned Tribunal dated 5-9-2013 and sought to be admitted on the following suggested questions of law.

"(i) Whether the Hon'ble Tribunal is correct in allowing the respondent to avail Cenvat credit on Ethanol, a non-excisable commodity, under Rule 3 of Cenvat Credit Rules, 2004, which provides that a manufacturer of final product shall be allowed to take the credit of duty of Excise specified in the First Schedule to the Central Excise Tariff Act, more so when the Central Excise Officer at the supplier's end has held the product to be wrongly classified and paid duty wrongly with intention to pass the unutilized Cenvat credit to customers?

(ii) Whether the Hon'ble Tribunal is correct in setting aside the order of the Commissioner (Appeals-I), Hyderabad against the respondent (MLL), when they availed the credit contrary to the provisions of Rule 3 read with Rule 9(5) of the Cenvat Credit Rules, 2004?"

We have heard the learned Counsel for the appellant and gone through the impugned judgment and order of the learned Tribunal.

We have noticed that the learned Tribunal on fact found that in this case duty levied on the raw material has actually been paid. Once it is found on fact and it is not challenged on the ground of any perversity, the exemption is applicable automatically. The learned Tribunal has relied on the decision of the Madras High Court in the case of Commissioner of Central Excise, Chennai-I v. CEGAT, Chennai - 2006 (202) E.L.T. 753 (Mad.) and recorded that the facts in that case and the present case are identical and therefore, the said decision is applicable to the present case.

Hence, we do not find any reason to interfere with the judgment and order of the learned Tribunal.

[b] However, I find that the High Court of Bombay, in the case of Nestle India Limited [2012(275) ELT 49 (Bom)] decided a similar matter, by holding as follows:

> *5. Mr. Ferreira, learned Assistant Solicitor General for the appellant, submitted that the scheme of law is that if, excise duty is collected, a person at subsequent place is entitled to claim Modvat credit. According to Mr. Ferreira, learned Assistant Solicitor General, this can be so if, duty is validly collected at an earlier stage. In this case duty was not payable at all at the place outside Goa, since no duty can be levied on job work but only on manufacture and, therefore, the respondents are not entitled to claim any Modvat credit. Though this submission appears to be reasonable and in accordance with law, we find it not possible to entertain this submission in the facts of the present case since at no point of time the Revenue questioned the applicability of the excise duty at the place outside Goa. Those assessments have been allowed to became final and the goods have been removed from the jurisdiction of the Excise Officer at that place and brought to Goa. Now, in Goa it will not be permissible to allow the Revenue to raise the contention that the assessee in Goa cannot claim Modvat credit in Goa because duty need not be paid outside Goa.*
>
> *6. As we have observed that the assessment is allowed to be final, it would not be legal and proper to allow the Revenue to raise the question on the basis of Modvat credit. Indeed, now the payment of excise duty must be treated as valid, therefore, the claim of Modvat credit must be treated as excise duty validly paid.*
>
> [emphasis supplied]

I find that the High Court of Bombay has held that no credit is admissible in case the goods are not leviable to duty. The High Court allowed the credit in the above instance only because the assessment at the duty payment end had become final. The judgement upholds the rationale of the clarification, issued by the Board vide circular dated 14.1.2011.

14. I find that the adjudicating authority and the respondent have relied upon various case laws, viz. MDS Switchgear Limited [2008(229) ELT 485 (SC). Kerala State Electronic Corporation [1996(84) ELT 44 (Tri). Aggarwal Iron Industries [2005(184) ELT 397 (Tri-Del), Anand Arc Electrodes Private Limited [2010(252) ELT 411)], Nahar Granities Limited [2014(305) ELT 9 (Guj)]. Balakrishna Industries Limited [2014(309) ELT 354]. Going through the case laws clearly leads to a conclusion that once the payment of duty at the supplier/manufacturer's end has been held to have been wrongly paid in contravention of the provisions of Section 5A(1A) of the CEA, 1944, CENVAT credit is not available. In fact in the aforementioned cases, the CENVAT credit was allowed only on the ground that it was not challenged at the suppliers end. Since, the duty payment at the suppliers end has been challenged by way of issue of notice, the aforementioned case laws are not applicable to the present dispute. With respect to the reliance on the case of **M/s.** Arvind Limited [2014(300) ELT 481]. I find that it pertains to claim of rebate and is not relevant to the issue at hand.

15. I find that the adjudicating authority has relied upon circular no. 1014/2/2016-Cx dated 1.2.2016, which states that a buyer may avail CENVAT credit, if the supplier has paid duty. The relevant text is reproduced below for ease of reference:

2. In the said judgment, Hon'ble High Court has held that duty under Central Excise Act, 1944 can be levied, if the article has come into existence as a result of production or manufacture. Articles which are not produced or manufactured cannot be subjected to levy of excise duty. On the import of like article, no additional duty can be levied under section 3(1) of the Customs Tariff Act, 1975. Since the vessels and other floating structures for 'breaking-up' are not manufactured in India, no excise duty is leviable and consequently no additional duty under Section 3(1) of the Customs Tariff Act, 1975 can be levied on import of such goods. The reason for such conclusion by Hon'ble High Court is that when articles which are not produced or manufactured cannot be subjected to levy of excise duty, then on the import of like articles no additional duty can be levied under the Customs Tariff Act.

3. In view of above said judgement, trade are following two different practices as enumerated below and are being issued Show cause Notices according to the practice they follow :-

(i) Show Cause Notices have been issued to importers who are not paying CVD demanding CVD from them as department has appealed against the order of the Hon'ble High Court of Gujarat.

(ii) Show Cause Notices for wrong availment of CENVAT credit have been issued to those importers who are paying CVD voluntarily and taking CENVAT credit and utilising the same for payment of Central Excise duty liability arising due to breaking of vessels.

4. The problem faced by the trade due to issue of Show Cause Notices in either situation has been examined in Board and it has been decided that all Show Cause Notices issued for non-payment of CVD [refer para 3(i) above] shall be kept in call book till the SLP filed by the department in the Hon'ble Supreme Court is decided.

5. Show Cause Notice denying Cenvat Credit of CVD paid voluntarily by the importers at the time of import is not warranted. It is well settled position in law that a buyer may avail Cenvat Credit, if supplier has paid duty. In this regard following case law may be referred - CCE v. CEGAT [2006 (202) E.L.T. 753 (Mad HC' DB)], CCE v. Ranbaxy Labs Ltd. [2006 (203) E.L.T. 213 (P & H HC' DB)], Commissioner of Central Excise, Chennai-I v. CEGAT, Chennai reported as 2006 (202) E.L.T. 753 (Mad.). Credit is accordingly admissible for duty paid voluntarily.

6. Thus, once the importer has paid CVD on import of ship, Cenvat Credit of that CVD cannot be denied for payment of Central Excise duty on breaking of that ship. Show Cause Notices already issued for denying Cenvat Credit may be decided in light of these instructions and in future such Show Cause Notices may not be issued.

The above circular is not at all relevant since it talks of a situation pertaining to applicability of CVD and availment of CENVAT credit in the said context, while the present dispute is relating to an exemption under Section 5A(1A) of the Central Excise Act, 1944, which clearly debars a manufacturer from payment of Central Excise duty, as the exemption is unconditional. In the present case, the manufacturer was not supposed to pay Central Excise duty and therefore, the appellant could not have availed CENVAT credit of a payment that was not Central Excise duty. Hence, I find that the resort to the circular by the adjudicating authority and the respondent, is not legally tenable.

16. The respondent's contention is that the demand is barred by limitation. Section 11A(4) of the Central Excise Act,1944, lists five situations wherein extended period can be invoked. I find that the respondent had clearly failed to discharge the obligation cast under Rule 9(5) of the CENVAT Credit Rules, 2004, and had thereby availed the CENVAT credit in contravention of the CENVAT Credit Rules, 2004 and thereafter used it towards payment of Central Excise duty. Since the CENVAT credit was availed in contravention of

the CENVAT Credit Rules, 2004 with an intent to evade payment of duty, by utilizing such credit towards payment of duty, I find this to be a fit case for invocation of extended period. Hence, the contention of the respondent that extended period cannot be invoked, lacks merit.

17. Therefore, it would be in the interest of justice if the matter is remanded back to the adjudicating authority to pass an order in the matter, after following the law as has been laid down by the appellate authority/courts and after following the principles of natural justice. Needless to state that the adjudicating authority while passing the order will also look into the fact as to whether the notice issued to M/s. Aroma Polymers, Jaipur has been adjudicated or otherwise.

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

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

(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)

Date :31.07.2017
Attested

(Vinod Lukose)
Superintendent (Appeal-I),
Central Excise,
Ahmedabad.

By RPAD.

To,
M/s. Mecab Cable Private Limited,
Plot No. 635/A, Phase-IV,
GIDC, Vatwa, Ahmedabad-382445

Copy to:-

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