केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,
सत्यमेव जयते केंद्रीय कर शुल्क भवन, 7th Floor, Central Excise Building,
सातवीं मंजिल, पोलिटेकनिक के पास, Near Polytechnic,
आम्बावाडी, अहमदाबाद-380015 Ambavadi, Ahmedabad-380015
☎ 079-26305065 टेलेफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)112 & 113/Ahd-I/2016-17 /1140 to 1145
Stay Appl.No. NA/2016-17

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-073 to 074-2017-18**
दिनाँक **31.08.2017** जारी करने की तारीख Date of Issue 28/9/17

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

ग **Joint Commissioner,Central Excise, Ahmedabad** -I द्वारा जारी मूल आदेश सं **70/CX-I/Ahmd/JC/KP/2016** दिनाँक: **16/12/2016** से सृजित

Arising out of Order-in-Original No. **70/CX-I/Ahmd/JC/KP/2016** दिनाँक: **16/12/2016** issued by **Joint Commissioner, Central Excise, Ahmedabad- I**

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

M/s. Cony Engineering
Smt. Prafullaben S. Patel
Ahmedabad

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

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

भारत सरकार का पुनरीक्षण आवेदन :
Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त 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

Two appeals have been filed as mentioned below against OIO No. 70/Cx-I Ahmd/JC/KP/2016 dated 16.12.2016, passed by the Joint Commissioner, Central Excise, of the erstwhile Ahmedabad-I Commissionerate[for short - '*adjudicating authority*'].

Sr. No.	Name of the appellant(s)	Appeal No.
1	M/s. Cony Engineering, 52/5/2, Margo Industrial Estate, Near Chakudia Mahadev, Rakhial, Ahmedabad	112/Ahd-I/2016-17
2	Smt. Prafullaben S Patel, Proprietor, M/s. Cony Engineering, 52/5/2, Margo Industrial Estate, Near Chakudia Mahadev, Rakhial, Ahmedabad	113/Ahd-I/2016-17

2. Based on a intelligence, a show cause notice was issued to the appellant mentioned at Sr. No. 1, supra, proposing *inter alia* confiscation of the goods, recovery of central excise duty short paid along with interest by wrongly availing the SSI notification. The notice further proposed penalty on the appellant(s) mentioned at Sr. No. 1 and 2 above. This show cause notice was adjudicated vide OIO No. 3/JC/2005 dated 28.9.2005, wherein the then adjudicating authority, ordered confiscation of the goods, confirmed duty along with interest and further imposed penalty on both the appellants. Both the department and the appellant(s), preferred an appeal against the said OIO dated 28.9.2005. The Commissioner(A) vide his OIA No. 108-109/2006 dtd 26.6.2006, upheld the demand and redemption fine setting aside the rest of the OIO. The department's appeal was set aside vide OIA No. 236/2006 dtd 28.9.2006. Department thereafter filed an appeal against both the above mentioned OIAs. M/s. Cony Engineering also preferred an appeal against OIA No. 108-109/2006 dtd 26.6.2006. The departmental appeal against both the OIAs dated 26.6.2006 and 28.9.2006, was decided by the Hon'ble Tribunal vide its order no. A/3152-3154/WZB/AHD/2007 dated 11.12.2007, which restored the recovery of interest ordered by the adjudicating authority and further imposed penalty on appellant mentioned at Sr. No. 1, but reduced it to Rs. 1,29,962/-. Department, thereafter approached the High Court who vide its order dated 23.6.2009 in TA No. 1938 of 2008, remanded back the matter to the Hon'ble Tribunal. Tribunal, thereafter vide its order No. A/1556-1576/2009 dtd 15,16,17th July, 2009, imposed penalty equivalent to duty confirmed but gave an option to the appellant to deposit the entire dues within thirty days in which case the penalty would stand restricted to 25% of the duty amount. Department feeling aggrieved, approached the High Court who vide its order dated 17.2.2010 in TA No. 2592 of 2009, dismissed the departmental appeal. Department's appeal against the said order before the Hon'ble Apex Court was dismissed by the Apex Court. In the meantime, appellant's appeal before the Hon'ble Tribunal against OIA No. 108-109/2006 dtd 26.6.2006, was decided, wherein vide order no. A/1179/2011 dtd 17.6.2011, the matter came to remanded back to the adjudicating authority. This impugned OIO dated 16.12.2016, is a result of the said remand.

3. Feeling aggrieved, the appellant(s) have filed this appeal raising the following averments:

M/s. Cony Engineering

(a)the adjudicating authority erred in ignoring the directions/guidelines issued vide order dated 17.6.2011;
(b) the OIO is contrary to the directions in remand ordered by the Tribunal;
(c) that so far the impugned OIO relates to penalty, it has travelled beyond the scope of remand; that the entire order is unsustainable;
(d) that penalty imposed against appellant at Sr. No. 2 vide the earlier OIO dated 28.9.2005 was set aside by the Commissioner(A) vide his OIA No. 108-109/2006 dtd 26.6.2006, which was not disputed by the department;
(e)that the impugned OIO has not considered the main issue as to whether the benefit of SSI notification was available since it is clear that the brand name *CETRON* came to be embossed on housing body and top during the process of casting conducted at the premise of foundries and was not affixed by the appellant;
(f)the restriction imposed in para 4 of the SSI notification is not attracted in the facts of the present case;
(g) that they would like to rely on the case of M/s. Unispanners Privatee Limited [2001(127) ELT 815], Perarl Engineering Works [1999(113) ELT 644], Subrabha Engineering Industries [2000(122) ELT 535] and Jain Trading Company [2006(193) ELT 96]; Vimal Printery and Others [1999(115) ELT A 222], Sri Chakra Tyres [1999(108) ELT 361], Dugar Tetenal India [2008(224) ELT 180], Padmini Products [1989(43) ELT 195] and Chemphar Drugs and Liniments [1989(40) ELT 276];
(h) that they would like to rely on Boards circular nos. 71/71/194-Cx dated 17.10.1994 and 509/05/2000-Cx dated 18.1.2000;
(i) that total realization is required to be regarded as cum-duty-price in terms of the provisions of Section 4 of the Central Excise Act, 1944;
(j) that since the period of dispute is from December 1999 to April 2004 and the notice was issued on 6.10.2004, the notice is barred by limitation; that there was no suppression of facts
(k) Penalty imposed invoking the provisions of Rule 25 of Central Excise Rules, 2002, deserves to be vacated; that the demand of interest under section 11AB is not correct;
(l) the findings of the adjudicating authority that M/s. Cony Engineering was set up to keep the turnover below Rs. One crore, is far away from the facts on records;
(m) that the statement of Shri Tusharbhai Patel that '*CETRON*' trademark is embossed at the time of casting stands ignored.

Smt. Prafullaben S Patel, Proprietor

(a) that the personal penalty imposed is not sustainable and is contrary to the provisions of law;
(b) that the department had already accepted the setting aside of the penalty on the proprietor vide OIA dated 26.6.2006, which was not appealed against;
(c) that the penalty has been imposed both on the proprietorship and the proprietor, is akin to imposing penalty twice;
(d) that they would like to rely on the case of Tapi Textile Private Limited [2016(339) ELT 83], Vinodkumar Gupta [2013(287) ELT 54], Vinayak Drawings [2011(268) ELT 410] and Yathartha Yantra Udhyog [2016(334) ELT 117].

4. Personal hearing in both these appeals were held on 20.7.2017, wherein Shri N.R.Parmar, Consultant from G B Patel Associates, appeared for both the appellants and reiterated the grounds of appeal. He submitted additional submissions, which on going through I find, is a repetition of the grounds, already taken in the main appeal.

5. I have gone through the facts of the case, the appellant's grounds of appeal, and the oral submissions made during the course of personal hearing.

6. As is already mentioned, the impugned OIO dated 16.12.2016, is on account of remand by the Hon'ble Tribunal vide its order no. A/1179/WZB/AHD/2011 dated 17.6.2011 in Appeal no. E/2805/2006, wherein the Tribunal held as follows :[relevant extracts]

9. After carefully considering the submissions made by ld. Advocate, we find favour with the same. The entire purpose of adjudication is to decide the disputed issue in accordance with the law. It will not be out of place to observe that it is equally the responsibility of the adjudicating/appellate authority to arrive at correct decision by taking into account various precedent decisions of the Tribunal. An assessee may not be in knowledge of declaration of law by the quasi-judicial and judicial forum and as such may not raise a plea which may be in his favour. However, the departmental authorities are expected to be an expert in the Central Excise matters and in knowledge of the various rules on the disputed issue. As such, even if the assessee has not raised some particular issue, it is legally obligatory on the part of the appellate authority to take the same into consideration and to arrive at just and fair finding as long as the facts are not in dispute and it is only the legal issue, which is required to be decided.

10. Having observed so, we also find that even otherwise, in accordance with the various decisions referred supra, if the appellants have not advanced the legal issue before original adjudicating authority and has raised the same for the first time before Commissioner(Appeals), he should have examined the same and given a decision instead of rejecting the said plea at the outset, on the ground that the same was not raised before original adjudicating authority and the appellant is debarred from raising the same. In fact, claim of exemption notification is a question of law and can be raised at any point of law. The same is not relatable to the facts involved in the given case and its applicability, is required to be examined on the basis of facts already available on record. As such, in our view, the appellate authority was not justified in refusing to examine the applicability of Notification No.8/2003-CE. Further, the mere fact that the appellant deposited duty along with interest and 25% of penalty during the course of investigation, itself cannot be made the ground to conclude as if the appellants have accepted their liability. The mere fact that an appeal was filed against the adjudication order, is reflective of their protest against the said impugned order.

11. In view of the above, we set aside the impugned order and remand the matter to original adjudicating authority to examine the above plea of appellant, in the light of declaration of law by Tribunal in various decisions relied upon by the appellant. The matter is being remanded to original adjudicating authority inasmuch as admittedly, the appellant has not raised above issue before him and as such his opinion is not available. At this stage, ld.Advocate submits that the appellant may be allowed to raise other issues as regards limitation, demand being cum duty etc.

12. Inasmuch as the limitation is a mixed question of law and fact and as the matter is being remanded to original adjudicating authority for fresh decision, he may examine the issue in the light of submissions made by the appellant during the course of de novo proceedings.

7. The adjudicating authority, consequently vide her impugned OIO, held as follows:

(a)that the issue to be decided is whether the M/s. Cony Engineering is eligible for benefit of SSI, and demand of duty on excisable goods manufactured and cleared without payment of central excise duty bearing brand name of others;
(b)they were using only 'CETRON" brand name when they were selling gear boxes: that the brand name CETRON belongs to M/s. Cetron Transmission Company which is owned by the husband of the proprietor of M/s. Cony Engineering;
(c)because of the appellant's malafide intention and willfull act, for the same issue from the same Hon'ble CESTAT bench, two different orders were issued, by misleading the Hon'ble CESTAT;
(d) the period involved in the notice is from FY 1999-2000 through 2004-05 and during the said period exemption notification nos. 1/1993-CE, 8/2000-CE, 8/2001-CE and 8/2003-CE were in force from time to time;
(e) the appellants contention regarding their brand name on casting and hence claiming exemption from payment of duty by taking shelter of Circular No. 71/71/94-Cd dated 17.10.1994 is out of place: that brnad name itself is a concept and it is not necessarily be tangible; that brand name has a very wide concept whereas the appellant has narrowed down their vising to embossment only;
(f)the appellant has already paid total duty involved prior to notice and owned up the ineligibility of SSI exemption;
(g) the appellant has contested only imposition of penalty;
(h) that cum duty benefit is not available in such cases: that this view has been upheld by the Hon'ble Tribunal in the case of Jay Jalaram Processors [2014(313) ELT 724];
(i) that being an SSI unit the appellant failed to file declaration regarding their annual turnover as per notification No. 22/1998-CE(NT) and 36/2001-CE(NT);

Vide the impugned OIO, the adjudicating authority, confirmed the demand along with interest and imposed penalty on both the appellants.

(A) Appeal of M/s. Cony Engineering

8. The journey of this dispute, right upto the Hon'ble Supreme Court is briefly mentioned in para 2, supra. The task before the adjudicating authority, was set forth by the Hon'ble Tribunal, vide its order no. A/1179/WZB/AHD/201[illegible] dated 17.6.2011, *supra*, wherein

the adjudicating authority was directed to look into [a] applicability of exemption notification No. 8/2003 [b] limitation,[c] demand being cum duty, etc..

Applicability of SSI exemption notification

9. On the question of the applicability of SSI exemption notification, M/s. Cony Engineering, was denied the benefit of SSI exemption notification since on the goods manufactured by them were found to contain 'CETRON' trademark, and the SSI exemption notification clearly stated that the said exemption shall not apply to specified goods bearing a brand name or trade name, whether registered or not, of another person. However, I find that the adjudicating authority, has not provided adequate reasoning against the claim of the appellant that the mischief of para 4 of the said notification is not applicable in his case. The appellant has relied upon circular no. 71/71/194-Cx dated 17.10.1994 and 509/05/2000-Cx dated 18.1.2000, the relevant extracts of which are reproduced below :

Circular No. 71/71/94-CX, dated 27-10-1994

Illustration I
2. It has been represented that in the case of castings, there is a trade practice under which the SSI units produce the castings as per the design supplied by the customers and such castings may bear the brand name/design/logo as required by the users of castings. Such castings are finally used in the manufacture of other machinery like diesel engines. It has been represented that such castings are not traded as such in the open market and they are made for use by specific users. In such cases, the brand name which is put on the castings is the brand name of the machinery manufacturer, and thus putting the brand name is only to suit the manufacturing needs of the customer. Consequently, in such cases, the benefit of SSI exemption should not be denied.

4. The matter has been examined in the Board. The scope of brand name and trade name has already been clarified vide Ministry's letter F.No. B. 40/12/94-TRU, dated the 1st September, 1994 (Circular No. 52/52/94-CX.)

5. As explained in paragraph 3 of the letter, to attract the mischief of the provisions relating to brand name, two conditions have to be satisfied.
(1) Such brand name must indicate a connection between the branded goods and some person using such brand name.
(2) Such connection should be in the course of trade.

6. Consequently if there is no "trade" of such goods, the brand name provision would not apply.

7. Coming to the first illustration, castings are manufactured as per the specific requirement of the customers and the brand name which the small scale unit puts on such castings is meant for use of the customer only for further manufacture. Castings having such brand name are not sold in the market as castings as such, because it will be of no use to another person. It is felt that when such castings are not "traded" but only sold to a particular manufacturer for his own use, the embossing of the brand name of the customer on the castings would not amount to using brand name so as to deny the benefit of Notification No. 1/93. Of course if it is found that such branded castings are traded in the market as such, it will amount to use of such castings in the course of trade and the benefit of exemption notification will not be available. In other words, so long as the branded castings are being supplied to the customer for further manufacture, and are not otherwise "traded", the benefit of small scale exemption in such cases should not be denied merely on the ground that it contains brand name of another unit. Whether such supply is in the course of trade or not, of course, will be a matter of fact and has to be ascertained from the nature of transaction between the small scale unit and the brand name owner. So long as they are made to order as per the design and specification of a particular manufacturer and sold to that manufacturer for his own use, the benefit of Notification No. 1/93 cannot be denied.

509/05/2000-Cx dated 18.1.2000

I am directed to enclose a copy of Supreme Court judgment dated 24-9-1999 in the case of M/s. Vimal Printery and Others. As is evident from the judgment our Civil Appeal No. D. No. 8814/99 has been dismissed on

the ground of delay as well as on merit. The issue involved in this case was whether the party is entitled to the benefit of exemption notification for small scale industry under Notification No. 175/86, dated 1-3-1986 on the grounds that the raw material namely "duplex board" supplied by M/s. ITC Ltd. already contained their house mark "ITC" on the inner flap. The Tribunal had decided the case in favour of the party vide above mentioned CEGAT Order observing that the appellants are not putting the trade name or brand name on the goods and that they are receiving the goods for processing with the samble "ITC" already affixed on the duplex board. The Tribunal after examining para 7 of the Notificaiton No. 175/86 has held, that in such circumstances, para 7 of the Notification is not attracted and the benefit cannot be denied. The said CEGAT order stands confirmed by the enclosed Hon'ble Supreme Court judgment.

10. On going through the show cause notice, I find that in paras 2, 3, 6, 7 and 8, it is mentioned that the brand name CETRON was embossed at the time of castings on the pattern supplied. If so be the case, Board vide the aforementioned two circulars, has clarified that the benefit of the SSI exemption notification, in such cases, cannot be denied. However, I have only looked into what was mentioned in the show cause notice, which relied heavily on the panchnamma, and statements recorded of various persons, including the proprietor of M/s. Cony Engineering and the proprietor of M/s. Cetron Transmission Company. Since copies of statements and panchnamma are not a part of the appeal papers, I did not have the benefit of going through the exact wordings of the panchnamma and the statements. However, if it is found that such branded castings are traded in the market as such, it will amount to use of such castings in the course of trade and the benefit of exemption notification will not be available, which does not appear to be the case. However, since the entire statement and panchnama is not available, I cannot authoritatively comment on it. But having said this, it is abundantly clear that if what is mentioned in the five paras of the show cause notice is correct, the question of the mischief of brand name, as per the SSI exemption notification, will not apply in the present case.

11. Since the entire case stands on whether the appellant is hit by the mischief of brand name or otherwise and as to whether the appellant will be eligible for the benefit of the SSI notifications, as was in vogue in the various financial years, it would be in the interest of justice, if the matter is remanded back to the original adjudicating authority, with a clear direction to pass a speaking order taking into consideration the above two circulars and decide whether the M/s. Cony Engineering is eligible for the benefit of the exemption notification. Since the other two issues, namely, limitation and cum duty effectively depend on the first issue, the adjudicating authority would decide these issues based on the averments raised by the appellants. The adjudicating authority is also directed to discuss the case laws relied upon by the appellant.

(B) Appeal of Smt. Prafullaben S Patel, Proprietor,

12. The appellant in this appeal has primarily contented two things [a] that the penalty proceedings dropped against her vide OIA No. 108-109/2006 dtd 26.6.2006, was never disputed by the department and [b]that no penalty can be imposed on both the proprietor and the proprietary concern. The adjudicating authority has not passed any finding on both these averments. The facts in respect of the first averment is not very clear since the relevant papers are not available in teh appeal file. But as far as the second averment it is concerned, it is a fact that penalty has been imposed on both the proprietor and the proprietary concern. I find that

there are ample judgements holding that penalty cannot be simultaneously imposed on both the proprietor and the proprietary concern. The appellant has relied upon various judgement, viz

(a) Tapi Textile Private Limited [2016(339) ELT 83],

Penalty - Shortage of goods - Proprietorship concern - Penalty can either be imposed on proprietor or on proprietary firm, penalty of ` 10,000 imposed on proprietor sustained while equal penalty imposed on firm, set aside - Section 11AC of Central Excise Act, 1944. *[para 3]*

(b) Vinodkumar Gupta [2013(287) ELT 54],

Penalty - Imposition of - Proprietorship firm or proprietor/partners thereof - They cannot be treated as two different legal entities - Rights and obligations of firm are really those of their individual partners - Penalty imposed on proprietorship or firms means penalty on proprietor or partners - In that view, second penalty on proprietor/partner would amount to imposition of penalty twice over, which cannot be sustained in eyes of law. *[paras 9, 10]*

(c) Vinayak Drawings [2011(268) ELT 410]

Clandestine manufacture and removal - SSI exemption - Excisable goods manufactured but registration not taken and no records maintained - Finished goods cleared under kachcha slips and the same destroyed as per statement of proprietor - Impugned order holding SSI exemption as eligible - Goods not automatically become exempt under SSI exemption Notification No. 8/2003-C.E. unless option therefor exercised - No declaration given on availment of SSI exemption - Confiscation and penalty sustainable - Impugned order not correct in setting aside confiscation and penalty on firm - Separate penalty on proprietor not required - Section 5A of Central Excise Act, 1944 - Rule 25 of Central Excise Rules, 2002. *[paras 1, 4]*

(d) Yathartha Yantra Udhyog [2016(334) ELT 117].

Since the penalty has been imposed under Section 11AC, no penalty is imposable on Shri Anurag Jain, the proprietor of the respondent company under Rule 26

In view of the foregoing, I allow the appeal filed by Smt. Prafullaben S Patel, Proprietor and the impugned OIO to the extent it imposes penalty of Rs. 5.19.848/- on the proprietor, is set aside.

13. In view of the foregoing, it is held as follows:

[a] in respect of the appeal mentioned at Sr. No. 1 of table in para 1, the matter is remanded back to the adjudicating authority in terms of para 10 and 11, supra. The adjudicating authority, is directed to dispose of the matter latest by December 2017 as the matter is very old. Needless to state that the appellant will cooperate with the adjudicating authority;

[b] in respect of the appeal mentioned at Sr. No. 2 of the table in para 1, the appeal is allowed and the penalty imposed on the appellant is set aside.

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

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

(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)

Date :31.08.2017

Attested

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

By RPAD.

To,

M/s. Cony Engineering, 52/5/2, Margo Industrial Estate, Near Chakudia Mahadev, Rakhial, Ahmedabad	Smt. Prafullaben S Patel, Proprietor, M/s. Cony Engineering, 52/5/2, Margo Industrial Estate. Near Chakudia Mahadev, Rakhial, Ahmedabad

Copy to:-

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