



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

☎ : 079-26305065

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)15&16/Ahd-South/2018-19
Stay Appl.No. /2017-18

385370
3857

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-012 to 013-2018-19
दिनांक Date : 14-06-2018 जारी करने की तारीख Date of Issue

26/6/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. MP/17/Dem/2017-18 दिनांक: 05.10.2017 & MP/18/Dem/2017-18 दिनांक: 05.10.2017 issued by Assistant Commissioner, Div-V, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
M/s H.B.Metal 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 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।



(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.

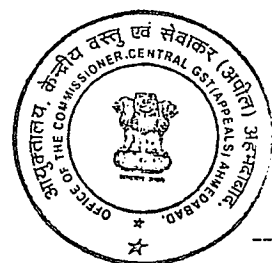
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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 मैनटल हॉस्पिटल कम्पाउण्ड, मेघानी 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 यथास्थिति 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 Appellate 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 अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति 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 alone is in dispute."



ORDER IN APPEAL

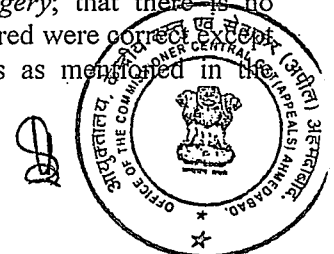
The below mentioned two appeals have been filed by M/s. H B Metals Private Limited, 237, Vijay Industrial Estate, B/h Bhikshuk Gruh, Odhav, Ahmedabad [for short - 'appellant'], viz.

Sr. No.	OIO No. and date [for short - impugned OIO]	Adjudicating authority	Appeal no.
1	MP/17/Dem/2017-18 dated 5.10.2017	Assistant Commissioner, CGST, Division V, Ahmedabad	15/Ahd-South/2018-19
2	MP/18/Dem/2017-18 dated 5.10.2017	Assistant Commissioner, CGST, Division V, Ahmedabad	16/Ahd-South/2018-19

2. Based on an intelligence that M/s Aegis Steel Cast and M/s Raj Engineers, engaged in manufacturing of Alloy Steel Castings, falling under chapter 84, were evading Central Excise duty by way of availing and utilizing in-admissible CENVAT credit on the strength of forged invoices issued by the appellant, an inquiry was initiated against both the appellant and the aforementioned two assessee's. The investigations revealed that the appellant, a dealer, had supplied/delivered goods other than what was mentioned in the invoices. As it appeared that the aforementioned two assessee's had wrongly availed CENVAT credit on the basis of fraudulent invoices, issued by the appellant, show cause notices were issued to the aforementioned two assessee's as well as to the appellant, proposing recovery of the wrongly availed CENVAT Credit along with interest and further proposing imposition of penalty. Vide the impugned OIOs, the adjudicating authority ordered recovery of the credit wrongly availed with interest and imposed penalty on the aforementioned two assessee's and the appellant.

3. Feeling aggrieved, the appellant has filed these appeals against the imposition of penalty vide the aforementioned two impugned OIOs, on the following grounds, viz:

- the impugned order is passed on assumption and presumption and there is no evidence available on record which can confirm the penalty;
- that based on the statements of the authorized signatory of the aforementioned two assessee's, the adjudicating authority came to a conclusion that the appellant had not supplied the same goods which are mentioned in the invoices; that the findings are baseless and without any evidence;
- that the department has not supplied any corroborative evidence that the appellant had not supplied the same goods which was mentioned in the invoices; that the burden is on the department to prove this;
- that the adjudicating authority erred in holding that for a single set consignment, two sets of invoices were issued; that there is no evidence available on record for this and no such allegation was made in the notice to this effect;
- that there is no finding that the appellant had purchased scrap from the open market without payment of duty and supplied it to the aforementioned two assessee's; that there was also no evidence that the goods purchased under the invoice from the supplier was cleared illicitly; that it is not permissible in the law to allege or to arrive at a conclusion that the appellant had indulged in any illegal activity;
- that the adjudicating authority had wrongly interpreted the word *forgery*; that there is no evidence that they had made any false documents; that the invoices prepared were correct and the description which was not matching the description of the goods as mentioned in the supplier's invoice;



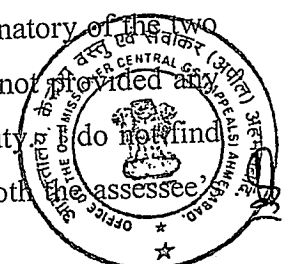
- that they wish to rely on the case of Birendra Kumar Singh [2006(198) ELT 460] and Rajendra Prasad [2001(136) ELT 925]; that it is a settled legal position that there is no evidentiary value of statement of co-accused when there is no corroborative evidence;
- that the impugned OIO nowhere specifies under which sub-clause of Rule 26 of the Central Excise Rules, 2002, the said offence is committed;
- that the adjudicating authority has wrongly confirmed demand which is time barred by invoking the extended period of five years.

4. Personal hearing in the matter was held on 25.5.2018 wherein Shri Dhaval Shah, Advocate and Shri Uttam Sen, Authorized signatory, appeared on behalf of the appellant. The learned Advocate reiterated the grounds of appeal and submits that there is no corroborative statement implicating the appellant. The Advocate further supplied copies of the judgements in the case of M/s. Nissan Thermoware P Limited [2011(266) ELT 45 (Guj.)] and M/s. Sakeen Alloys Private Limited [2014(308) ELT 655 (Guj.)]. The advocate further stated that the application for condonation of delay, may be allowed since they had received the OIO late.

5. I find that both the impugned OIOs were issued on 5.10.2017, however, both the appeals have been filed on 15.5.2018. The appellant has also enclosed a copy of the letter dated 20.3.2018 of the Assistant Commissioner, Central GST Division V, Ahmedabad South Commissionerate [the adjudicating authority], informing that the OIOs which were sent to the appellant via speed post was received back, undelivered. Thereafter, the OIOs were affixed on the notice board of the Division Office. Subsequently, on the request of the appellant, a copy of the same, was given on 20.3.2018, to the appellant, in the interest of justice. The appellant has also filed an application for condonation of delay, as a precaution. Going through the sequence of events, as is depicted in the letter dated 20.3.2018, I hold that the appeals have been filed within the prescribed time as the appeals were filed on 15.5.2018 in respect of the OIO which was given to the appellant on 20.3.2018.

6. I would now like to discuss the merits of the case. I find that in respect of OIO No. MP/17/Dem/2017-18 dated 5.10.2017, the main notice was M/s. Raj Engineers and the appellant herein, was a co noticee. Similarly, in OIO No. MP/18/Dem/2017-18 dated 5.10.2017, the main appellant was M/s. Aegis Steel, and again the appellant herein, was a co-noticee. In respect of both the OIOs, the main notices had filed their appeals which was decided by me vide my OIA Nos. 361-364/2017-18 dated 26.2.2018. It is in this background that I would now like to discuss these appeals, filed by the appellant.

7. In the aforementioned OIA dated 26.2.2018, I had held that that the invoices were issued by the appellant for the goods other than what was supplied, so as to enable the two aforementioned assessee's to take inadmissible CENVAT credit. The appellant has contested the findings of the adjudicating authority, by pleading that the findings were based on assumption and presumption; that it was based only on the statements of the authorized signatory of the two assessee's; that there was no corroborative evidence; that the department had not provided any proof that the goods were purchased from open market without payment of duty. I do not find any merit in the arguments raised more so since the authorized signatory of both the assessee's



are on record that they had received goods other than what was mentioned in the invoices. This clearly leads one to a conclusion that the primary intention was to pass on credit wherein both the recipient and the appellant, were hand in gloves. The appellant fraudulently passed on credit which was not due to the assessee's concerned. The appellant has surprisingly contended that - *the invoices prepared by them is correct except the description is not matching with the description of goods mentioned in the suppliers invoices and that it does not attract forgery.* This argument does not hold goods since it is on record that they had supplied goods which were other than what was mentioned in the invoices. Therefore, now to come up with an argument that just the description was not matching, justifies the finding of the adjudicating authority that the goods supplied to the aforementioned two assessee's were other than what was mentioned in the concerned invoices.

8. The appellant has finally, relying on two case laws, submitted that findings of the adjudicating authority are based on the statements of the authorized signatory of the aforementioned two assessee's; that the findings are baseless and without any evidence; that the department has not supplied any corroborative evidence that the appellant had not supplied the same goods which were mentioned in the invoice; that the burden is on the department to prove this. I find that the contention is incorrect on account of the following:

[a] there is a clear cut admission from the authorized signatory of the recipients [in this case the aforementioned two assessee's] that they had received the goods other than what was mentioned in the invoices. The claim appears to be correct/reliable since no prudent man would purchase and incur expenditure on goods, which are not his inputs.

[b] there are instances in the worksheet in the show cause notice, which clearly shows that purchase invoices were not available;

[c] the appellant in the appeal papers has himself admitted that the change in the description cannot be termed as forgery.

I find that the findings of the adjudicating authority are based on facts and admissions. Conclusions based on the facts that any person could draw, acts as corroborative evidence. Since the investigation is of a past period, the appellants contention that no corroborative evidence was produced to prove that the appellant had not supplied the goods mentioned in the invoice, is stretching the matter to far. The facts belie the claim of the appellant. The admissions of the two aforementioned assessee's when seen conjointly with the facts depicted above, leads one to a reasonable conclusion, that the appellant had supplied goods which were other than what was mentioned in the invoices. I therefore, do not find any merit in the claim of the appellant. The case laws quoted/relied upon are not applicable to the present dispute. Further the argument that the impugned OIO nowhere specifies under which sub clause of Rule 26, the offence is committed, I find, would vitiate the penalty imposed. For the sake of clarity it is held that the penalty imposed on the appellant may be read as imposed under Rule 26(2) of the Central Excise Rules, 2002. The last contention that the extended period is not applicable to the present case is not a tenable argument since as far as the appellant is concerned. As far as penalty is concerned, limitation would not come in play. Hence, this contention is also rejected.




9. In view of the foregoing, the appeals filed by the appellant is rejected.

10. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
10. The appeal filed by the appellant stands disposed of in above terms.

उमा शंकर
(उमा शंकर)
आयुक्त (अपील्स)

Date : 16.6.2018

Attested


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

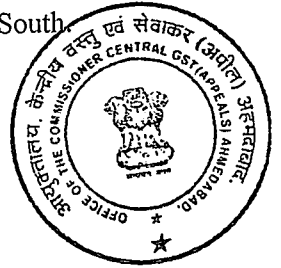
By RPAD.

To,

M/s. H B Metals Private Limited,
237, Vijay Industrial Estate,
B/h Bhikshuk Gruh,
Odhav,
Ahmedabad

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-V, Ahmedabad South.
4. The Assistant Commissioner, System, Central Tax, Ahmedabad South.
5. Guard File.
6. P.A.



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