



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

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

केंद्रीय कर भवन,

7th Floor, GST Building,

Near Polytechnic,

सातवीं मंजिल, पोलिटेकनिक के पास,

Ambavadi, Ahmedabad-380015

आम्बावाडी, अहमदाबाद-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(32)143&144/Ahd-South/2018-19
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-0137&138-2018-19
दिनांक Date : 31-12-2018 जारी करने की तारीख Date of Issue _____ 21/1/2019

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 13/CE-I Ahmd/JC/KP/2018 दिनांक: 18.09.2018 issued by
Joint Commissioner, Div-Ahd south, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
Yash Chemex
Harshlaxmi Chemisolv
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) केंद्रीय 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 प्रक्रिया 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.

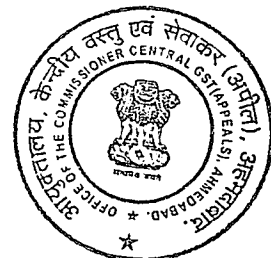
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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, मेघाणी नगर, अहमदाबाद-380016

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



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

- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए 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 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 रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

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

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

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

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

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

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

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

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

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

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

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

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



ORDER-IN-APPEAL

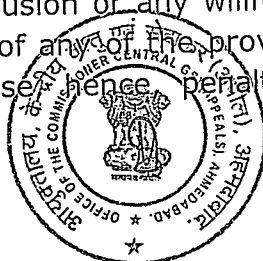
M/s Yash Chemex Inc, Plot No.457, Phase-II, GIDC, Vatva, Ahmedabad [for short-" M/s Yash"] and M/s Harshlaxmi Chemisol, 16, Prernatirth Bungalow-1, B/h Prernatirth Temple, Satellite, Ahmedabad (D 613, Shiromani Complex, Opp Ocean Park, Nehru Nagar, Sattelite, Ahmedabad) [for short- M/s Harshlaxmi] has filed appeal against Order-in-Original No.13/CE-1/Ahmd/JC/KP/2018 dated 18.09.2018 [for short-"impugned order"] passed by the Joint Commissioner of CGST, Ahmedabad South [for short-"adjudicating authority"].

2. Briefly stated, based on an information that M/s Harshlaxmi has indulged in selling of excisable goods without bill to different buyers and for transportation of said goods, they indulged M/s Navdurga Roadlines, Shop No.22, Ojas Complex, P No.69, Sector 9-C, N H Road, Gandhidham and M/s Mohit Bulk Carriers/Triveni Roadlines, Gandhidham, the officers of the Directorate General of Central Excise Intelligence, Zonal Unit, Ahmedabad [for short-DGCEI] has carried out searches at their premises on 10/16.09.2014. Further detailed investigation revealed that M/s Harshlaxmi have sold Goods to manufacturers and traders under Cenvatable Invoices and non-Cenvatable invoices for local purchase as well as for imported goods; that M/s Harshlaxmi has issued various invoices to M/s Yash only paper, but actually the corresponding goods have not been supplied to M/s Yash under the invoices issued. M/s Harshlaxmi was issuing various invoices without physically supplying the corresponding goods to M/s Yash and M/s Yash has fraudulently availed CENVZT credit on the basis of invoices issued by Harshlaxmi. After completion of investigation, a show cause notice dated 24.10.2016 was issued to M/s Yash for recovery of CENVAT credit amounting to Rs.1,02,99,643/- with interest, wrongly availed on the goods totally valued to Rs.8,55,85,101/- which were actually not received by them during the period of December 2011 to July 2014. The said notice also proposes for imposition of penalty on M/s Yash under [i] Rule 15(2) of CENVAT credit Rules, 2004 (CER) read with Section 11 AC of Central Excise Act, 1944 (CEA); under Rule 26 (1) of Central Excise Rules, 2002; and [ii] imposition of penalty on M/s Harshlaxmi under Rule 26(2) of CER. The adjudicating authority, vide impugned order has confirmed the recovery of Cenvat Credit with interest and imposed penalty of Rs.1,02,99,643/- under Rule 15(2) of CER read with Section 11 AC of CEA and Rs.1,02,99,643- under Rule 26(1) of CER on M/s Yash; Rs.1,02,99,643/-each on M/s Harshlaxmi and the transporter M/s Navdurga Road lines under Rule 26(2) of CER.

3. Feeling aggrieved, M/s Yash and M/s Harshlaxmi has filed this appeal against the impugned order, wherein, they raised the following averment:



- the entire investigation had been done on the basis of evidences which itself created doubt and the authenticity of the same was challenged before him besides other strong submissions but the learned adjudicating authority has failed to appreciate the submissions and arbitrarily proceeded to confirm the demand and penalty, thus resulting into grave injustice to the appellants.
- they had purchased the inputs on the basis of invoices, the payment of which was done by the appellant through cheque and the said inputs were used in the manufacture of finished goods which were further cleared on payment of Central Excise duty and all the above facts were known to the investigation at the time of search of the factory premises of the appellant and it was also brought to notice of adjudicating authority, however, he has remained silent on the most vital evidences and proceeded to conclude the investigations on the basis of a diary, which itself is doubtful piece of evidence.
- the investigation has failed to extend the investigation to the alleged actual buyers to whom the dealers had sold the goods in cash and the said cash was returned to the appellant after making certain adjustments and the investigation has simply proceeded on the basis of statements, which have been recorded under threat, fear and duress and as such the same did not hold any strength in substantiating the case.
- In the present case, as statement of authorized persons of M/s Yash and other persons were recorded under duress or pressure and as the same were not correct, the statements were retracted by the persons at a later date. It is a settled law that the retracted statement cannot be used as an evidence for framing any charges against him and the case has to be proved on the basis of corroborative evidences, which are absolutely absent in this case.
- There were no corroborative evidences in the entire case and the entire case had been built upon the basis of documents/note book seized from the premises of third party and statements only; that the entire case has been made up on the basis of admission statements of persons of M/s Yash, M/s Harshlaxmi and other persons, where all the statements were recorded in question form and where only questions which confirmed to the irregularity of Cenvat credit were put upon by the investigating agency rather than questions relating to facts of the case.
- Their company had received the duty paid inputs, the same were accounted for by our company in the books of accounts and used in the manufacture of finished goods and finally cleared on payment of Central Excise duty; thus, we have followed all the conditions prescribed under the Cenvat Credit Rules, 2004. We say and submitted that it is a settled law that the receipt of inputs recorded by the assessee are required to be considered for investigation and the investigation has to establish that the records maintained by the assessee were not proper, which has not been done in the instant case. The appellant wishes to rely on the following judgments in support of their claim.
- The investigating agency has failed to establish as to how M/s. HarshLaxmi paid cash to them and how did they reach to a conclusion the said dealer had paid cash to them; that they also failed to establish as to what the appellant did of the huge cash received by M/s Yash from M/s. HarshLaxmi, specially when the bank accounts do not reflect any huge transaction of cash inflow in our bank accounts.
- As the Cenvat credit has been availed as per the Cenvat credit rules and the same has been recorded in the statutory records, thus, the elements of none of the elements fraud, collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of the Excise Act are not present in the instant case. Hence penalty under rule 15(2) cannot be



imposed on us. The provisions of Rule 26(1) of Central Excise Rules, 2002 will also not be applicable, as they have not acquired possession or are in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing the goods which were liable for confiscation under the Act or these rules and it is therefore requested to set aside the allegation of imposition of penalty in the instant case.

- They relied on various case laws in their favour.

4. Personal hearing in the matter was held on 13.12.2018. Shri Anil Gidwani, Tax Consultant appeared for the same and reiterated the grounds of appeal.

5. I observe that the allegations against M/s Yash is that they had availed CENVAT credit amounting to Rs. 1,02,99,643/- fraudulently on the goods totally valued to Rs. 8,55,85,101/- which were actually not received by them from M/s Harshlaxmi during the period 2011-12 to July 2014; The allegation against M/s Harshlaxmi that they have supplied only invoices without supplying the goods physically so as to enable M/s Yash to avail the said credit fraudulently. I observe that the main grounds for such allegations and confirmation of duty with interest and imposition of penalty by the adjudicating authority are as under:

- [i] Investigation have gathered irrefutable & Non-controvertible documentary evidences revealing illegal activities of M/s Yash have indulged themselves in evasion of central excise by way of fraudulent availment of Cenvat credit on the basis of invoices issued by M/s Harshlaxmi, without actual receipt of corresponding goods.
- [ii] Documents withdrawn under Panchnama dated 16.12.2014 reveals that M/s Harshlaaxmi has not supplied the corresponding goods along with Cenvatable invoices and only passed on Cenvat credit fraudulently to M/s Yash; that the said facts have been admitted by the authorized persons of the said dealers.
- [ii] As per documents submitted by M/s Navdurga Road lines, Gandhidham who was engaged in transportation by M/s Harshlaxmi clearly shows that the corresponding goods have never reached at the factory premises of the appellant and this fact was also admitted by the authorized person of the said Road lines.
- [ii] The ground plan & rented agreement submitted by M/s Harshlaxmi reveals that they do not have the facility to store such a hazardous & Inflammable liquid cargo at any place; that the invoices issued by them reveals that there is a difference ranging from 0 to 555 days between the date of invoices issued by M/s Laxmi and M/s Harshlaxmi and from the date of invoices issued by the manufacturers/1st stage dealer/importers etc. This fact was admitted by the authorized persons of M/s Harshlaxmi.



- [iii] The Partner of M/s Yash had admitted that they had taken Cenvat credit on the raw materials wrongly on the strength of invoices issued by M/s Harshlaxmi without receiving the corresponding goods during the relevant period.
- [iv] Admitting their liability, the appellant had paid voluntarily an amount of Rs.12,18,296/- during the course of investigation on November 2014.
- [v] 22 other manufacturers who had also availed Cenvat credit on the basis of Cenvatable invoices issued by M/s Harshlaxmi, without physically receipt of the corresponding goods and they have also voluntarily paid the amount of Cenvat credit wrongly availed with interest and penalty as provided under the provisions of CEA.

6. The adjudicating authority has confirmed the duty demand on the basis of alleged grounds mentioned above as he observed that M/s Yash had purportedly obtained invoices on the raw materials in question without receipt of goods so as to avail the CENVAT credit involved therein fraudulently from M/s Harshlaxmi. I observe that it is a fact that all the allegations involved in the instant case was admitted by the authorized persons of M/s Yash and M/s Harshlaxmi and also by the transporters in their statements recorded by DGCEI. Further, I also observe that the other manufacturers who have availed Cenvat credit on the basis of invoices supplied by M/s Harshlaxmi were also admitted the fact that they had not received any goods from M/s Laxmi shlaxmi, instead only invoices were received so as to avail Cenvat credit fraudulently. Since the suppliers themselves have admitted that they had not delivered the goods to their customers including to M/s Yash and also non-receipt of the goods by M/s Yash is duly supported by the statements of authorized persons of M/s Yash, in my opinion, the allegations mentioned above is sufficient to prove the case against M/s Yash that they did not receive the goods. Further, a number of documentary evidences viz. [i] lorry receipts issued by the transporters, loading registers maintained by the transporters, bills issued by the transporters; [ii] note book maintained by M/s Harshlaxmi, Ledger Account and freight ledger account maintained by M/s Harshlaxmi and other documents withdrawn vide Panchnama support the facts of the allegation.

7. M/s Yash and M/s Harshlaxmi further contended that there were no corroborative evidence in the instant case and the DGCEI has failed to bring out the facts as to what were the other ingredients used to manufacture the finished goods if they had not purchased raw materials and as to how they achieved a value addition, resulting into final payment of Central Excise duty through PLA in addition to Cenvat. I observe that all these contentions are vague in nature, looking into the facts and evidence brought out by the investigating authority as mentioned at para 5 above. I find that in the instant case the DGCEI has conducted searches in



various locations and recorded statements of authorized persons such as M/s Yash and M/s Harshlaxmi and other manufacturers and on the basis of valid documents withdrawn from the premises of M/s Yash and also from M/s Harshlaxmi during the course of investigation, they worked out the amount of CENVAT credit wrongly taken by the appellant. Thus, from the evidence narrated by the investigating authority, it is clear that the entire avilment of credit is only on the strength of documents without actual receipt of the goods. Further, the investigation and documents revealed that M/s JHarshlaxmi do not have the facility to store such a hazardous & Inflammable liquid cargo at any place. Further, the invoices issued by them reveals that there is a difference, ranging from 0 to 555 days, between the date of invoices issued by M/s Harshlaxmi and from the date of invoice's issued by the manufacturers/1st stage dealer/importers which also an admitted facts M/s Harshlaxmi. This clearly shows that no goods have been transported by them to M/s Harshlaxmi at any stage. In the circumstances, I do not find any merit in the above mentioned contention of the appellant and also the case laws cited by them. Accordingly, I uphold the order of the adjudicating authority with regard to recovery of wrongly availed CENVAT credit with interest.

8. As regards imposition of penalty on M/s Yash, I observe that the adjudicating authority has imposed penalty of Rs.1,02,99,643/- i.e equal to the Cenvat credit fraudulently availed, each under Section 11AC of CEA and under Rule 26 of Central Excise Rule, 2002. I find that the entire activity as discussed above was vitiated by fraud coupled with misstatement and suppression of facts with intent to evade payment of duty by M/s Yash. The act being fraudulent, imposition of penalty also does not suffer from any illegality, particularly, in view of the systematic manner in which the fraud was committed. Therefore, looking into the apt of the case, I do not find any merit to interfere in the quantum of penalty imposed by the adjudicating authority under Rule 15(2) of CER read with Section 11 AC of CEA.

8.1 Further, I find that the adjudicating authority has imposed penalty equal to the amount of duty evaded, under Rule 26(1) of CER on M/s Yash for the same contravention. Since the adjudicating authority has already imposed penalty equal to the Cenvat credit fraudulently availed, under Rule 15 (2) of CER read with Section 11AC of CEA, imposition of penalty equal to the Cenvat credit involved under Rule 26(1) Central Excise Rules, 2002, in my opinion, is disproportionate and too harsh. Rule 26 (1) of CER stipulates that:

*"Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, **any excisable goods** which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater."*

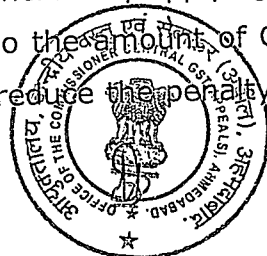


For invocation of above Rule, there has to be "any excisable goods". The primary allegation in impugned order and show cause notice is that no goods have been traded. It means there is no goods which has been dealt with. Therefore, otherwise also, Rule 26 ibid is not applicable in this case. This position has been maintained in Hon'ble Tribunal's decision in case of M/s Apple Sponge and Power Ltd [2018 (362) E.L.T. 894-Tri. Mumbai]. The relevant para is as under.

"On plain reading of Rule 26, it is observed that this penalty can be imposed in two situations. Under sub-rule (1), the penalty is imposable on the person who deals with the goods which is liable for confiscation. In the present case, it is the case of the department that the appellant has not received the input. Therefore, there is no question of dealing with the goods. Accordingly, penalty under sub-rule (1) of Rule 26 is not applicable. As regards sub-rule (2), the said sub-rule is applicable on the person who issues the invoice without supplying the inputs for fraudulent passing on the cenvat credit. Penalty under sub-rule (2) is imposable only on the person who issues the invoice. The appellant does not fall under the category of the person mentioned in sub-rule (2). The invoice was issued by M/s. Ambe Vaishno Steels Pvt. Ltd. Therefore, if at all penalty is imposable, it is on M/s. Ambe Vaishno Steels Pvt. Ltd. and not on the appellant. I also find that penalty under Rule 26 can be imposed only on the natural individual person and not on the artificial person or company because the goods is handled by natural living person and not by an artificial entity. Therefore, on both the counts, penalty under Rule 26 is not imposable."

In view of above discussion, I set aside the penalty imposed on M/s Yash under Rule 26(1) of CER.

9. Now, I take the issue relating to imposition of penalty on M/s Harshlaxmi. From the foregoing discussion, it is very clear that they were also actively involved in issuing invoice to M/s Yash without physically supplying the goods to them. The act being fraudulent so as to enable the manufacturers to avail the Cenvat credit wrongly, imposition of penalty also does not suffer from any illegality, particularly, in view of the systematic manner in which the fraud was committed. Further, in view of Hon'ble Tribunal's decision in case of M/s Apple Sponge and Power Ltd supra, penalty under Rule 26 (2) of CER is imposable on the person who is issues the invoice. Therefore, penalty is imposable on M/s Harshlaxmi under Rule 26(2) of Central Excise Rules, 2002. I observe that the adjudicating authority has imposed penalty of Rs.1,02,99,643/- on M/s Harshlaxmi i.e equal to the Cenvat credit wrongly availed by M/s Yash which is on very higher side. Being a supplier of goods, the penalty imposed on M/s Harshlaxmi appears to be very high and harsh. Further, I observe that in a similar and related issue, penalty under Rule 26(2) of CER was imposed on M/s Harlaxmi, vide OIA No.AHM-EXCUS-002-APP-75-18-19 dated 14.09.2018. In the said case, I observe that the jurisdictional adjudicating authority has imposed penalty of Rs.5,00,000/- in connection with issuance invoices to a manufacturer namely M/s Yahska Polymers who availed Cenvat credit amount to Rs.41 lakhs fraudulently. Vide the said impugned order, the penalty was reduced by me to Rs.3,00,000/-. Therefore, applying the same ratio and also looking into such circumstances and also the amount of Cenvat Credit fraudulently availed by M/s Yash, I am inclined to reduce the penalty on M/s Harshlaxmi to Rs. 7,50,000/- under Rule 26(2) of CER.



10. In view of above, I partially allow the appeal filed by M/s Yash and M/s Harshlaxmi. Both the appeals stand disposed of accordingly.

31/12/18

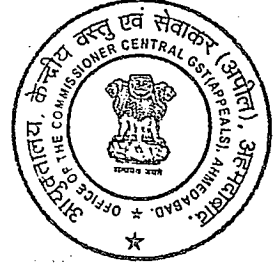
(उमा शंकर)

आयुक्त (अपील्स)

Date : 31.12.2018

Attested

(Mohanan V.V)
Superintendent (Appeals)
CGST, Ahmedabad



By R.P.A.D

To

M/s Yash Chemex Inc,
Plot No.457, Phase-II, GIDC, Vatva, Ahmedabad

M/s Harshlaxmi Chemisolv,
16, Prernatirth Bungalow-1, B/h Prernatirth Temple,
Satellite, Ahmedabad
(D 613, Shiromani Complex, Opp Ocean Park, Nehru Nagar, Sattelite, Ahmedabad)

Copy to:-

1. The Chief Commissioner, CGST, Ahmedabad Zone .
2. The Principal Commissioner, CGST, Ahmedabad South
3. The Joint Commissioner, CGST, Ahmedabad South.
4. The Dy/Asstt. Commissioner, CGST, Ddivn III/VII, Ahmedabad South
5. The Assistant Commissioner, System-Ahmedabad North.
6. Guard File.
7. P.A. File.