# केंद्रीय कर आयुक्त (अपील)

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

सत्यमेव जयते

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

7th Floor, GST Building,
Near Polytechnic,
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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)145/Ahd-South/2018-19
Stay Appl.No. /2018-19

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-0166-2018-19**
दिनाँक Date : **28-02-2019** जारी करने की तारीख Date of Issue 5/4/2019

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

ग Arising out of Order-in-Original No. **AC/12/DIV-II/2017-18** दिनाँक: **05.09.2018** issued by Assistant Commissioner, Div-II, Central Tax, Ahmedabad-South

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

**Jupiter Comtex**
**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 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।

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

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

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. 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 appeal has been filed by M/s. Jupiter Comtex Private Ltd., Unit-2, Plot No. 2017, Nr. Ratnadeep Industries, GIDC, Vatva, Ahmedabad - 382445 [for short –'appellant'] against OIO No. AC/12/Div-II/2018-19 dated 05.09.2018, passed by the Assistant Commissioner, CGST, Division II, Ahmedabad South Commissionerate [for short –'adjudicating authority'].

2. The facts to the present appeal are that during the course of audit of the records of the appellant for the period 2015-16, it was observed that the appellant had failed to assess the value of the goods cleared during an interdivision sale, in terms of Rule 8 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rule, 2000 [for short Valuation Rules, 2000] read with section 4 of the Central Excise Act, 1944. Further it was also observed that the appellant had availed inadmissible Cenvat credit of service tax charged by their job worker, as job work amounts to manufacture and is not a service in terms of section 66D(f) read with section 66B(40) of the Finance Act, 1994.

3. A show cause notice was issued to this effect to the appellant, which was adjudicated vide the aforementioned impugned OIO dated 05.09.2018, wherein the demands were confirmed for the contravention of the provisions of Rule 8 of the Valuation Rules, 2000 read with section 4 of the Central Excise Act, 1944 and rule 9(1)(f) of the Cenvat Credit Rules,2004 under the proviso to subsection (1) of section 11 of the Central Excise Act, 1944 by invoking extended period of limitation alongwith interest and penalty under Rule 8 of the Valuation Rules, 2000 and rule 9(1)(f) & Rule 15(2) of the Cenvat Credit Rules,2004 read with section 11 AC of the Central Excise Act,1944.

4. Feeling aggrieved, the appellant has filed this appeal raising the following grounds:

- The appellant paid the central excise duty difference payable as per the CAS-4 certificate on 27.02.2017 i.e prior to the query raised by the audit party on 14.03.2017;
- That the selectively applying the 110% of the cost price on invoices where the clearances were below such cost price is not legally sustainable;
- When the CAS-4 is undisputed, entire quantity and duty paid thereunder is essential to consider to ascertain differential excise duty payable;
- They would rely on the judgement in the case of M/s Essar Steel India Ltd. Vs Commissioner of C.Ex, Raipur[2016(09)LCX0115];
- The service in question was not liable to central excise duty at the end of job worker and therefore was not covered under the 'negative list' but was covered under a conditional exemption notification no. 25/2012-ST, issued under Section 93 of the Finance Act, 1994;
- There is no clause barring an assessee from paying tax on exempted services in the Finance Act, 1994;
- The appellant had paid the tax alongwith interest before the issuance of SCN, so no penalty should be imposed on them; and
- The appellant relied on the judgement in the case of Landis + Gyr Ltd[2017 (049) STR 0637].

5. The appellant vide their letter dated 15.01.2019 informed that they do not wish to appear in person and requested that the matter may be decided on merits.

6. I have gone through the facts of the case, the grounds of appeal and their submission dated 15.01.2019. There are basically two issues to be decided in the present appeal:

- Whether selectively applying the 110% of the value arrived at CAS-4 for calculating the differential duty on invoices where the values of clearances on goods are less than such cost price, is correct?
- The Cenvat credit taken on the service tax paid to the job-worker is admissible?

7. In connection to the first issue, the appellant had relied on the judgment of the CESTAT Principal Bench, Delhi in the case of M/s Essar Steel India Ltd. Vs Commissioner of C.Ex, Raipur [2017 (345) E.L.T. 139 (Tri. - Del.)]. The relevant portion of the judgment is reproduced below:

*"**10.** The next issue for decision is on the quantification of differential duty. Even though there is no provisional assessment in the present case, the duty determination on the inter-unit transfer is made on annual costing. As such when the Department arrived at cost on annual average basis the duty liability, excess or shortage has also to be determined on such basis. It is not tenable while for arriving at per unit duty liability the whole year data is considered for costing, for total duty liability only months when short payment was noticed were considered. In other words when CAS-4 based annual costing formed basis for arriving transaction value, the overall duty liability/short payment should be arrived at after considering duty already paid during that year on such goods. We find the reasoning given by the Original Authority against adjustment of already paid duty as untenable. Section 11B has no application in such situation, when the appellants duty liability is determined on annual CAS-4, the duty already paid during said period has to be adjusted. The question of unjust enrichment has no relevance here. There is no refund considered here. **The point that the duty paid in excess in certain months has been availed as credit by sister unit hence, cannot be adjusted towards short payment also not tenable. The demand arose based on annual costing. Such cost price in terms of Rule 8 will apply to all clearances made during the relevant year. Admittedly, duty already discharged has to be considered for arriving at overall short payment. Selectively applying the said cost price only for months when the clearances were below such cost price is not legally sustainable.***

*11. Further, the finding of the Lower Authority against adjustment of Rs. 16,07,19,858/-, towards differential duty is not clear. Admittedly, the said amount is paid due to upward revision of costs. The months covered are also the months for which short payment of duty was confirmed. Hence, it is not clear why such payment could not be adjusted against total duty liability.*

*12. We find the Original Authority has not fully examined the issue of time-bar raised by the appellant. Intimations of price revision followed by CAS-4 Certificates have been given to the Department. Monthly statutory returns with duty payment details have been filed. The existence of more than one cost certificates during different months in one financial year is apparently in the knowledge of the Department. Hence, the question of time-bar requires closer scrutiny. Since we intend to remand the case to the Original Authority on the quantification of duty demand as discussed above, this aspect also has to considered by the Original Authority for a clear finding."* [emphasis supplied]

8. It is a fact that the appellant had cleared goods on inter-division sale and the sole basis of its payment of differential duty, was annual CAS-4. The CAS-4 for the year 2015-16 was received by the appellant on 09.02.2017. The appellant had paid an amount of Rs. 17,23,374/- as differential duty for the year 2015-16, alongwith interest on said amount, on 27.02.2017, whereas the show cause notice was issued on 30.06.2017. The adjudicating authority had given a duty calculation sheet to the appellant regarding the demand of duty of Rs. 28,93,351/- in which only those invoices were included where the clearance of goods were made below the 110% of the cost as per CAS-4. I find that the dispute is only regarding the

quantification of the differential duty amount. In terms of the judgement supra, it is very clear that the while calculating the differential duty, duty already discharged during the year has to be taken in account. I find the appellant has erred in understanding the crux of the judgement. The department in its duty calculation sheet in connection to the show cause notice has demanded only the differential duty after offsetting the duty already paid by the appellants during those particular transactions where the invoice value of transactions is less than the value calculated as per valuation rules. The appellant has failed to acknowledge the fact that the when the transaction value is more than the value calculated as per valuation rules, the appellant has to pay the duty on the transaction value. I find that the department has rightly demanded the duty in the impugned order and as the appellant failed to pay the complete duty before issuance of show cause notice, I uphold the imposition of applicable interest and penalty.

9. So far as the second question is concerned, I find that the appellant had taken the cenvat credit on the service tax paid on the services of the job worker which is inadmissible as the process of job work which amounts to manufacture is not a service in terms of section 6D (f) read with section 65B (40) of the Finance Act, 1994. The appellant's stance that nothing in the Finance Act, 1994 prevents them to pay service tax on exempted service is not legally tenable as the process of job work is not a service. Further regarding the imposition of the penalty in the impugned order, I find that the issue of inadmissibility of the service tax paid to the job worker service was brought to the notice of the appellant from the audit party in its unit 2. In view of the foregoing it seems the appellant is deliberately availing the cenvat credit on the inadmissible service tax paid to the job worker.

10. I find that the appellant's reliance on the judegement in the case of Landis + Gyr Ltd[2017 (049) STR 0637] is not correct as they have continued the incorrect practice of availing the cenvat credit over the service tax paid to the job worker. In view of this, I uphold the impugned order.

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

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

(उमा शंकर)
प्रधान आयुक्त (अपील्स)

Date : 26.02.2019

Attested

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

केन्द्रीय वस्तु एवं सेवाकर (अपील), अहमदाबाद
CENTRAL GST (APPEALS), AHMEDABAD

By RPAD.

To,

M/s. Jupiter Comtex Private Ltd.,
Unit-2, Plot No. 2017,
Nr. Ratnadeep Industries, GIDC,
Vatva, Ahmedabad - 382445

Copy to:-

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