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,
Ambavadi, Ahmedabad-380015

☎: 079-26305065

टेलेफैक्स : 079 - 26305136

रजिस्टर्ड डाक ए.डी. द्वारा

S417to5421

क फाइल संख्या : File No : V2(32)18/Ahd-South/2018-19
Stay Appl.No. /2017-18

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP-030-2018-19**
दिनाँक Date : **30-07-2018** जारी करने की तारीख Date of Issue 8/8/2018

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

ग Arising out of Order-in-Original No. **AC/06/DIV-II/2017-18** दिनाँक: **28.03.2018** issued by Assistant Commissioner, Div-II, Central Tax, Ahmedabad-South

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

Bodal Chemicals Ltd. U-II
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।

(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 भुंगतान 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

M/s. Bodal Chemical Ltd (Unit II) Plot No.123 & 124, Phase-1, GIDC, Vatva, Ahmedabad, Gujarat, (for short - '*appellant*") has filed this appeal against Order-in-Original No.AC/06/Div-II/2017-18 dated 28.03.2018 (for short –*impugned order*), passed by the Assistant Commissioner, Central GST, Division-II, Ahmedabad–South (for short - '*adjudicating authority*").

2. Briefly, the facts are that based on Revenue Para of CERA Audit for the period from 2010-11 to 2013-14, a show cause notice dated 01.07.2015 was issued to the appellant, alleging that they had availed CENVAT credit in respect of common taxable services but had failed to maintain separate accounts as stipulated in Rule 6 of the CENAT Credit Rules, 2004. The notice further alleged that the appellant was engaged in trading activity in addition to manufacturing goods falling under chapter 29 of Central Excise Tariff Act, 1985. The jurisdictional Assistant Commissioner, vide order-in-original No.AC/15/Div.II/2015-16 dated 29.02.2016 decided the aforementioned show cause notice, wherein he confirmed the demand of Rs. 1,61,730/- along with interest and also imposed penalty under Rule 15(2) read with Section 11AC (1)(e) of the Central Excise Act, 1944. Vide Order-in-Appeal No.AHM-EXCUS-001-APP-064-2016-17 dated 27.02.2017, the Commissioner (Appeals) held that the CENVAT credit demanded cannot be more than the CENVAT credit availed and accordingly, he remanded the matter to the adjudicating authority for determining the CENVAT credit availed by the appellant on such exempted service. However, the adjudicating authority has again determined the duty of 6% of trading activity (exempted service) and confirmed the duty accordingly and also imposed penalty under Rule 15(2) read with Section 11AC of Central Excise Act, 1944.

3. Being aggrieved, the appellant has filed the instant appeal on the grounds that:

- The proceedings came up before the adjudicating authority as per directions of the Commissioner (Appeals) order dated 27.02.2017; that the Commissioner (Appeals) has remanded the matter to the adjudicating authority to determine the CENVAT credit availed on such exempted service and held that the CENVAT credit demanded cannot be more than the CENVAT credit availed. The adjudicating authority has not followed the said direction and failed to determine the amount of CENVAT credit on such exempted service.
- The adjudicating authority has failed to consider the submissions made by the appellant and thus the impugned order is in violation of principles of natural justice; that the adjudicating authority having failed to under taken any verification the facts that whether the appellant had taken any input

service credit of the services utilized in trading activity or both, the demand confirmed is merely on the basis of presumption.

- No penalty is imposable.

4. Personal hearing in the matter was held on 27.06.2018. Shri N.K.Tiwari, Consultant appeared for the same and reiterated the grounds of appeal. He further pointed out that the directions of Commissioner (Appeals) order dated 27.02.2017 was not carried out by the adjudicating authority.

5. I have carefully gone through the facts of the case, the appellant's grounds of appeal and submissions made during the course of personal hearing. The issue to be decided is whether the demand confirmed in terms of Rule 6 of CENVAT Credit Rules, 2004 [for short-CCR] along with interest and penalty, is correct or otherwise.

6. I find that the issue involved in the matter has already been decided by the Appellate Authority, vide his OIA No. AHM-EXCUS-001-APP-064-2016-17 dated 27.02.2017, wherein the matter was remanded to the adjudicating authority for re-determination of CENVAT credit availed by the appellant. In the said OIA, it has been held that the demand of amount under Rule 6 is more than the CENVAT credit availed and such demand would clearly be against the spirit of reversal of CENVAT credit. Further, in the said OIA, a specific direction was given to the adjudicating authority to determine the CENVAT credit. The disputed issue in the matter has extensively discussed in para 8 to14 of above referred OIA dated 27.02.2017 which is as under:

> *"9. The undisputed fact is that the appellant was engaged in trading activity also. There is also no dispute as far as the allegation of non maintenance of separate accounts, is concerned. It was imperative on the appellant, to either, not take CENVAT credit in respect of input service used in trading activity or maintain separate accounts as per Rule 6(2), ibid. However, as is already mentioned, the appellant took CENVAT credit in respect of input service used in trading activity and also failed to maintain separate accounts.*
>
> *10. The appellant argued that the traded goods were never brought to their premises but supplied mainly for exports from the place of manufacture without bringing the same to its premises; that no input service on such traded goods was used and therefore, it was incorrect to suggest that common input service credit was taken by them. This argument is not tenable and acceptable, looking into the facts and circumstances of the case. It is fact that the appellant had availed Cenvat credit of common input services viz. banking services, advertisement services, security service, Chartered Accountant service etc in connection with goods traded (supplied for exports) as well as in connection with manufacturing activities in their premises and as held by the adjudicating authority it cannot be delineated transaction wise in such situation. In the circumstances, since the appellant has carried out trading activity and falling within the meaning of 'exempted service' as defined under Rule 2(e) of CCR-04, it was imperative on the appellant, to either, not take CENVAT credit in respect of input service used in trading activity or maintain separate accounts as per Rule 6(2), ibid. However, as is already mentioned, the appellant took CENVAT credit in respect of input service used in trading activity and also failed to maintain separate accounts. Therefore, the provisions of Rule 6 (3) of CCR clearly attracts in appellant's case.*

11. Further, I observe that the JS (TRU), CBEC, New Delhi has issued a letter no. 334/8/2016-TRU dated 29.2.2016 on the basis of amendment in Rule 6 ibid. The relevant extract of which are reproduced below:

(h) Rule 6 of Cenvat Credit Rules, which provides for reversal of credit in respect of inputs and input services used in manufacture of exempted goods or for provision of exempted services, is being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit.

(i) sub rule (1) of rule 6 is being amended to first state the existing principle that CENVAT credit shall not be allowed on such quantity of input and input services as is used in or in relation to manufacture of exempted goods and exempted service. The rule then directs that the procedure for calculation of credit not allowed is provided in sub-rules (2) and (3), for two different situations.

(ii) sub-rule (2) of rule 6 is being amended to provide that a manufacturer who exclusively manufactures exempted goods for their clearance up to the place of removal or a service provider who exclusively provides exempted services shall pay (i.e. reverse) the entire credit and effectively not be eligible for credit of any inputs and input services used.

(iii) sub-rule (3) of rule 6 is being amended to provide that when a manufacturer manufactures two classes of goods for clearance upto the place of removal, namely, exempted goods and final products excluding exempted goods or when a provider of output services provides two classes of services, namely exempted services and output services excluding exempted services, Page 33 of 38 then the manufacturer or the provider of the output service shall exercise one of the two options, namely, (a) pay an amount equal to six per cent of value of the exempted goods and seven per cent of value of the exempted services, subject to a maximum of the total credit taken or (b) pay an amount as determined under sub-rule (3A).

(iv) The maximum limit prescribed in the first option would ensure that the amount to be paid does not exceed the total credit taken. The purpose of the rule is to deny credit of such part of the total credit taken, as is attributable to the exempted goods or exempted services and under no circumstances this part can be greater than the whole credit.

I understand that the amendment to CENVAT Credit Rules, is not retrospective. However, this amendment reflects the interpretation and intent of the Government. In-fact Joint Secretary himself states that the rules are being redrafted with the objective of simplifying and rationalizing the same without altering the established principles of reversal of such credit. Even otherwise to demand an amount under Rule 6 which is more than the CENVAT credit availed would clearly be against the spirit of reversal.

12. In view of above, the Cenvat credit demanded is not more than the credit availed. In the instant case, I observe that the demand of Rs.1,61,730/-was raised on the basis of percentage of trading value. Therefore, the Cenvat credit availed on such exempted service is required to be determined. In the circumstances, I feel that this issue is required to be considered by the adjudicating authority afresh for determining the Cenvat credit availed by the appellant on such exempted service, as such, I remand back the issue to the adjudicating authority for considering the matter in view of above discussion.

13. The appellant's other contention is that the notice is barred by limitation. The adjudicating authority's justification for invoking extended period is that the appellant has contravened the provisions of Rule 6 and 2(l) of the CCR and has also suppressed facts with the intent to evade payment of duty. Looking into the facts of the case, I do not find any merit to interfere the argument of the adjudicating authority for invoking extended period, as the appellant had well aware of the legal provisions available and not followed.

14. I find that the adjudicating authority has imposed penalty under Section 11 AC of the Central Excise Act, 1944. The penalty imposed under the said Section is required to be modified as the demand of amount liable to pay under Rule 6(3) of CCR is modified, as discussed at para 12."

7. Despite following the decision *supra*, I find that the adjudicating authority has again confirmed the demand of Rs.1,61,730/- with interest and imposed penalty, by repeating earlirder dated 29.02.2016. The defiance of the direction of Commissioner (Appeals) order is either deliberate or the original authority lacks the understanding of a clear direction. Either way both are deplorable. In this regard, I rely decision of Hon"ble High Court of Gujarat's decision in case of M/s Lubi Industries- 2016 (337) E.L.T. 179 (Guj.) which reads as under:

"6. *In our opinion, the Assistant Commissioner committed a serious error in ignoring the binding judgment of superior Court that too in case of the same assessee. The principle of precedence and judicial comity are well established in our legal system, which would bind an authority or the Court by the decisions of the Coordinate Benches or of superior Courts. Time and again, this Court has held that the departmental authorities would be bound by the judicial pronouncements of the statutory Tribunals. Even if the decision of the Tribunal in the present case was not carried further in appeal on account of low tax effect, it was not open for the adjudicating authority to ignore the ratio of such decision. It only means that the Department does not consciously agree to the view point expressed by the Tribunal and in a given case, may even carry the matter further. However, as long as a judgment of the Tribunal stands, it would bind every Bench of the Tribunal of equal strength and the departmental authorities taking up such an issue. An order that the adjudicating authority may pass is made appealable, even at the hands of the Department, if the order happens to aggrieve the Department. This is clearly provided under Section 35 read with Section 35E of the Central Excise Act. Therefore, even after the adjudicating authority passes an order in favour of the assessee on the basis of the judgment of the Tribunal, it is always open to the Department to file appeal against such judgment of the adjudicating authority."*

8. In the circumstances, I again remand the case to the adjudicating authority for deciding the case afresh in view of Appellate Authority's earlier decision dated 27.02.2017 *supra* with direction to decide the matter within 15 days of receipt of this order. Accordingly, I set aside the impugned order.

8. The appeal filed by the appellant stand disposed of in above terms.

(उमा शंकर)
आयुक्त (अपील्स)
Date : /07/2018

Attested

(Mohanan V.V)
Superintendent (Appeals)
Central GST, Ahmedabad

By R.P.A.D

To

M/s. Bodal Chemical Ltd (Unit II)
Plot No.123 & 124, Phase-1,
GIDC, Vatva, Ahmedabad,
Gujarat

Copy to:-

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