

	केन्द्रीय कर आयुक्त (अपील)	
सत्यमेव जयते	O/O THE COMMISSIONER (APPEALS), CENTRAL TAX, केन्द्रीय कर भवन, सातवीं मंजिल, पॉलिटेक्निक के पास, आम्बावाडी, अहमदाबाद-380015	7 th Floor, GST Building, Near Polytechnic, Ambavadi, Ahmedabad-380015
☎ 079-26305065		☎ 079-26305136

रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(84)59/Ahd-South/2018-19
Stay Appl.No. /2018-19

6517+06521

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-063-2018-19
दिनांक Date : 14-09-2018 जारी करने की तारीख Date of Issue

22/10/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 02/Refund/Div-I/17-18 दिनांक: 28.02.2018 issued by
Assistant Commissioner, Div-I, Central Tax, Ahmedabad-South

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent
**Cony Engineering
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.

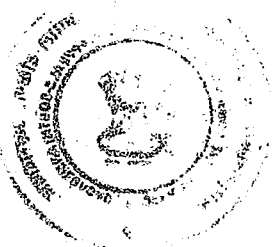
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(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, अपील के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल 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।

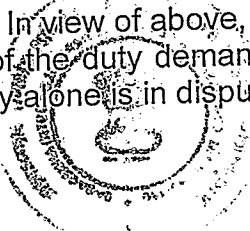
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 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।

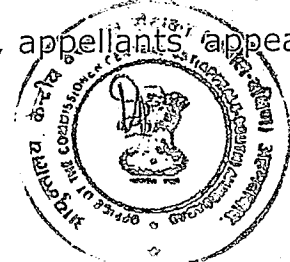
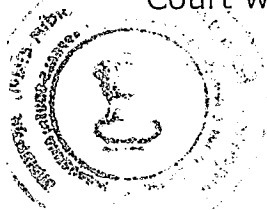
In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty where penalty alone is in dispute."



ORDER-IN-APPEAL

M/s. Cony Engineering, 52/5/2, Margo Industrial Estate, Near Chakudia Mahadev, Rakhial, Ahmedabad (herein after referred to as the appellants) have filed this appeal against OIO No. 02/Ref/Div-I/17-18 dated 16.12.2016, passed by the Assistant Commissioner, Central GST, Ahmedabad (South)(for short - 'adjudicating authority').

2. Based on a intelligence, a show cause notice was issued to the appellants, proposing *inter alia* confiscation of the goods, recovery of central excise duty short paid along with interest by wrongly availing the SSI notification. The notice further proposed penalty on the appellants. This show cause notice was adjudicated vide OIO No. 3/JC/2005 dated 28.9.2005, wherein the then adjudicating authority ordered confiscation of the goods, confirmed duty along with interest and further imposed penalty on the appellants. The appellants paid the amount of Rs. 1,48,510/- vide challan No. 1/2005-06 dtd. 28.10.2005 for Rs. 86,010/- and vide challan No. 2/2005-06 dtd. 28.10.2005 for Rs. 62,500/-. Both the department and the appellants preferred an appeal against the said OIO dated 28.9.2005. The Commissioner(A) vide his OIA No. 108-109/2006 dtd. 26.6.2006, upheld the demand and redemption fine setting aside the rest of the OIO. The appellants accordingly filed a refund claim amounting to Rs. 1,48,510/- on 11.09.2005 which was paid to them vide MO No. 06/2007/AC/Ref dtd. 08.02.2007. The department's appeal was set aside vide OIA No. 236/2006 dtd 28.9.2006. Department thereafter filed an appeal against both the above mentioned OIAs. The appellants also preferred an appeal against OIA No. 108-109/2006 dtd 26.6.2006. The departmental appeal against both the OIAs dated 26.6.2006 and 28.9.2006, was decided by the Hon'ble Tribunal vide its order no. A/3152-3154/WZB/AHD/2007 dated 11.12.2007, which restored the recovery of interest ordered by the adjudicating authority and further imposed penalty on appellants but reduced it to Rs. 1,29,962/-. Department, thereafter approached the High Court who vide its order dated 23.6.2009 in TA No. 1938 of 2008, remanded back the matter to the Hon'ble Tribunal. Tribunal, thereafter vide its order No. A/1556-1576/2009 dtd 15,16,17th July, 2009, imposed penalty equivalent to duty confirmed but gave an option to the appellant to deposit the entire dues within thirty days in which case the penalty would stand restricted to 25% of the duty amount. Department feeling aggrieved, approached the High Court who vide its order dated 17.2.2010 in TA No. 2592 of 2009, dismissed the departmental appeal. Department's appeal against the said order before the Hon'ble Apex Court was dismissed by the Apex Court. In the meantime, appellants appeal



before the Hon'ble Tribunal against OIA No. 108-109/2006 dtd 26.6.2006, was decided, wherein vide order no. A/1179/2011 dtd 17.6.2011, the matter came to be remanded back to the adjudicating authority. On deciding the case as per remand order of the Tribunal, the adjudicating authority, vide the OIO No. 70/CX-I Ahmd/JC/KP/2016 dated 16.12.2016, confirmed the demand along with interest and imposed penalty of Rs. 1,29,962/- on the appellants. Now since the demand and penalty were confirmed vide the OIO No. 70/CX-I Ahmd/JC/KP/2016 dated 16.12.2016, the refund already given to the appellants vide MO No. 06/2007/AC/Ref dtd. 08.02.2007 became recoverable and vide the impugned order, the demand of the refund has been confirmed.

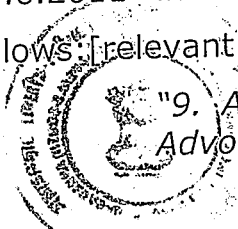
3. Feeling aggrieved, the appellants have filed this appeal raising the following averments:

- (a) that the adjudicating authority has erred by confirming the demand without verifying the payment particulars and facts and circumstances of the case;
- (b) that the OIO is contrary to the directions in remand ordered by the Tribunal, High court and the Supreme Court;
- (c) that the adjudicating authority has erred by not considering the fact on records that the appellants have paid the interest amount of Rs. 86,010/- and again demanded in the impugned order;
- (d) that the OIO No. 70/CX-I Ahmd/JC/KP/2016 dated 16.12.2016 was challenged before the Commissioner (Appeal) who, vide OIA No. AHM-EXCUS-001/APP-073 TO 074-2017-18 dtd. 28.09.2017 remanded the matter back to the adjudicating authority for fresh consideration of the availability of SSI exemption benefit on the branded goods as per board's Circular No. 71/71/94-CX dtd. 27.10.1994 and 509/05/2000-CX dtd. 18.01.2000;
- (e) that the impugned OIO has been passed in violation of principles of natural justice as they have not received any letters for personal hearing even when they had given intimation of change of address.

4. Personal hearing in the appeal was held on 28.8.2018 wherein Shri N.R.Parmar, Consultant, appeared for the appellants and reiterated the grounds of appeal. He requested that the case be remanded and decided along with the main issue pending with the adjudicating authority.

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

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



9. After carefully considering the submissions made by Id. Advocate, we find favour with the same. The entire purpose

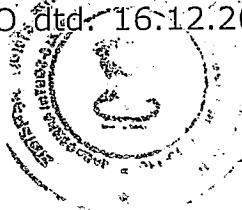


of adjudication is to decide the disputed issue in accordance with the law. It will not be out of place to observe that it is equally the responsibility of the adjudicating/appellate authority to arrive at correct decision by taking into account various precedent decisions of the Tribunal. An assessee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

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

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

7. The adjudicating authority, consequently vide the OIO No. 70/CX-I Ahmd/JC/KP/2016 dated 16.12.2016, confirmed the demand along with interest and imposed penalty on the appellants. This OIO was challenged before the Commissioner (Appeal) who, vide OIA No. AHM-EXCUS-001/APP-073 TO 074-2017-18 dtd. 28.09.2017 remanded the matter back to the adjudicating authority for fresh consideration of the availability of SSI exemption benefit on the branded goods as per board's Circular No. 71/71/94-CX dtd. 27.10.1994 and 509/05/2000-CX dtd. 18.01.2000. Since the OIO dtd. 16.12.2016 based on which this demand has been confirmed



vide the impugned order stands set aside and is non-existent then the confirmation of demand by the adjudicating authority is incomprehensible and cannot be upheld. In view of this fact, the impugned order is premature and the appeal is allowed by way of remand. The issue involved in the present appeal is to be decided as per the consequences of the adjudication as per directions given by the undersigned authority contained in OIA No. AHM-EXCUS-001/APP-073 TO 074-2017-18 dtd. 28.09.2017.

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

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

उमा शंकर

(उमा शंकर)
केन्द्रीय कर आयुक्त (अपील्स)
अहमदाबाद

दिनांक: 14.09.2018

सत्यापित

धर्मद्र उपाध्याय

(धर्मद्र उपाध्याय)
अधीक्षक (अपील्स),
केन्द्रीय कर, अहमदाबाद

By RPAD.

To,
M/s. Cony Engineering,
C/O Umeshbhai Parshottamdas Patel,
M-504,
Sukan Residency,
New S.G.Road,
Near Vandematram,
Gota,
Ahmedabad - 382481

Copy to:-

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



