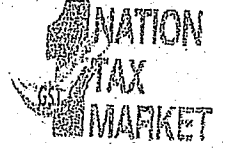




सत्यमेव जयते

आयुक्त का कार्यालय),अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-
Ahmedabad



जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद 380015.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad-380015
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DIN-20201064SW00008YC215

स्पीड पोस्ट

- क फाइल संख्या : File No : V2(32)31/EA2/AHD-South/Appeals/2019-20/1616A to 16120
- ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-51 /20-21
दिनांक Date : 23.10.2020 जारी करने की तारीख Date of Issue 28/10/2020
आयुक्त (अपील) द्वारा पारित
Passed by Shri Akhilesh Kumar, Commissioner (Appeals)
- ग Arising out of Order-in-Original No. 04/DC/Div-1/NT/2019-20 दिनांक: 27.09.2019, issued by
Assistant/Deputy Commissioner, Central GST & Central Excise, Division-I, Ahmedabad-South
- ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Rashmi Enterprise
Plot No. 135, 01st Floor,
Opp. Ramdev Estate, NI Municipal Water Tank,,
Nagarwel Hanuman Road, Sukramnagar,
Rakhial, 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 मजिल, 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.



(क) 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।

(A) 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.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) 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।

(c) 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 दिनोंक 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, अपीलों के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन, असरवा, गिरधरनागर, अहमदाबाद -380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor, Bahumali Bhawan, Asarwa, Girdhar Nagar, Ahmedabad : 380004. 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 और 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



ORDER-IN-APPEAL

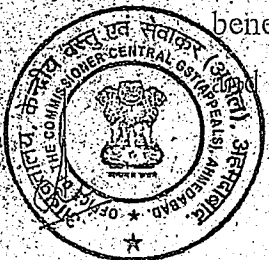
The Department, through the Deputy Commissioner, CGST, Division-I, Ahmedabad South, has filed this appeal, as per Review Order No. 27/2019-20 dated 02.01.2020 passed against Order-in-Original No.04/DC/Div-1/NT/2019-20 dated 27.09.2019 [hereinafter referred to as "impugned order"] passed by the Deputy Commissioner of CGST, Division-I, Ahmedabad South [hereinafter referred to as "adjudicating authority"] in the case of M/s Rashmi Enterprise, Plot No.135, 1st Floor, Opposite Ramdev Estate, Near Municipal Water Tank, Nagarwel Hanuman Road, Sukramnagar, Rakhial, Ahmedbad [hereinafter referred to as "Respondent"].

2. Briefly stated, the facts of the case are that during scrutiny of ER-3/ER-1 returns of the Respondent by the appellant department, it was observed that the Respondent is engaged in the manufacture of "Ice Cream Cone" and "Cone with Sleeve (Aluminum Foil)" and classified them under Chapter Heading 19053290 of the Central Excise Tariff Act, 1985 and availed the exemption under Notification No.12/2012-CE (Sr.No.28) dated 17.03.2012 as amended. It was also observed that they were paying Central Excise duty @6% for the said products by availing exemption under Notification supra for the period from April 2016 to June 2017. They also manufactured Sleeve (Aluminum Foil) which classified under S.H.No.760413039 of CETA and paid duty @12.5% at Tariff Rate. As it was observed that the Notification supra has prescribed duty @6% for "wafer biscuits" and the product manufactured and cleared by the Respondent is not "wafer biscuit" but in fact "Ice-cream Cone", it was alleged that they are not eligible for exemption under the said notifications *supra* and were liable to pay Central Excise duty @12.5% ad-valorem. Accordingly, a show cause notice dated 26.02.2018 was issued to the Respondent for recovery of Central Excise duty amounting to Rs.33,12,586/- being the differential duty on cones cleared along with interest for the relevant period. The said notice also proposed imposition of penalty under Section 11AC of Central Excise Act, 1944 (CEA) on the Respondent. The adjudicating authority, vide impugned order has confirmed the entire allegations by way of confirming the duty demanded along with interest and imposed penalty of Rs.16,56,586/-(50% of the tax/duty) under the provisions of Section 11AC (1c) of the CEA.

3. Being aggrieved with the impugned order, the Department has filed the instant appeal on the grounds that:



- The respondent has suppressed the facts and wrongly availed the benefit of exemption Notification No. 12/2012-CE dated 17.03.2012 not applicable to them and on the basis of this, adjudicating authority confirmed the demand along with interest. However, while imposing penalty under Section 11AC (1) (C) of the Central Excise Act,1944, imposed 50% penalty instead of 100% of the duty amount confirmed under Section 11AC(1) (C) of the Central Excise Act,1944 and hence the adjudicating authority has erred in applying the said provisions.
4. Opportunity for personal hearing granted on 22.09.2020. Nobody appeared for personal hearing. Respondent vide their letter dated 13.10.2020 informed that they have also filed an appeal against the impugned Order-In-Original No. 04/DC/Div-I/NT/2019-20 dated 27.09.2019 which was already decided by the Commissioner (Appeals), Ahmedabad vide Order-In-Appeal No. AHM/EXCUSE/001/ APP/06/2020-21 dated 04.06.2020 wherein their appeal has been allowed and hence, in this proceeding they are not required to say anything more.
5. I have carefully gone through the facts of the case and submissions made by the Department in Appeal Memorandum and submission made by the Respondent vide their letter dated 13.10.2020. The limited point to be decided in the instant case is whether the respondent are liable for 50% penalty, as imposed in impugned order, or 100% penalty as contended by the department under Section 11AC (1) (C) of the Central Excise Act,1944.
6. I find that present appeal filed by the department is against the OIO No. 04/DC/Div-I/NT/2019-20 dated 27.09.2019 wherein it was held that the goods manufactured by the appellant is only ice-cream cone and not wafer biscuit and accordingly denied the benefit of Notification No.12/2012-CE dated 17.03.2012 (Sr.No.28) and confirmed the demand and imposed penalty of 50% of duty confirmed under Section 11AC (1)(C) of the Central Excise Act,1944. However, the respondent filed an appeal against the said order claiming the benefit of exemption under Notification No.12/2012-CE dated 17.03.2012 (Sr.No.28) classified their product Ice cream cone as waffles and wafer. The said appeal has been decided vide AHM/EXCUSE/001/ APP/06/2020-21 dated 04.06.2020 in the case of respondent in their own case wherein Ice cream cone is classified as waffles and wafer, eligible for benefit of exemption under Notification No.12/2012-CE dated 17.03.2012 (Sr.No.28) and allowed the appeal filed by appellant.



7. In view of above discussion, I find that the main issue of classification of product Ice cream cone under waffles and wafer was already decided by this authority and appeal was allowed in favour of the respondent. Once the demand has been set aside, the question of penalty does not arise. Hence, I do not find any merit in the appeal filed by the department.

8. In view of above discussion, I reject the appeal filed by the department. The appeal stands disposed of in above terms.

Akhilesh Kumar
23rd October, 2020
(Akhilesh Kumar)
Commissioner (Appeals)
/2020



Attested

(Signature)
(Atul B. Amin)
Superintendent (Appeals)
CGST, Ahmedabad

By R.P.A.D

To

M/s Rashmi Enterprise,
Plot No.135, 1st Floor,
Opp Ramdev Estate, NI Municipal Water Tank,
Nagarwel Hanuman Road, Sukramnagar,
Rakbhal, Ahmedabad

The Deputy Commissioner of CGST,
Division-I, Ahmedabad South

Copy to:

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