आयुक्त (अपील) का कार्यालय,

Office of the Commissioner (Appeal),

केंद्रीय जीएसटी, अपील आयुक्तालय, अहमदाबाद

Central GST, Appeal Commissionerate, Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

. 07926305065- टेलेफैक्स07926305136

सत्यमेव जयते

NATION TAX MARKET

रजिस्टर्ड डाक ए.डी. द्वारा **DIN: 20210264SW00007707DE**

क फाइल संख्या : File No : V2(84)/1/Ahd-South/2020-21

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-001-APP- 76/2020-21**

दिनाँक Date : **23-02-2021** जारी करने की तारीख Date of Issue 26/02/2021

श्री अखिलेश कुमार आयुक्त (अपील) द्वारा पारित

Passed by Shri. Akhilesh Kumar, Commissioner (Appeals)

ग Arising out of Order-in-Original No **AC/11/Div-II/2019-20 dated 18.02.2020** issued by Deputy Commissioner, Div-II, Central Tax, Ahmedabad-South.

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

M/s Cadmach Machinery Co.Pvt.Ltd, Plot No. 3604/3605, Phase-IV, GIDC Vatva, 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 issued under the Central Excise Act 1944,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) **केंद्रीय जीएसटी** अधिनियम, 2017 की धारा 112 के अंतर्गतः–

Under Section 112 of CGST act 2017 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 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. 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.

(28) 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 I(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

(29)

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 ज़मा 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:

(xxxvii) amount determined under Section 11 D;
(xxxviii) amount of erroneous Cenvat Credit taken;
(xxxix) 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।

6(I) 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."

II. **Any person aggrieved by an Order-In-Appeal issued under** the Central Goods and Services Tax Act,2017/Integrated Goods and Services Tax Act,2017/ Goods and Services Tax(Compensation to states) Act,2017,may file an appeal before the appellate tribunal whenever it is constituted within three months from the president or the state president enter office.

ORDER-IN-APPEAL

1. This order arises out of an appeal filed by M/s. Cadmach Machinery Co. Pvt. Ltd., Plot No. 3604/3605, Phase-IV, GIDC Vatva, Ahmedabad (hereinafter referred to as '*appellant*') against Order in Original No. AC/11/DIV-II/2019-20 dated 18.02.2020 (hereinafter referred to as '*the impugned order*') passed by the Deputy Commissioner, CGST & Central Excise, Division-II, Ahmedabad-South (hereinafter referred to as '*the adjudicating authority*').

2. Facts of the case, in brief, are that the appellant is engaged in manufacturing of goods falling under Chapter 84 of the First Schedule to the Central Excise Tariff Act, 1985 and holding Central Excise Registration No. AAACC6242RXM001, which is now migrated to GST under GSTIN 24AAACC6242R1ZF.

2.1 Audit of the records of the appellant was carried out by the auditors from the office of the Principal Director of Audit (Central), Indian Audit & Accounts Department, Ahmedabad for the period from 2009-10 to 2013-14. During the said audit it was pointed out that the appellant had sold and cleared their manufactured goods to some of their buyers against invalidation of Advance Licence/EPCG Licence passing on certain discounts on such transactions. As per the objection raised vide Inspection Report issued from F.No. CERA(Hq.)/Insp.Report/105/14, such discounts would be an additional consideration on which duty is payable considering the same as part of transaction value. On the basis of the said audit objection and scrutiny of the relevant documents of the appellant, the jurisdictional central excise authorities have worked out that the appellant have passed on total discount of Rs. 1,19,54,337/- to their buyers against invalidation of licence which has resulted into short payment of Central Excise duty amount of Rs. 14,57,052/-. Accordingly, a show cause notice was issued to the appellant by the Joint Commissioner, Central Excise, Ahmedabad-I vide F.No. V.84/15-125/CADMACH/ADC/OA-I/2015 dated 25.04.2016 for demand and recovery of the Central Excise duty amount of Rs. 14,57,052/- under Section 11A (4) of the Central Excise Act, 1944 alongwith interest leviable thereon under Section 11AA of the said act and penalty as well as confiscation was also proposed under Rule 25 of Central Excise Rules, 2002 read with Section 11AC(1)(c) of the Central Excise Act, 1944.

2.2 The show cause notice dated 25.04.2016 has been adjudicated by the adjudicating authority vide the impugned order. The relevant portion of the impugned order is briefly reproduced below:

(i) *Demand of Central Excise duty amounting to Rs. 14,57,052/- is confirmed under the provisions of Section 11A (4) of the Central Excise Act, 1944;*

(ii) *Order recovery of interest at the applicable rate under Section 11AA of the Central Excise Act, 1944;*

(iii) *Penalty of Rs. 14,57,052/- imposed on the appellant under Rule 25 of the Central Excise Rules, 2002 readwith Section 11AC(1)(c) of the Central Excise Act, 1944.*

(iv) *The goods cleared by the appellant is held as liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002, however, an option given to pay fine of Rs. 14,57,052/- in lieu of confiscation in terms of Section 34 of the Central Excise Act, 1944.*

3. Being aggrieved with the impugned order, the appellant preferred this appeal on the grounds reproduced below:

(i) *In the reply dated 13.02.2017 to Show Cause Notice, it has been categorically reiterated that they have not taken any benefit of "Deemed Export" and not availed any benefit of Foreign Trade Policy, from the DGFT, against impugned supply.*

(ii) *The transactions between the appellant and the buyers are at arm's length and all the terms and conditions of sale, are notified to buyers, at the time of supply itself. Therefore, there is no additional consideration, flowing from buyers to the appellants. The licences surrendered by the buyer of goods, cannot be called additional consideration, flowing from buyer to seller.*

(iii) *The appellant have not taken any benefit, out of the invalidation of EPCG licence. However, it is submitted that the benefit, received from DGFT, if any, cannot be considered as an additional consideration, for sale of goods. The benefits, given by DGFT, are in terms of Foreign Trade Policy and nothing to do with sale of goods. They rely on the judgement of Hon'ble Tribunal in the case of Sterlite Industries (I) Ltd. Versus CCE, Vapi [2005 (189) ELT 329 (Tri.Mum).*

(iv) *They have relied upon the decision of Hon'ble CESTAT in case of Commissioner of Central Excise, Nagpur Versus Indorama Textiles Ltd. Reported in [2017 (6) GSTL 282 (Tri. Mumbai) and submitted that there is no additional consideration, in the impugned transaction and the discounts given to their customers are as a result of pure commercial consideration.*

(v) *The demand is barred by limitation, as much as (i) show cause notice dated 25.04.2016 has been issued covering a period from 2009-2010 to 2013-14, invoking extended period of limitation of more than 5*

years (for part period) as the part of the demand is beyond 5 years period, which is not permissible under the provisions of Section 11A(4) of the Central Excise Act, 1944. (ii) the entire transaction involves invalidation of licences and supply of goods, under the cover of an invoice etc., which are fully and properly disclosed in the monthly ER-1 returns and hence, these activities are within the knowledge of the department.

(vi) *They have also placed reliance on the decision of Hon'ble CESTAT in the case of IFGL Refractories Ltd. Versus Commissioner of Central Excise & Customs, Bhubaneshwar reported in [2006 (206) ELT 728 (Tri.Kolkata)] under which it is held that "No fraud, collusion or misstatement willful or otherwise, or suppression of facts or contravention of any of provision on part of assessee-Longer period of limitation not invocable [at para 2(b)]and also held -When entire excise duty, paid by assessee, refundable to them under para 122 (c) of Import Policy, in such revenue neutral situation, larger period of limitation of five years laid down in proviso to Section 11A(1) of Central Excise Act, 1944 not invocable".* Accordingly, they contended that the demand is barred by limitation and therefore liable to be set-aside.

(vii) *The fine imposed in lieu of confiscation of goods, in terms of Section 34 of Central Excise Act, 1944 is not correct as there is no clandestine removal and goods are removed under the cover of statutorily prescribed documents. Under such circumstances, there is no warrant for confiscation of goods under Rule 25 of Central Excise Rules, 2002 and when goods are not liable for confiscation, there is no question of imposition of redemption fine.*

(viii) *They have acted bonafidely, disclosed all the information to the department and therefore, there are no stipulated ingredients, for imposing penalty in their case. They placed reliance on the decision of Hon'ble Tribunal in the case of CCE & C, Aurangabad Versus Wockhardt Ltd. reported at [2009-TIOL-1308-CESTAT-MUM] under which it is held that penalty under Section 11AC of the Central Excise Act, 1944 is not imposable, where, there is no finding of mens rea. Further, Hon'ble Supreme Court, in the case of Cosmic Dye Chemical Versus CCE, Bombay reported at [2002-TIOL-236-SC-CX-LB] also held that mis-statement or suppression of facts, should be "willful" and contravention of any of the provisions of the Act or Rules, should be "with intent to evade payment of duty".*

4. The appellant was granted opportunity for personal hearing on 29.10.2020 through video conferencing platform. Mr. Kaza Subrahmanyam, Consultant, appeared for personal hearing as authorised representative of the appellant. He re-iterated the submissions made in Appeal Memorandum.

5. I have carefully gone through the facts of the case available on record, grounds of appeal in the Appeal Memorandum and oral submissions made by the appellant at the time of hearing. I find that the issues to be decided in the case are as under:

(a) *Whether the discount allowed by the appellant to its buyers in lieu of invalidation of EPCG Licence is an additional consideration or otherwise;*

(b) *Whether extended period of limitation is applicable in this case or not?*

(c) *Whether the fine imposed in lieu of confiscation of goods, in terms of Section 34 of Central Excise Act, 1944 is legally correct?*

6. It is observed from the case records that the appellant has sold and cleared the goods at a discount in lieu of invalidation of EPCG licence of the respective buyers. It is the contention of the appellant that they had cleared goods in question against invalidation of Zero Duty EPCG Licence and that they had not taken any benefit of "Deemed Export" and not availed any benefit under Foreign Trade Policy from the DGFT. It has been further contended that the benefit, received from the DGFT, if any cannot be considered as an additional consideration, for sale of goods. They placed reliance on the judgement of Hon'ble Tribunal in case of Sterlite Industries supra.

6.1 For appreciation of matter in proper perspective, it would be proper to examine the provisions of Foreign Trade Policy (2009-2014) underwhich procurement of capital goods against invalidation of EPCG Licence is provided and benefits to the Indigenous Supplier against such supply. The relevant provisions as per Para-5.6, 5.7 and Para-8.3 of Foreign Trade Policy (2009-2014) are reproduced below:

> *"**5.6 Indigenous Sourcing of Capital Goods and benefits to Domestic Supplier**: A person holding an EPCG Authorization may source capital goods from a domestic manufacturer. Such domestic manufacturer shall be eligible for deemed export benefit under paragraph 8.3 of FTP. Such domestic sourcing shall also be permitted from EOUs and these supplies shall be counted for purpose of fulfillment of positive NFE by said EOU as provided in Para 6.9 (a) of FTP.*
>
> ***5.7 Fixation of Export Obligation (EO)**: In case of direct imports, EO shall be reckoned with reference to actual duty saved amount. In case of domestic sourcing, EO shall be reckoned with reference to notional Customs duties saved on FOR value.*
>
> ***8.3 Benefits for Deemed Exports**: Deemed exports shall be eligible for any / all of following benefits in respect of manufacture and supply of goods qualifying as deemed exports subject to terms and conditions as in HBP v1:-*
>
> *(a) Advance Authorisation/ Advance Authorisation for annual requirement / DFIA.*

(b) Deemed Export Drawback.

(c) Exemption from terminal excise duty where supplies are made against ICB. In other cases, refund of terminal excise duty will be given. Exemption from TED shall also be available for supplies made by an Advance Authorisation holder to a manufacturer holding another Advance Authorization if such manufacturer, in turn, supplies the product(s) to an ultimate exporter."

6.2 In the present case, it is observed that the appellant is manufacturing capital goods and have supplied such capital goods to various buyers who were EPCG licence holders, against invalidation of such EPCG licence and allowed them discounts. It is further observed that in case of supply against invalidation of EPCG licences, the appellant is entitled for various kind of deemed export benefits in term of para-8.3 of the Foreign Trade Policy 2009-2014, as mentioned in above para.

6.3 Further, I find that the similar issue of additional consideration has been settled by Hon'ble Supreme Court in the case of M/s. IFGL Refractories Ltd., reported at [2005 (186) ELT 529 (SC)] wherein at para 9 it has been held as under:-

9. *Ultimately it was agreed that M/s. Visakhapatnam will surrender its Advance Licences and in lieu thereof the Respondents get the Advance Intermediate Licences. Thus, without the Advance Licences of M/s. Visakhapatnam Steel Plant, being made available to the Respondents, the prices would have been as were quoted earlier. It is only because of the Advance Licences being surrendered by M/s. Visakhapatnam Steel Plant and in lieu thereof Advance Intermediate Licences being made available to the Respondents that the Respondents could offer lower prices. The surrendering of Licences by M/s. Visakhapatnam Steel Plant and as a result thereof the Respondents getting the Licences had nothing to do with any Import and Export Policy. It was directly a matter of contract between the two parties. This resulted in additional consideration by way of "Advance Intermediate Licence" flowing from M/s. Visakhapatnam Steel Plant to the Respondents. The value received there from is includable in the price. The Tribunal was wrong in stating that such an arrangement can never be placed upon the platform of additional consideration. In so stating the Tribunal has ignored and/or lost sight of the fact that it was in pursuance of the contract of sale between Respondents and M/s. Visakhapatnam Steel Plant that the Licences were made available to Respondents. The Export and Import Policy had nothing to do with the arrangement/contract under which the Licences flowed from the buyer to the seller. At the costs of repetition it must be mentioned that had the Respondents had*

Advance Intermediate Licence on their own i.e. without M/s. Visakhapatnam Steel Plant having to surrender its Licences for the purposes of the contract, then the reasoning of the Tribunal may have been correct. But here, in pursuance of the Contract of Sale, there is directly a flow of additional consideration from the buyer to seller. The value thereof has to be added to the price. ***We are thus unable to accept the broad submission that where parties take advantage of policies of the Government and the benefits flowing there from, then such benefit cannot be said to be an "additional consideration".***

6.4 Further, I find that the appellant has placed reliance on the judgment of Hon'ble CESTAT in case of Commissioner of Central Excise, Nagpur Versus Indorama Textiles Ltd. Reported in [2017 (6) GSTL 282 (Tri. Mumbai), in support of their contention that there is no additional consideration in the impugned transaction and the discounts given by the appellants to their customers are as a result of pure commercial consideration. In the said judgment Hon'ble CESTAT held that:

5. *We do appreciate the logic in the plea that benefits of transfer by buyer to seller of goods of licence for duty-free imports, would constitute economic gain for the recipient which is amenable to quantification as additional consideration. The appellant-Commissioner has relied upon the terms of contract requiring invalidation of licence issued to customer of respondent as conferring a gain to the respondent without throwing light on the economic consequences of such invalidation. It would appear that the buyers of the respondent in the impugned transactions had been issued with licences for import of raw materials for use in the manufacture of export products, and instead of procuring from abroad, opted to source them from respondent. Needless to say, the licence, being rendered superfluous, was liable to be invalidated and the privilege of duty-free import by the licence holder no longer available.* ***There is no evidence to arrive at the conclusion that respondent was a beneficiary in consequence of invalidation or was eligible for any incentives prescribed in the Foreign Trade Policy.***

However, in the present case, it is observed that the appellant have cleared their finished goods i.e. capital goods to their buyers against invalidation of EPCG Licence and in such transaction, it is very clearly provided as per Para-5.6 of the Foreign Trade Policy (2009-2014) that the domestic manufacturer/supplier is eligible for various benefit under FTP as discussed above. Accordingly, I find that the facts of the present case are not similar to the said case and the case law is distinguished. Further, the

judgment in case of M/s. IFGL Refractories Ltd. has been given by Hon'ble Supreme Court which has binding precedence.

6.5 Further, I also find that Hon'ble CESTAT, Bangalore in case of Liebherr Machine Tools India P. Ltd. Versus CCE (Appeals), Bangalore vide Final Order No. 21029/2016, dated 27-10-2016 reported at 2017 (357) E.L.T. 971 (Tri. - Bang.) held that:

> *"**6.1** The Apex Court in the IFGL Refractories (supra) case has considered a very similar situation. The case before the Apex Court also involved extending the benefit of advance intermediate license from the buyer to the manufacturer. The Apex Court held that the difference in prices on account of the transfer of additional intermediate license is to be considered as additional consideration. The learned advocate for the appellant tried to distinguish this judgment since it has been rendered in the context of Section 4 of the Act as it existed prior to its amendment on 1-7-2000. However, Revenue has placed reliance on the subsequent decision of the Apex Court in the case of Indorama Synthetics (supra) where the decision of the Apex Court is on the same lines but rendered in the context of Section 4 after its amendment. Going by the above decisions of the Apex Court, we have no doubt that the benefit accruing to the appellant by way of extending the benefit of concessional rate of duty for import of components is to be considered as additional consideration flowing from the buyer to the appellant. The charging of differential duty on such consideration merits no interference.*
>
> ***6.2** The learned advocate has sought to set aside the demand on the ground of revenue neutrality by placing reliance on the Three-Member decision of Ahmedabad Tribunal in the case of Reliance Industries Ltd. (supra). We are of the view that the plea of revenue neutrality comes into play when differential duty paid by one unit is available immediately as Cenvat credit to the same unit or to another unit of the same manufacturer or its sister unit. In the present case that is not so. We find that the machines have been supplied to another customer M/s. Bajaj Auto. It may well be that the differential duty, when paid, is also available to the customer. However, on such a plea the demand itself cannot be set aside."*

6.6 In view of the above discussion and the judgements issued by Hon'ble Supreme Court and Hon'ble CESTAT, I find that the invalidation of EPCG licences by the buyers and allowing discount by the appellant is an additional consideration on which duty has to be paid and the plea of the appellant that the buyers were not related and the transactions were at arm's length is not sustainable.

7. As regards the contention of the appellant in respect of invocation of the extended period of limitation, it is observed that the department was never informed about the discounts allowed to the customers against the invalidation of EPCG licences. Further, it was only when the CERA Auditors

took the objection, the department came to know about such discount/transaction. Therefore, I am of the considered view that the appellant have suppressed the facts from the department and demand invoking extended period is legally correct.

7.1 Further, the appellant has also contended that *"the demand is barred by limitation, as much as show cause notice dated 25.04.2016 has been issued covering a period from 2009-2010 to 2013-14, invoking extended period of limitation of more than 5 years (for part period) as the part of the demand is beyond 5 years period".* However, as regards the said contention, it is observed that the appellant has not submitted any specific details in support of the said contention and further, as per the list of relied upon documents to the show cause notice dated 25.04.2016 issued in the matter, all the discount sheets vide which discounts offered to the buyers by the appellant are dated 02.04.2013 and onwards. Accordingly, I find that the abovementioned contention of the appellant that the part of the demand is beyond 5 years period is factually incorrect.

8. Now, as regards the confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002 and imposition of fine of Rs. 14,57,052/- by the adjudicating authority vide impugned order, in lieu of confiscation in terms of Section 34 of the Central Excise Act, 1944, it is observed in the present case that the goods have already been cleared before the audit was conducted and were not physically available for seizure or confiscation.

8.1 In the similar issue, I find that Hon'ble CESTAT, New Delhi in case of M/s. Chinku Exports Versus Commissioner of Customs, Kalkatta vide Final Order No. A/505/99-NB, dated 23-6-1999 reported at [1999 (112) ELT 400 (Tri.), New Delhi] held that:

> ***10.*** *In view of the aforesaid findings and analysis, we are of the considered opinion that none of these charges upheld in the order impugned are in fact sustained by our analysis. In this connection we are also surprised to find that the redemption fine of Rs. 2.89 lakhs has been imposed when the goods were not available for confiscation, the same having been exported many years ago. Neither was any bond with a security in any format available with the Department to be enforced. In view of this it is clear that the redemption fine imposed was totally outside the purview of legal provisions in this regard.*

8.2 Further, I also find that a similar view has been taken by Larger Bench of Hon'ble CESTAT, Mumbai in case of M/s. Shiv Kripa Ispat Pvt. Ltd. Versus Commissioner of C.Excise & Customs, Nasik vide Misc. Order Nos. M/43-44/2009-WZB/LB/(SMB), dated 19-1-2009 reported at [2009 (235) ELT 623 (Tri. LB)] as re-produced below:

> ***"10.*** *We have also particularly noted a decision of the Tribunal (cited by the learned advocate) which stands upheld by the Supreme Court.*

In Chinku Exports case, the Tribunal had held the redemption-fine-related issue against the Revenue in para (10) of its order, reproduced below :

"10. In view of the aforesaid findings and analysis, we are of the considered opinion that none of these charges upheld in the order impugned are in fact sustained by our analysis. In this connection we are also surprised to find that the redemption fine of Rs. 2.89 lakhs has been imposed when the goods were not available for confiscation, the same having been exported many years ago. Neither was any bond with a security in any format available with the Department to be enforced. In view of this it is clear that the redemption fine imposed was totally outside the purview of legal provisions in this regard. Therefore, we set aside the order impugned and allow the appeal with consequential relief as per law."
(emphasis supplied).
Dismissing the department's Civil Appeal filed against the above order of the Tribunal, the Apex Court ordered vide 2005 (184) E.L.T. A36 (S.C.) as under:

"We see no reason to interfere with the impugned order. The appeal is dismissed." (emphasis supplied)

In the result, the view taken by the Tribunal in Chinku Exports case stands affirmed by the Apex Court and consequently the similar view taken by the P & H High Court in Raja Impex case is a binding precedent while the contra decision of the Madras High Court in Venus Enterprises case ceases to be good law on the point. It may be noted contextually that the dismissal, by the apex Court, of the SLP filed by M/s. Venus Enterprises did not have the effect of enhancing the precedent value of the High Court's decision in that case.

11. *It is nobody's case that a binding judicial authority on the question of imposability of fine under Section 125 of the Customs Act in lieu of confiscation of goods not available for confiscation would not be applicable where the similar question arises as to whether a fine could be imposed under Rule 25 of the Central Excise Rules, 2002 (read with Section 34 of the Central Excise Act) in lieu of confiscation of excisable goods not available for confiscation.*

12. *We have not come across any binding decision contrary to Raja Impex (supra). We find that, in Wokhardt Hospital & Heart Institute's case (supra) cited by the learned Jt. CDR, the above issue was not among the questions of law which arose for consideration of the Bombay High Court. The case of Harbans Lal (supra) considered by the Hon'ble Supreme Court is no different.*

13. *In the result, the issue referred to us in either of the two appeals is held against the Revenue in the light of the High Court's decision in Raja Impex case.*

8.3 In view of the judicial pronouncements by Hon'ble CESTAT, I find that the impugned order passed by the adjudicating authority to the extent of declaring goods liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002 and imposing fine of Rs. 14,57,052/- in lieu of confiscation in terms of Section 34 of the Central Excise Act, 1944 is legally not sustainable and hence, I find it proper to set aside the impugned order to that extent.

9. On careful consideration of the relevant legal provisions, judicial pronouncements and submission made by the appellant, I pass the Order as per details given below:

(i) I do not find any merit in the contention of the appellant against confirmation of the demand of Central Excise duty amounting to Rs. 14,57,052/- by the adjudicating authority vide the impugned order. Accordingly, the impugned order is upheld to that extent and appeal filed by the appellant is rejected.

(ii) I also do not find any merit in the contention of the appellant against imposition of the penalty of Rs. 14,57,052/- by the adjudicating authority vide the impugned order. Accordingly, the impugned order is upheld to that extent and appeal filed by the appellant is rejected.

(iii) However, as discussed in the para-8 to para-8.3 above, the impugned order passed by the adjudicating authority to the extent of declaring goods liable for confiscation under the provisions of Rule 25 of the Central Excise Rules, 2002 and imposing fine of Rs. 14,57,052/- in lieu of confiscation in terms of Section 34 of the Central Excise Act, 1944 is legally not sustainable and hence, I set aside the impugned order and appeal is allowed to that extent.

10. The appeal filed by the appellant stands disposed off in above terms.

23rd February, 2021.

(Akhilesh Kumar)
Commissioner (Appeals)

Date: 23rd February, 2021

Attested

(M.P.Sisodiya)
Superintendent (Appeals)
Central Excise, Ahmedabad

By Regd. Post A. D

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Copy to :

1. The Pr. Chief Commissioner, CGST and Central Excise, Ahmedabad.
2. The Principal Commissioner, CGST and Central Excise, Ahmedabad-South.
3. The Deputy /Asstt. Commissioner, Central GST, Division-II, Ahmedabad-South.
4. The Deputy/Asstt. Commissioner (Systems), Central Excise, Ahmedabad-South.
5. Guard file
6. PA File