आयुक्त(अपील)काकार्यालय,
Office of the Commissioner (Appeal),
केंद्रीय जीएसटी, अपील आयुक्तालय,अहमदाबाद
Central GST, Appeal Commissionerate, Ahmedabad
जीएसटी भवन, राजस्वमार्ग, अम्बावाड़ीअहमदाबाद३८००१५.
CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015
. ☎ 07926305065- टेलेफैक्स07926305136

सत्यमेव जयते

NATION TAX MARKET GST

DIN : 20220664SW0000721382

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXD/39/2021/1331 To 1335

ख अपीलआदेश संख्याOrder-In-Appeal Nos.**AHM-EXCUS-001-APP-009/2022-23**
दिनाँक Date : **24-05-2022** जारी करने की तारीख Date of Issue 07-06-2022

आयुक्त (अपील) द्वारापारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **MP/06/AC/2020-21** दिनाँक: **31.12.2020** issued by Assistant Commissioner, Central GST, Division –III, Ahmedabad-South

ध अपीलकर्ता का नाम एवं पता Name & Address

1. **Appellant**
   The Assistant Commissioner, CGST Division-III, Ahmedabad South
   2nd Floor, GST Bhawan, Near Govt. Polytechnic,
   Ambawadi, Ahmedabad - 380015

2. **Respondent**
   M/s Ashish Chemicals
   Plot No. C-1/50 & 51, C-1/45, 46 & 49,
   Phase-II, GIDC Vatva, Ahmedabad - 382445

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India:

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानिकार खाने 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 मे 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 मामलें 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 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।

(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 दिनाँक से तीन मास के भीतरमूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए।उसके साथ खाता इ.का मुख्य शीर्ष 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 होतो रूपये 200/–फीस भुगतान की जाए और जहाँ संलग्नरकम 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 सेवा कर 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 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,BahumaliBhawan,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 होत 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 शुल्कअधिनियम 1970 यथासंशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूलआदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रतिपर रू.6.50 पैसे कान्यायालय 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.

(8) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण(सिस्टेट),के प्रतिअपीलो के मामले में कर्तव्यमांग(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 सेवाकर 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:

(vii) amount determined under Section 11 D;
(viii) amount of erroneous Cenvat Credit taken;
(ix) 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

The present appeal has been filed by the Assistant Commissioner, CGST, Division-III, Commissionerate- Ahmedabad South (hereinafter referred to as the appellant), on the basis of Review Order No. 30/2020-21 dated 26.03.2021 passed by the Principal Commissioner, Central GST, Ahmedabad South Commissionerate in terms of sub-section (2) of Section 35E of the Central Excise Act, 1944, against Order in Original No. MP/06/AC/2020-21 dated 31.12.2020 [hereinafter referred to as "*impugned order*"] passed by the Assistant Commissioner, CGST, Division-III, Commissionerate- Ahmedabad South [hereinafter referred to as "*adjudicating authority*"] in the case of M/s. Ashish Chemicals, Plot No. C-1/50 & 51, C-1/45, 46 & 49, Phase-II, GIDC, Vatva, Ahmedabad – 382 445 [hereinafter referred to as the respondent].

2. Briefly stated, the facts of the case is that the respondent was holding Central Excise Registration No. AABFA6775FXM002 and were engaged in the manufacture of goods falling under Chapter 32 of the First Schedule to the Central Excise Tariff Act, 1985. They were registered as a 100% EOU upto 04th May, 2016, when it exited from the EOU scheme. The records of the respondent, for the period F.Y. 2012-13 to F.Y. 2014-15, were audited by the officers of Indian Audit and Accounts Department, Ahmedabad, and it was observed during the course of the audit that Spend Acid (20% Sulphuric Acid 30M3) emerged as a by-product during the process of manufacture of their final products. The Spent Acid was cleared by the respondent for treatment and safe disposal to M/s.Noval Spent Acid Management. However, the respondent was not issuing any invoice nor paying Central Excise duty on clearance of the Spent Acid.

2.1 Therefore, the respondent were issued a SCN dated 17.04.2017 demanding Central Excise duty amounting to Rs.11,92,164/- along with interest and proposing imposition of penalty under Section 11AC (1) (c) of the Central Excise Act, 1944. The SCN was adjudicated vide OIO No. MP/07/AC/DIV-IV/2017-18 dated 21.09.2017 wherein the duty demanded was confirmed along with interest and penalty was also imposed. Being

aggrieved, the respondent filed appeal with the Commissioner (Appeals), Ahmedabad, who vide OIA No.AHM-EXCUS-001-APP-471-2017-18 dated 28.03.2018 remanded the matter back to the adjudicating authority to examine the marketability of the Spent Sulphuric Acid. In the denovo proceedings, the adjudicating authority vide the impugned order dropped the proceedings against the respondent.

3. Being aggrieved with the impugned order, the appellant department has filed the instant appeal on the following grounds:

i) The adjudicating authority has failed to consider that as per Section 2 (d) of the Central Excise Act, 1944, the goods which is specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 as being subject to duty of excise are identified as 'excisable goods', which is being capable of being bought and sold for a consideration and such goods shall be marketable.

ii) The adjudicating authority has failed to consider the observation of the Commissioner (Appeals) that there is no denying the fact that Spent Sulphuric Acid was delivered to the treatment plant and was disposed of after necessary treatment. This in itself, however, does not establish that the Spent Acid had not marketability, unless there are results of the tests conducted on the spent acid before and after treatment to show that the Spent Acid was highly toxic and required treatment before final disposal. However, the adjudicating authority has not examined the marketability of the said product inspite of specific order passed by the Appellate authority.

iii) The adjudicating authority has not considered the decision in the case of CCE, Ahmedabad Vs. Keti Chemicals – 1999 (113) ELT 689 (Tri.-LB) wherein the classification and dutiability of Spent Acid has been decided. The said judgment of the Hon'ble Tribunal was upheld by the Hon'ble Supreme Court in the case of CCE Vs. Nirma Chemical Works Ltd. – 2002 (146) ELT 485 (SC).

iv) The adjudicating authority has erred in accepting the contention of the respondent that the Spent Acid has not commercial value or no value at all as the product was waste for them. However, the respondent has not come forward with anything to substantiate

their claim. While it may be true that the respondent are not charging any amount from M/s.Novel Spent Acid Management, that does not in any way render the goods as having no value.

v) As per the website of M/s.Novel Spent Acid Management, the Spent Acid obtained by them is subsequently sold by them, which indicates that the Spent Acid cleared by the respondent does infact have a value.

4. The respondent filed their cross-objections on 19.05.2021, inter-alia, submitting that :

- The adjudicating authority has rightly considered the test report submitted by them along with the expert opinion. The adjudicating authority has considered the certificate dated 24.04.2019 issued by the Chartered Engineer wherein it was certified that the Spent Acid which arises in their factory is highly toxic and such spent acid is highly contaminated by color and has a high COD value. While issuing the certificate, the Chartered Engineer has considered the test report dated 17.04.2019 and 18.04.2019 issued by M/s. Swastik Analytical Laboratory. Considering the test report, the Chartered Engineer had opined that the Spent Acid was not marketable and has no commercial use as raw material for any industry.
- The adjudicating authority has also considered the certificate dated 19.02.2018 issued by Shri Shankarbhai Patel of M/.Novel Spent Acid Management wherein it is stated that the Spent Acid was treated by their company and it was after such treatment that it was discharged as waste into the mega pipeline. Therefore, it was also established that the Spent Acid was never sold at any price and was discarded as waste.
- The department has not adduced any evidence as regards marketability of the Spent Acid. It is a well settled legal position that when the opinion of an expert is submitted along with test reports, such expert opinion is important for the purpose of deciding an issue. Therefore, if the department has any grievance against such an opinion, it is the duty of the department to submit contrary report or undertake test to prove that the opinion is erroneous. They refer and rely upon the decisions in the case of Shyam Textile Mills – 2015 (328) ELT 390; Mangal Textile Mills Pvt. Ltd.- 2004 (171) ELT 160 (Guj);

Commissioner Vs. Greenply Industries Ltd. – 2017 (357) ELT 314; Farm Fresh Foods Pvt. Ltd.- 2009 (241) ELT 74 and Business Overseas Corporation – 2015 (17) ELT 637.

- The contention that the adjudicating authority has not followed the directions of the Commissioner (Appeals) is devoid of merit inasmuch as the adjudicating authority has categorically given findings as to why the product was not marketable in the condition in which it was cleared and hence, was not excisable.
- It is settled legal position that if the demand is made by the department, it is the department's duty to prove that the goods were marketable. The Hon'ble Supreme Court had in the case of Gujarat Narmada Valley Fertilizers Co. Ltd. – 2005 (184) ELT 128 (SC) categorically held that unless the product is capable of being marketed and is known to those who are in the market as having a distinct identity, excise duty cannot be levied on such goods. It was also held that the burden to prove that the goods are marketable is on the revenue.
- In the case of Bata India Ltd. – 2010 (252) ELT 492, it was held by the Hon'ble Supreme Court that marketability is very essential for the purpose of excisability of the goods and the burden to prove marketability is on the revenue. Similar view was taken in the case of Lupin Ltd. – 2013 (293) ELT 354; Gujarat State Fertilizers and Chemicals Ltd.- 2009 (234) ELT 532; Champlast Samplast Ltd.- 2015 (317) ELT 495.
- For any goods to be excisable for levy of Excise, it has to be manufactured in the first place. They rely upon the decision in the case of Mettur Thermal Power Station Vs. CBEC – 2016 (335) ELT 29 (Mad.). In the present case, Spent Acid is emerging a waste product during the manufacture of final products and therefore, the ratio of the above judgment is squarely applicable to the facts of the present case. They also rely upon the judgment in the case of UOI Vs. Ahmedabad Electricity Company Ltd. – 2003 (158) ELT 3 (SC).
- Just because Spent Acid finds a place in the Central Excise Tariff would not mean that the same is an excisable good when no manufacturing activity has been undertaken.

- Spent Acid emerges as a by-product or waste during the manufacture of the finished goods, namely dyes and intermediates. Therefore, there is no question of paying excise duty on the value adopted by the department under Rule 11 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Even if duty was leviable, it would be on the basis of the price at which they sold the goods. Since they had sold the goods at zero value, the consequential excise duty will also be nil.
- Rule 11 can be invoked only when the preceding rule are not applicable. Further, Section 4 of the Central Excise Act substituted w.e.f. 01.07.2000 introduced the concept of transaction value which essentially accepted that different transaction values which may be charged to different customers.
- Spent Acid which is a hazardous substances has no value in the market. The disposal of Spent Acid in the open environment is not permissible and for that reason it has to be delivered to a unit which neutralizes the said acid.
- They have not received any money for such disposal of the said product. On the contrary, invoices were raised by M/s.Novel Spent Acid Management charging amount for treatment and transportation. Therefore, there was no price for which they had disposed the Spent Acid. It is also an admitted fact that they and M/s.Novel Spent Acid Management are not related persons. Therefore, the valuation has to be done in accordance with the transaction value adopted by them, which in this case has been Nil, but this value was real and genuine price.
- Rule 6 of the Valuation Rules provides that where price is not the sole consideration for sale of the excisable goods and the same are sold at a price less than the manufacturing cost and profit, no additional consideration is flowing directly or indirectly, the value of such goods shall be deemed to be the transaction value. Due to the peculiarity of the case, the transaction value was zero and therefore, excise duty on the basis of transaction value has to be Nil.
- The contention of the department that the decision in Keti Chemicals was not followed is not just and proper. The adjudicating authority has distinguished the decision of Keti Chemicals and held that sulphuric

acid as was arising in that case was a different commodity from that in the present case.

- The department has failed to consider that the decision of Keti Chemical was later considered in the case of Markfet Vanaspati & Allied Industries – 2000 (116) ELT 204 wherein the Larger Bench of the Hon'ble Tribunal held that for being exigible to excise duty not only the test of manufacture but also the test of marketability is to be satisfied. In the present case, the goods are not marketable and hence, they are not exigible to excise duty.
- In an identical case of Jainik Industries, the Joint Commissioner, Ahmedabad passed OIO No. 232-24/CX-1/AHMD/JC/KP/2017 the demand was dropped relying upon the GPCB norms as well as the notification of the Ministry of Environment and Forest. In the present case, the Spent Acid arising in their factory has a COD level of 1710 mg/L and is also contaminated in color as is evident from the certificate of the Chartered Engineer. Therefore, the Spent Acid is not marketable in view of the GPCB norms along with the Environment Protection Rules. The Spent Acid being not marketable and being a waste product is not exigible to central excise duty.

5. Personal Hearing in the case was held on 20.04.2022 through virtual mode. Shri Amal P. Dave, Advocate, appeared on behalf of the respondent for the hearing. He reiterated the submissions made in appeal memorandum.

6. I have gone through the facts of the case, submissions made in the Appeal Memorandum, and submissions made at the time of personal hearing and materials available on records. The issue before me for decision is whether the respondent is liable to pay Central Excise duty on the Spent Acid cleared by them to M/s.Novel Spent Acid Management.

6.1 I find that the impugned order has been passed in denovo proceedings ordered vide OIA No. AHM-EXCUS-001-APP-471-2017-18 dated 28.03.2018 passed by the Commissioner (Appeals), Ahmedabad. The relevant portion of the said OIA is reproduced as below :

> " There is no denying the fact that Spend Sulphuric Acid was delivered to the treatment plant and was disposed of after necessary treatment. This in itself

> however does not establish that the effluent (Spent Sulphuric Acid) had not marketability, unless there are test results of the tests conducted on the effluent before and after the treatment in the treatment plant to shot that the effluent was highly toxic and required treatment before final disposal. There must be GPCB norms with regard to levels of contaminants for safe disposal of effluent, e.g. COD level in the effluent. The effluent with permissible levels of contaminants would obviously not require any treatment before disposal and in that case it can be marketable depending upon its utility. This is an important aspect to decide the marketability of the Spent Sulphuric Acid in this case and therefore, I find it necessary to remit the matter back to the adjudicating authority to examine this aspect before reaching any conclusion with regard to marketability of the product in question."

6.2 It is clear from the above OIA that the matter was remanded back to the adjudicating authority for considering the test results of the product before and after treatment and thereafter arrive at a conclusion regarding the marketability of the product. I find that the above OIA has not been challenged in appeal by the department before any higher appellate authority.

7. I find that the issue of classification and dutiability of the product Spent Sulphuric Acid has been settled in the case of Collector of Central Excise, Ahmedabad Vs. Keti Chemicals – 1999 (113) ELT 689 (Tribunal). In the said case, the Larger Bench of the Hon'ble Tribunal had held at Para 8 of the judgment that :

> "The Tribunal also in Nirma Chemical Works case, supra observed that spent sulphuric acid is "produced as a by-product in the form of water/residue during the process of manufacture of Nitrobenzene and acid slury/detergent powder by sulphonation. It is also sold and find use in the manufacture of fertilizers. Therefore, it cannot be said that it is not a manufactured product or goods." **Once it is a by-product in the form of waste/residue it has to suffer duty of excise. Accordingly the duty is leviable on spent sulphuric acid.**" [Emphasis supplied]

Further, the Hon 'ble Tribunal had, at Para 10 of the said judgment, held that spent sulphuric acid is classifiable under Heading 28.07 of the Schedule to the Central Excise Tariff Act, 1985. The classification of Spent Acid as held by the Hon'ble Tribunal in the said case was subsequently upheld by the Hon'ble Supreme Court in the case of Collector of Central Excise, Ahmedabad Vs. Nirma Chemical Works Ltd. – 2002 (146) ELT 485 (SC).

7.1 I find that the adjudicating authority has sought to distinguish the judgment in the case of Keti Chemicals, supra on the grounds that the

finished product manufactured, in the course of which the Spent Acid arose was different. However, that is a not a proper appreciation of the ratio of the judgment of the Hon'ble Tribunal. Irrespective of the finished product being manufactured, the resultant by-product in the present case as well as in the case of Keti Chemicals was Spent Sulphuric Acid. Therefore, the ratio of the judgment in the case of Keti Chemicals is squarely applicable to the facts of the present case insofar as the classification and dutiability of the product is concerned.

8. Excisable Goods have been defined in Section 2 (d) of the Central Excise Act, 1944, which is reproduced as below :

> " "excisable goods" means goods specified in the First Schedule and the Second Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as being subject to a duty of excise and includes salt;
>
> Explanation : For the purposes of this clause, "goods" includes any article, material or substance which is capable for being bought and sold for a consideration and such goods shall be deemed to be marketable."

8.1 In terms of the above definition, any product which is capable for being bought and sold for a consideration is deemed to be marketable. The appellant department have contended that the marketability of the product has not been examined by the adjudicating authority. The appellant department have, however, not adduced any material to support the contention that the product in question is capable of being marketed. On the other hand, it is the contention of the respondent that the Spent Acid being hazardous is not marketable in view of the GPCB norms. The adjudicating authority has, after considering the submissions of the respondent and by relying upon the certificate of the Chartered Engineer, held at Para 5.4 of the impugned order that the product in question is not marketable considering the high COD value and the product having color. The adjudicating authority has determined the marketability or otherwise merely on account of the hazardous nature of the product, which is not the only factor determining the marketability of a product. I find that there is no finding in the impugned order as regards whether the product in question is capable of being bought and sold for a consideration, which is the basis for determining the marketability of a product in terms of the Explanation to Section 2 (d) of the Central Excise Act, 1944.

8.2 While it may be possible that the product in question is capable of being bought and sold for a consideration, the factual position with regard to the clearance of the product by the respondent in the present case also requires consideration. I find that the respondent is clearing the Spent Acid to M/s.Novel Spent Acid Management for treatment and they are not charging any amount for such clearances. On the contrary, the respondent is paying M/s.Novel Spent Acid Management for treatment of the Spent Acid cleared by them.

8.3 The valuation of excisable goods is in terms of Section 4 of the Central Excise Act, 1944 and in terms of sub-section (1) (a), where the seller and buyer are not related and price is the sole consideration for sale, the value shall be the transaction value. In the instant case, I find that the product Spent Acid is not sold by the respondent to M/s.Novel Spent Acid Management but they have availed the services of the said firm for treatment and safe disposal as per the environment regulation norms and accordingly, cleared the Spent Acid to the said firm. Therefore, the important and vital ingredient of 'sale' is absent in the present case.

8.4 The terms 'sale' and 'purchase' have been defined in the Section 2 of the Central Excise Act, 1994 to mean any transfer of the possession of goods by one person to another in the ordinary course of trade or business for cash or deferred payment or other valuable consideration. In the instant case, I find that there is no allegation by the appellant department that the respondent has received any amount from M/s.Novel Spent Acid Management to whom the Spent Acid was cleared by them. Therefore, it would not be appropriate to say that the clearance of Spent Acid by the respondent to the said firm amounted to a sale.

8.5 I further find that the appellant department has, in the SCN, resorted to Rule 11 of the Valuation Rules, 2000 for determining the value of the Spent Acid cleared by the respondent. Rule 11 is reproduced as below :

> " If the value of any excisable goods cannot be determined under the foregoing rules, the value shall be determined using reasonable means consistent with the principles and general provisions of these rules and sub-section (1) of section of the Act."

Further, though the jurisdictional Range Superintendent was advised to conduct a market survey to ascertain the market value of the Spent Acid, no such market survey appears to have been conducted. The appellant department has proceeded to value the Spent Acid, cleared by the respondent, on the basis of the value considered by the department in a proceedings against another assessee. It is also pertinent to mention that even this value appears to have not been determined under the provisions of Section 4 of the Central Excise Act or the Valuation Rules, 2000 framed thereunder. Therefore, I am of the considered view that this is not a proper application of the provisions of Rule 11 of the Valuation Rules in the present case. Accordingly, the value determined by the appellant department, not being in consonance with the provisions of the Act and the Rules, cannot be applied to the clearance of the Spent Acid by the respondent.

9. Considering the above facts, I find that there is no sale involved in the clearance of Spent Acid by the respondent to M/s.Novel Spent Acid Management and neither are they receiving any consideration, in any manner, from the said firm. The clearance of the Spent Acid by the respondent to the said firm is not for any commercial purposes but for the purpose of treatment of the Spent Acid to comply with the statutory requirements of the Pollution Control and Environment Norms. It is also not disputed by the appellant department that the respondent are infact paying the said firm for treatment of the Spent Acid cleared by them, in compliance with the requirements of the Pollution and Environmental norms.

10. In view of the above facts, I am of the considered view that though the Spent Sulphuric Acid is classifiable under Chapter Heading 28.07 and chargeable to duty in terms of the judgment of Keti Chemicals, supra, however, as there is no sale in the instant case and neither is any consideration being received by the respondent for clearance of the Spent Sulphuric Acid, no Central Excise duty is chargeable from them in respect of such clearance of Spent Sulphuric Acid for treatment according to the Pollution and Environment norms.

11. In view of the above, I am of the considered view that there is no merit in the appeal filed by the appellant department. Accordingly, I uphold the impugned order and reject the appeal filed by the appellant department

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

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

(Akhilesh Kumar)
Commissioner (Appeals)

Date: 24.05.2022.

Attested:

(N.Suryanarayanan. Iyer)
Superintendent(Appeals),
CGST, Ahmedabad.

BY RPAD / SPEED POST

To

The Assistant Commissioner,
CGST & Central Excise,
Division-III,
Commissionerate :Ahmedabad South.

Appellant

M/s. Ashish Chemicals,
Plot No. C-1/50 & 51, C-1/45, 46 & 49,
Phase-II, GIDC,
Vatva, Ahmedabad – 382 445

Respondent

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Principal Commissioner, CGST, Ahmedabad South.
3. The Assistant Commissioner (HQ System), CGST, Ahmedabad South. (for uploading the OIA)
4. Guard File.
5. P.A. File.