



रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No
V2/12/EA2/RAJ/2016

मूल आदेश सं /
OID No
DC/JAM/R-843/2015-16

दिनांक /
Date
19.02.2016

ख अपील आदेश संख्या (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-092 -2017-18

आदेश का दिनांक / 09.10.2017 जारी करने की तारीख / 11.10.2017
Date of Order: Date of issue:

कुमार सतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित /
Arising out of above mentioned OID issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name&Address of the Appellant & Respondent :-
M/s. Dharampal Satyapal Ltd., Legal Department, DS Headquarters, C-6-10, Sector,Dharmpal Satyapal Road,,Noida - 201 309, U.P.

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) विशेषकरण मुद्दाकार से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बतलाए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फॉर्म EA-3 को धारा प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा, व्याज की सीमा और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये वा 50 लाख रुपये तक अथवा 50 लाख रुपये से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करे। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा। /

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.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/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 Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में धारा प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करे (उसमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की सीमा, व्याज की सीमा और लगाया गया जुर्माना, रुपये 5 लाख या उससे कम, 5 लाख रुपये वा 50 लाख रुपये तक अथवा 50 लाख रुपये से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करे। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपये का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दंडों की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित पत्र ST-7 में की जा सकती एवं उसके साथ आवृत्त, केन्द्रीय उत्पाद शुल्क अध्याय आवृत्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रामाणिक होनी चाहिए) और आवृत्त द्वारा सहायक आवृत्त अध्याय आवृत्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलवीच न्यायाधिकरण को आवेदन दंडों करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) शीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलवीच प्राधिकरण (सेनटेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एक के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलवीच प्राधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस करीब स्तर से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'मांग किए गए शुल्क' में शिमा शामिल है।
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनटेट जमा की गयी गई राशि
(iii) सेनटेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्राधान्य वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलवीच प्राधिकारी के द्वारा विचाराधीन स्थान नहीं एवं अपील को लागू नहीं होगी।
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, 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, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
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 8 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण प्राधिकार निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के अंतर्गत आवेदन प्रस्तुत करने, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौकी नजिन, जीवन टॉप भवन, संसद भवन, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid.
- (i) यदि मांग के किसी नुकसान के मामले में, जहां नुकसान किसी ग्राहक को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह से या भंडारण से मांग के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में मांग के नुकसान के मामले में। /
In case of any loss of goods, where the loss occurs 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
- (ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे भारत के विभिन्न क्षेत्रों में प्रयुक्त कच्चे मांग पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
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.
- (iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को मांग निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
- (iv) स्मिन्धित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटों के अंतर्गत इस अधिनियम एवं इसके विभिन्न प्राधान्यों के तहत मांग की गई है और ऐसे आदेश जो आवृत्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई तरीक अध्याय सहायकविधि पर या बाद में पारित किए गए हैं। /
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 such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
- (v) उपरोक्त आवेदन की दो प्रतियां पत्र संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संघर्ष के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदावती के प्राधान्य के तौर पर TR-6 की प्रति संलग्न की जानी 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 DIO 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.
- (vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदावती की जानी चाहिए।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। /
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त ढंग से किया जाना चाहिए। इस लघु के होते हुए भी की निम्न पढी कथों से बचने के लिए सहायक अपीलवीच प्राधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाना है। /
In case, if the order covers various numbers 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 scripitoris work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) सहायक प्राधिकरण शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थान आदेश की प्रति पर निर्धारित 6.50 रुपये 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 adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.
- (F) शीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलवीच न्यायाधिकरण (बावे विधि) नियमावली, 1982 में उचित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाना है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलवीच प्राधिकारी को अपील दायित्व करने से संबंधित व्यापक, विस्तृत और अद्यतन प्राधान्यों के लिए, अपीलवीच विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

The Principal Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the appellant") has filed the present appeal against Order-in-Original No. DC/JAM/R-843/2015-16 dated 19.02.2016 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, Central Excise & Service Tax Division, Jamnagar (hereinafter referred to as "the lower adjudicating authority") in the case of M/s. Dharampal Satyapal Limited, 1, Plot No. 4041, R.K. Commercial Complex, GIDC Phase-III, Dared, Jamnagar (hereinafter referred to as "the respondent").

2. Briefly stated facts of the case are that the respondent was engaged in manufacture of Candy (Sugar confectionary) falling under Chapter 17049020 of the first schedule to the Central Excise Tariff Act, 1985 and assessed their final products under Section 4A of the Central Excise Act, 1944. The respondent had filed refund claiming that effective rate of duty on sugar confectionary falling under CETH 17049020 was 6% as per Notification No. 12/2012-CE dated 17.03.2012 as amended and rate of abatement of MRP was 30% as per Notification No. 49/2008-CE(NT) dated 24.12.2008, as amended. However, they through oversight had paid duty @ 12% plus cess instead of 6% plus cess and claimed abatement of MRP @ 35% instead of 30% and thereby had paid excess duty of Rs. 9,65,963/-. SCN No. V.17(18)-37/Refund/2015-16 dated 02.02.2016 was issued to the respondent under Section 11B (2) of the Act calling for reason as to why the refund amount should not be credited to the Consumer Welfare Fund, however, the lower adjudicating authority vide impugned order sanctioned refund claim to the respondent.

3. Being aggrieved with the impugned order, the department preferred the present appeal, *inter-alia*, on the grounds that the lower adjudicating authority erred in sanctioning refund of Rs. 9,65,963/- to the respondent by not considering the fact that the ultimate MRP was inclusive of all taxes and the consumer pays for the product as per MRP; that the lower adjudicating authority failed to consider the doctrine of unjust enrichment while sanctioning the refund claim of the respondent; that the respondent after having passed on the incidence of duty to consumers had no *locus standi* to claim refund of duty; that when the respondent has already recovered cost of their finished product on MRP basis, it is sufficient to presume that incidence of duty has been passed on to the ultimate consumer; that invoices issued by the respondent to their dealers show that they had recovered Central Excise duty in full from their dealers, hence, incidence of duty has been passed on to the consumers by the respondent; that the respondent had not provided any supportive

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documents establishing that the incidence of duty was actually not passed on to any other person.

4. The respondent has filed Memorandum of Cross Objections on the following grounds: -

(i) The contents of the appeal are baseless and not legally correct. The lower adjudicating authority has examined the facts in detail and has rightly sanctioned the refund claim. The respondent had transferred the goods to their own depots located at various places in all over India showing assessable value and rate of duty. No invoices under Rule 11 of the Central Excise Rules, 2002 were issued to the wholesalers/distributors/dealers from their depots. They have not issued any excise invoices to the distributor or dealers charging Central Excise duty. Hence, it is not a case that duty @ 12% has been recovered from the customers as per the invoices.

(ii) The MRP of the said product irrespective of rate of duty or amount of duty paid, remained unaffected i.e. the MRP remained same when duty was being paid @ 12% by mistake and when duty was being paid @ 6% after correction. On paying duty @ 6% and abatement @ 35% from MRP, the assessable value for stock transfer to depots has been revised with backward calculations to keep MRP unaffected. Hence, when there is no change in MRP of the product during both periods; prior to the refund period and after the refund period and the Central Excise duty calculated @ 12% was not being recovered through Central Excise invoices, the doctrine of unjust enrichment is not applicable and Central Excise duty has not impacted the MRP and duty paid in excess has not been passed on to the consumers but borne by the respondent.

(iii) The entire cost including the element of Central Excise duty is borne by the respondent, the MRP, remaining the same throughout the period under reference. The amount of refund, when sanctioned under Section 11B shall be absorbed by the respondent in their Books of Accounts as an amount due to them on applying correction. The ultimate consumer remains unaffected as he does not bear the element of excise duty as they bought the product as per MRP. It is not a case where the respondent is unjustly enriched at the expense of the consumer. The MRP of such products are based on various facts such as competitive price of similar products, market of the product, etc.

(iv) The respondent has submitted a certificate of Chartered Accountant that element of duty has not been recovered from/passed on to the consumer under the invoices since the entire stock is transferred to the Depots of the respondent and the

goods were assessed under Section 4A of the Act. The Chartered Accountant's certificate regarding absorption of the cost by the assessee has been accepted in catena of the judgments as under: -

- Sipani Automobiles – 2004 (176) ELT807 (Tri. – Delhi)
- Flow Tech Power – 2005 (187) ELT 399 (Tri. – Chennai)
- AT & S India Pvt. Ltd. – 2006 (199) ELT 1123 (Tri. – Bang.)
- Roopa Ram Suthar – 2014 (35) STR 583 (Tri. – Delhi)

(v) The respondent also relied on the decision in the case of M/s. Addison & Co. reported as 2001 (129) ELT 44 (Mad.) in support of their contentions.

5. The department vide letter dated 25.09.2017 submitted detailed comments on the grounds of Memorandum of Cross Objections as under: -

(i) Issuance of Central Excise invoices by the Depots of respondent to their Dealers/Distributors is not the only test to ascertain that incidence of Central Excise duty is passed on or not. It is also required to be examined at what price the goods have been sold to customer and whether the Central Excise duty has been included in the price mentioned in the VAT invoices issued to their Dealers/Distributors. The respondent has submitted invoices issued under Rule 11 of the Central Excise Rules, 2002 for transfer of goods to its own depots but not produced any corresponding VAT invoice or Bill raised to their Dealers/Distributors, hence, the contention of the respondent that price charged to the customers has remained unaffected, cannot be verified. Thus, the respondent has failed to submit necessary documents to establish that burden of Central Excise duty has not been passed on to their customers. It is well settled law that burden of proof that the duty has not been passed on to the customers lies on the respondent, who has claimed the refund.

(ii) The respondent has not submitted any document or evidence in support of their claim that the price charged to their customers and MRP of the product have not been affected. The bar of unjust enrichment is applicable even if the MRP has remained unchanged as decided by the Hon'ble CESTAT in the case of Shree Baidyanath Ayurved Bhavan Limited reported as 2009 (238) ELT 680 (Tri.-Mum.) and in the case of Euro Merchandise (I) Ltd. reported as 2015 (318) ELT 445 (Tri.-Ahmd.)

(iii) The sample invoices issued by the respondent for transfer of goods from factory gate to their depots and sample invoices issued by their depots to their dealers/distributors for sale of goods, submitted by the respondent do not correspond with one another. The invoices issued from the factory to their various depots mentioned description of goods "Candy Pass Pass Pulse" whereas the invoices issued to dealers/distributors mentioned "Pulse Kachcha Aam Candy". Further, MRP

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of the product sold from the depots of the respondent to their dealers/distributors have also not been mentioned in respective invoices issued from depots.

(iv) The doctrine of unjust enrichment does not require that burden of duty should not have been passed on to the ultimate consumer. In the case of goods covered under MRP based assessment, the burden can be passed on to the wholesale customers also. In the case of Inn-Vanue Hospitality Management Pvt. Ltd. reported as 2008 (225) ELT 500 (Tri. -Mum.), the Hon'ble CESTAT has held that "*Uniformity in price before and after assessment is not sufficient to conclude that duty burden has not been passed on to customers – Refund hit by unjust enrichment.*" Further, in the case of Rajasthan Spinning & Weaving Mills Ltd. reported as 2006 (194) ELT 254 (Tri. -Del.), Hon'ble CESTAT held that "*Establishment charges are expenses which are debited to Profit and Loss account and appropriated to sales price of product – They may not be collected from customers, but loaded on value of goods without quoting specifically – Appellants to satisfy adjudicating authority that they have not claimed amount from customers and they have not charged amount in profit and loss account as expense – No balance sheet or any other document produced to show that amount not accounted in profit and loss account and not recovered from customers.*"

(v) The Chartered Accountant has certified that "*Burden of duty not passed on to the ultimate customers as the goods assessed under Section 4A.*" The certificate is silent about the burden of Central Excise duty has been passed on to their customers or otherwise. The respondent is not selling their final products i.e. sugar confectionery directly to the ultimate consumers but the final products are reaching to ultimate consumer after crossing entire market and sales chain. Further, the Chartered Accountant has not specified which records and accounts have been verified for the purpose of issuance of certificate. The respondent has not submitted any other document i.e. Balance Sheet, Ledger Account etc. to establish that the Central Excise duty for which refund was claimed was outstanding in the Balance Sheet and the same has not been expensed out in the Profit and Loss account.

(vi) The case law of Addison & Co. (*supra*) relied upon by the respondent is of no avail to them in the facts and circumstances of the present case.

6. Personal hearing in the matter was attended to by Shri Bhagirath Mal Jyotishi, General Manager, Legal Services on behalf of the respondent, who submitted Memorandum of Cross Objections claiming that they could know the department's appeal on 29.06.2017 only for the first time as their Jamnagar unit was closed; that the issue of unjust enrichment has been discussed in detail by the lower adjudicating

authority; that their MRP before March, 2015 and after March, 2015 remained same; that they have not passed on incidence of duty to the ultimate consumer; that grant of refund is justified as there is a certificate of Chartered Accountant also to that effect; that their claim has been subjected to audit and refund has been granted only after following the prescribed procedure; that the appeal of the department should be rejected.

FINDINGS:

7. I have carefully gone through the facts of the case, impugned order, grounds of appeal filed by the Department, Memorandum of Cross objections filed by the respondent and submissions made by the respondent during personal hearing as well as comments on Memorandum of Cross objections submitted by the department. The issue to be decided in the present appeal is that whether the impugned order passed by the lower adjudicating authority sanctioning refund of excess Central Excise duty paid by the respondent to them is proper or refund was required to be credited to Consumer Welfare Fund as incidence of duty has been passed on by the respondent to other person?

8. The department has contended that the respondent has recovered cost of their finished product on MRP basis which is inclusive of Central Excise duty and hence it is sufficient to presume that the incidence of duty has been passed on to other person whereas the respondent made counter argument that they have not issued any excise invoices to the distributor or dealers charging Central Excise duty, hence, burden of Central Excise duty is not passed on to the ultimate consumer as MRP remained same before and after Central Excise duty changed. It is not a case that duty @ 12% has been recovered from the customers as per the invoices and MRP of the said product irrespective of any rate of duty or amount of duty paid, remained unaffected. I examined sample copy of invoices produced by the respondent along with Memorandum of Cross Objections. I find that the respondent has produced copy of Central Excise invoices for their product Candy Pass Pass Pulse whereas copy of invoices produced issued by their Depot to their Distributors/Wholesales are for Pulse Kachcha Aam Candy. Thus, the respondent has not produced the copies of Central Excise invoices in respect of those products which were issued to their Depots and corresponding sale to Distributors/Wholesales to establish their claim that incidence of Central Excise duty has been borne by them and not passed on to any other person. I also find that the Central Excise invoices issued by them for transfer of goods to their various depots wherein Central Excise duty @ 12% had been charged, however, the depots of the respondents have sold the respective goods to their Dealers/Distributors, which are non-related parties under commercial invoices. This implies that whatever duty has paid on the subject

goods has been absorbed in the assessable value at which the depots of the respondent have sold these goods to their Dealers/Distributors.

8.1 The respondent has failed to explain their case as to how incidence of Central Excise duty has not been passed to any other person by demonstrating the assessable value at which particular sugar confectionary transferred by them to their depots and assessable value of the said goods when sold to their Dealers/Distributors. I find that the respondent has made a plain statement that incidence of Central Excise duty has not been passed on to the ultimate consumers. Thus, the respondent's claim that they have borne the incidence of Central Excise duty is devoid of merits. The respondent's contention that MRP of the product remained same during refund period and after period, would also not be of any help to them as even if retail sale price remains the same, it does not mean that the respondent has not passed on the incidence of Central Excise duty to their Dealers/Distributors.

8.2 The respondent has contended that they have produced Certificate of Chartered Accountant stating that element of duty has not been recovered/passed under the invoices since the entire stock is transferred to the Depots of the respondent and the goods are assessed under Section 4A of the Act. I find that the certificate of the Chartered Accountant does not unambiguously state that the incidence of duty has not been passed on to any other person. The Chartered Accountant has simply stated that element of duty has not been recovered since entire stock is transferred to Depots! It also does not state as to which documents they have verified! It is evident that they have not verified that stock of goods was further sold to their dealers under commercial invoices vide which the incidence of duty has been absorbed in the assessable value at which the goods were sold by their depots. There is no logic in the statement given by the Chartered Accountant that element of Central Excise duty has not been recovered since the goods assessed under Section 4A of the Act. I find that Section 4A of the Act envisages that the goods notified to declare retail sale price on package of goods then the value shall be such retail sale price less abatement allowed by the Central Government. In the instant case, the respondent has transferred their final products to their depots at a value assessed under Section 4A of the Act and paid Central Excise duty accordingly, however their depots while selling the said goods to their dealers/distributors had issued commercial invoices by absorbing element of Central Excise duty. I find that the respondent has failed to prove that incidence of duty has not been passed on to any other person and hence refund granted to the respondent is hit by bar of unjust enrichment. Thus, the respondent is not entitled for the refund

sanctioned to them by the lower adjudicating authority.

9. In view of above facts and circumstances, I set aside the impugned order and allow the appeal filed by the department.

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

9.1. The appeal filed by the department stands disposed off in above terms.

(Handwritten Signature)
9/10/2016
(कुमार संतोष)
आयुक्त (अपील्स)

By Regd. Post AD

To

| | |
|---|---|
| M/s. Dharampal Satyapal Limited, 1, Plot No. 4041, R.K. Commercial Complex, GIDC Phase-III, Dared, Jamnagar | मेसर्स धरमपाल सत्यापाल लिमिटेड, १, प्लॉट नं. ४०४१, आर. के. कमर्शियल कॉम्प्लेक्स, जी.आइ.डी.सी. फेस-III, दरेड, जामनगर |
|---|---|

Copy to: -

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Deputy Commissioner, GST & Central Excise Division, Jamnagar
4. Guard File.