

294



::आयुक्त (अपील-III) का कार्यालय,केंद्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS-III), CENTRAL EXCISE,
द्वितीय तल, केन्द्रीय उत्पाद शुल्क, भवन / 2nd Floor, Central Excise, Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot- 360001
Tele Fax No. : 0281 – 2477952/2441142 Email cexappealsrajkot@gmail.com



रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/97 /BVR/2016	BHV-EXCUS-000-JC-01-08-2016-17	07.04.2016,

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

BHV-EXCUS-000-APP-012-2017-18

आदेश दिनांक / Date of Order :	29.05.2017	जारी करने की तारीख / Date of issue:	05.06.2017
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श्री उमा शंकर, आयुक्त (अपील-III) द्वारा पारित /
Passed by Shri Uma Shanker, Commissioner (Appeals-III)

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 OIO 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. G.H.C.L. Limited, Sutrapada, Veraval-Kodinar Highway, Dist : GIR- Somnath

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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन 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 बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, ओ-20, न्यू मेंटल होस्पिटल कम्पाउंड, मेघानी नगर, अहमदाबाद-380016, को की जानी चाहिए। /
 To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, 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) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। 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। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए 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 नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। 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। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए 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 दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज 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) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय 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 दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ती गई यत्न राशि
- (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।/

For an appeal to be filed before the CES

TAT, 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 6 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 याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, 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-35 ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल 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 में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल 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 माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (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 माल निर्यात किया गया है। /

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि 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 प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण 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 अदायगी के साक्ष्य 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 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.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी 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, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता 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 scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट 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-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता 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 अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी 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 present appeal has been filed by M/s. GHCL Ltd., Sutrapada, Veraval Kodinar Highway, Tal.: Veraval, Dist. Junagadh-362275 (*hereinafter referred to as "the appellant"*) against Order-in-Original No.BHV-EXCUS-000-JC-01-08-2016-17 dated 07.04.2016 (*hereinafter referred to as "the impugned order"*) passed by the Joint Commissioner, Central Excise & Service Tax, Bhavnagar (*hereinafter referred to as "the adjudicating authority"*) in their own case.

2. Briefly stated facts of the case are that the appellant holders of Central Excise Registration are engaged in the manufacture of Soda Ash and Sodium Bio-Carbonate, falling under Chapter Sub-Heading No. 28362010 and 28013020 respectively of the First Schedule to the Central Excise Tariff Act, 1985 (*hereinafter referred to as "the final products"*). They were availing CENVAT Credit under the CENVAT Credit Rules, 2004 (*hereinafter referred to as "the CCR"*). The appellant were using coal/lignite based boilers for generation of steam which was used for manufacture of the said final products and also availing Cenvat Credit of duty paid on coal/lignite. The Fly Ash derived from the said boilers and classifiable under Chapter Heading No.26.21 were attracting duty @ 5% Ad Valorem vide Notification No.2/2011-CE dated 01.03.2011 (6% Ad Valorem w.e.f. 17.03.2012), with CENVAT Credit facility, and therefore, the appellant were required to pay Central Excise duty at appropriate rate on removal of the Fly Ash, to maintain 'Daily Stock Account' thereof and to file Monthly Return i.e. ER-1 in respect of the said products in terms of Rule 8, Rule 10 and Rule 12 of the Central Excise Rules, 2002 respectively. However, on being asked, the appellant has denied to consider the said product as an excisable goods and to recognize as 'manufacture, relying upon the judgments in the cases of Shaw Wallac Gelatins Ltd. Vs. CCE-2001(131)ELT397(Tri.-Del) and UOI Vs. Ahmedabad Electricity Co. Ltd.-2003(158)ELT3(SC) and contending that it being waste product having no transaction value was not marketable. During the period from March, 2011 to March, 2015, the appellant had cleared total quantity of 10,06,669.00 MTs of the said products without payment of Central Excise duty totally amounting to Rs.1,73,09,844/-, which was arrived at on the assessable value determinable in terms of Section 4(b) of the Central Excise Act, 1944 readwith Rule 11 of the Central Excise Valuation (Determination of Prices of Excisable Goods) Rules, 2000 on the basis of contemporary value of such identical goods manufactured and cleared by other manufacturers. This led into issuance of eight show cause notices which includes seven periodical show cause notices, which were adjudicated by the adjudicating authority vide impugned order wherein he confirmed the entire demand of Rs.1,73,09,844/- alongwith interest under Section 11A(1)/11AB/11AA

of the Central Excise Act, 1944 and imposed penalty equal to the confirmed demand and Rs.5,000/- under Rule 25 and Rule 27 of the Central Excise Rules, 2002 respectively.

3. Being aggrieved by the impugned order, the appellant filed the present appeal on the various grounds with case laws. It is observed that the appellant has come up with the same grounds and citations as was submitted before the adjudicating authority in the present case. Therefore, for the sake of repetitions I refrain to reproduce the same. However, for brevity, the appellant mainly contended that the disputed goods i.e. Fly Ash, generated as residue during the burning of coal used as fuel in the boilers, was not excisable goods and hence not leviable to Central Excise Duty since the process thereof was neither amount to manufacture nor the goods were marketable, as has been consistently held by various courts among other in the cases of Moti Laminates-1995(76)ELT241(SC), Indian Aluminium-1980(6)ELT146(Bom.) & 1995(77)ELT268(SC), Tata Iron & Steel Co. Ltd.-2004(165)ELT386(SC), Hindalco Industries Ltd.-2015(315)ELT10(Bom.), Ahmedabad Electricity Co.-2003(158)ELT3(SC) etc., which were discussed in the impugned order. They strongly relied upon in the case of Ahmedabad Electricity Co. (*supra*), which is stated to be in their favour. They also contended that provision for concessional rate of duty under Notification No. 02/2011-CE dated 01.03.2011 could not be a ground for demand of duty on the said goods. The appellant further contended that the said goods were not being sold by them as they had disposed off the same and as such there was no assessable value available for duty payment, even otherwise it being a waste/refuse had no value and could not be valued on the basis of other sources in terms of Rule 11 *ibid*. They also contended that since there was no question of confiscation of goods as they had not cleared any dutiable goods, the question of penalty under Rule 25 *ibid* did not arise. Similarly, since no provisions of the Rules were violated by them, no question of penalty under Rule 27 *ibid* arises. Even otherwise, their present case involved interpretative issue, hence no penalty imposable upon them. In view of their submission, the impugned order is liable to be set aside.

4. Personal hearing in the matter was held 16.03.2017 which was attended by S/Shri Deepak Singhal and Manish Depala on behalf of the appellant. They reiterated the grounds of appeal filed by them and also submitted that Fly Ash was not dutiable in view of the decision of Hon'ble Supreme Court in the case of Ahmedabad Electricity Co. Ltd. reported at 2003(158)ELT3(SC). Further, the respondent-department has neither submitted any comments on the grounds raised by the appellants in their present appeals nor appeared for the hearing. I therefore proceed to decide the case on

merit on the basis of records available on file.

5. I have carefully gone through the facts of the case, impugned order, grounds of appeals and submissions made by the appellant. The issue to be decided in the present appeal is that whether the impugned order confirming the proposed demand of Central Excise duty alongwith interest and imposing penalty equal to the confirmed demand with regard to the subjected goods viz. Fly Ash, classifying under Chapter Heading No. 26.21, in terms of Notification No. 2/2011-CE dated 01.03.2011 is proper or otherwise.

6. I observe that the adjudicating authority has confirmed the demand of Central Excise duty on the Fly Ash holding to be excisable goods, classifiable under Ch. Heading No. 26.21 and leviable to the duty in terms of the said notification dated 01.03.2011. However, the appellant contended that the disputed goods i.e. Fly Ash, being a residue having no value, were non-excisable goods and hence could not be levied to Central Excise Duty since the process thereof was neither amount to manufacture nor the goods were marketable, for which they placed reliance of various case laws.

7. It is observed that the appellant were engaged in manufacturing of final products viz. Soda Ash, Sodium Bio-Carbonate etc., and using coal/lignite based boilers for generation of steam/electricity, which was used further for manufacture of the said final products. They were also availing Cenvat Credit of duty paid on coal/lignite.

8. I observe that conjunctive reading of provisions of Sections 2(d), 2(f) and 3 of the Central Excise Act, 1944 implies that in order to be an excisable good, it should be manufactured or produced, specified in the Central Excise Tariff Act, 1985 and capable of being bought and sold for a consideration.

9. In the present case, I find that undisputed facts of the case are that the so called disputed goods viz. Fly Ash, were emerged as a by-product and produced during the process of combustion of coal for generation of steam/electricity, which were used further for manufacturing of the said final products, and the same were classifiable under Chapter Heading No.26.21, which were attracting duty @ 5% Ad Valorem (6% Ad Valorem w.e.f. 17.03.2012) vide Notification No.2/2011-CE dated 01.03.2011 as amended.

10. On perusal of the case laws cited by the appellant, I find that the issue

involved in those cases was related to other goods such as soap stock, scrap, waste, parings, dross & skimmings of Aluminium/Zinc/Steels/other non-ferrous metal, hence not identical to the goods under reference in the case on hand. Further, the Appellate Tribunals/Courts in the said case laws have dealt with the issue with reference to word 'manufactured' deployed in Section 3 *ibid* and not decided the matter in consideration of word "produced" used therein and vital for the case in hand. I also find that as defined under Section 2(f) *ibid*, "manufacture includes any process incidental or ancillary to the completion of a manufactured product. I find that Hon'ble High Court in the case of *Oudh Sugar Mills Ltd. v. Union of India and Ors.*, reported in 1982(10)ELT937(All.), held that any by-product or intermediary product would be covered by the word 'production' in Section 3 *ibid*. I also find that in the case of *Khandelwal Metal & Engineering Works & Anr. v. Union of India*, reported in 1985(20)ELT222 (S.C.), it was held that waste and scrap are by-products of the process of manufacture and are inevitably incidental to the manufacturing process. Therefore, in the instant case, it clearly implies that the combustion of coal is incidental/ancillary process for manufacturing of the final products, during the course of which the Fly Ash was produced. As regard the appellant's reliance in the case of *Ahmedabad Electricity Company Ltd. (supra)*, I find that the goods involved in the said case was 'cinder' held to be non-excisable goods being unburnt part of coal, produced without having gone through the manufacturing process, which is not the case of present appeal involving different goods i.e. Fly Ash, which was produced during the combustion of coal in the course of manufacturing of the final products, hence the said case law is not applicable. I further find that the said Fly Ash was produced as a new and distinct product having different use thereof and the same has been specified in the Tariff Act and was capable of being bought and sold for consideration, as has been evident from the practices adopted by such other manufacturers who cleared such products on payment of duty and on the basis of sale value thereof, the assessable value of the goods in this case has been arrived at in the impugned order.

11. I also find that the appellant has relied upon the decision of Hon'ble Apex Court in the case of *Ahmedabad Electricity Company Ltd. (supra)* in their support. I observe that the said case was decided much prior to issuance of the Notification No. 2/2011-CE dated 01.03.2011 which shows that the legislation after considering the said decision has consciously decided to charge the central excise duty on the impugned goods. Therefore, the intention of the legislation is very clear and hence, I find that there is no ambiguity about charging of central excise duty on the said goods.



12. As regard argument of the appellant for non applicability of Rule 11 *ibid*, I observe that since the appellant had stated to have disposed off the said products i.e. Fly Ash, without consideration rather they incurred expenditure for such disposal, however the Central Excise duty is leviable on incident of manufacture of excisable goods and the said product is held to be excisable goods leviable to duty. Since, except Rule 11 *ibid* all rules of the Central Excise Valuation (Determination of Prices of Excisable Goods) Rules, 2000 covers contingencies where sale or self consumption is involved in some form or other, therefore, in such case, the assessable value would be determinable in terms of residuary rule i.e. Rule 11 *ibid*, which has been adopted in the impugned order. Hence, I do not find any force in the appellant's arguments in this regard.

13. Therefore, in view of above discussion, I find that the said Fly Ash satisfied the test of being manufactured in terms of the said corresponding provisions and thus levied to duty in stipulation of the Notification dated 01.03.2011 *supra*. Thus, arguments advanced by the appellant are untenable. The appellant is therefore liable to pay duty along with consequential interest and penalty. Therefore, I do not find any infirmity with the impugned order and uphold the same. Accordingly, I reject the present appeal of the appellant.

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

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



(उमा शंकर)

आयुक्त (अपील्स - III)

By Speed Post

To,
M/s. GHCL Ltd., Sutrapada,
Veraval Kodinar Highway, Tal.:
Veraval, Dist. Junagadh-
362275

Copy to:

1. The Chief Commissioner, Central Excise and Service Tax, Ahmedabad.
2. The Commissioner, Central Excise and Service Tax, Bhavnagar.
3. The Assistant Commissioner, Central Excise, Junagadh.
4. The Dy./Assistant Commissioner (Sys.), Central Excise, H. Q., Bhavnagar – with a request to upload the OIA on website.
5. The Superintendent, Central Excise, AR-II, Veraval.
6. PA to Commissioner (Appeals-III), Central Excise, Ahmedabad.
7. Guard File.