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NATION TAX MARKET

::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील फाइल संख्या / Appeal / File No	मूल आदेश सं / O.I.O. No	दिनांक / Date
	V2/9/BVR/2017 6513 to 6517	V/15-04/PREV/COM.LEVY/ 2016-17	05.01.2017

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

BHV-EXCUS-000-APP-071-2017-18

आदेश का दिनांक / Date of Order: **18.12.2017** जारी करने की तारीख / Date of issue: **20.12.2017**

कुमार संतोष, 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 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 **Appellants &** Respondent :-
M/s Janmohan Company., Opp. Police Chowky, Sukhnath Chowk., Junagadh - 362 001

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके से 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, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावी 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) 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 कराना 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 नियमावली, 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 (उसमें से एक प्रति प्रमाणित होनी चाहिए) और इसमें 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 कराना 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/-

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दायर की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फार्म S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियां संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को अपील दायर 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 For 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 अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो कि वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्कयोग्य 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 ली गई गलत 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 होंगे।/
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 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, केंद्रीय 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-35B 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 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 अदा की 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 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 वुपूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मंजूर की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए है।/
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 अवेक्षण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदनों 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 है 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 विभिन्न पार्टी से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केंद्रीय 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 filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I 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 की वर्णित एवं अन्य संबन्धित मामलों को अधिनियमित करने वाले नियमों की ओर 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

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:: ORDER IN APPEAL ::

The present appeal has been filed by M/s. Janmohan Company, Sukhnath Chowk, Opp.: Police Chowky, Junagadh-362 001 **(hereinafter referred to as "the appellant")** against the Order-In-Original No. V/15-04/PREV/COM.LEVY/2016-17 dated 05.01.2017 **(hereinafter referred to as "the impugned order")** passed by the Assistant Commissioner, Central Excise, Division-Junagadh **(hereinafter referred to as "the lower adjudicating authority")**.

2.1 Brief facts of the case are that the appellant is holding Central Excise Registration No. AJRPP5023CXM001 and is engaged in manufacture of Unmanufactured Branded Tobacco falling under CETSH 24011090. The activity of manufacturing of un-manufactured branded tobacco was brought under compounded levy scheme under Section 3A of the Central Excise Act, 1944 and the product unmanufactured branded tobacco was notified vide Notification No. 10/2010-CE(NT) dated 27.02.2010. The appellant opted to work with one single F.F.S. Machine under the above levy, operationalised vide Chewing Tobacco and un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter referred to as "the Rules") issued vide Notification No. 11/2010-CE (NT) dated 27.02.2010. The appellant's duty liability was determined to be Rs. 51.48 lakh per packing machine per month, in terms of Notification No. 16/2010-CE dated 27.02.2010as amended vide Notification No. 16/2016-CE dated 01.03.2016. Accordingly, the appellant paid Rs. 51.48 lakh for the month of September, 2016 by cash for Rs. 29,17,200/- vide Challan no. 51884 dated 03.09.2016 and by adjustment as per Abatement Order dated 01.09.2016 for Rs. 22,30,800/- for the month of June, 2016.

2.2 The appellant discontinued production w.e.f. 00:00 hrs of 17.09.2016 to 30.09.2016 for 14 days and for entire months of October, 2016 & November, 2016, during which their packing machine remained sealed by Jurisdictional Range Superintendent, as per provisions of the Rules. The appellant applied for abatement of duty on account of non production in terms of Rule 10 of the Rules vide their letter dated 09.09.2016 as the appellant had not produced notified goods for the period from 17.09.2016 to 30.09.2016 in September, 2016 and also during the months of October, 2016 and November, 2016 following due procedure of the said Rules. The appellant removed notified

goods produced upto 16.09.2016 within first two days from commencement of the said period towards compliance with the condition under rule 10 of the Rules.

2.3 The impugned order stated that as per Rule 10 of the Rules, in case a factory did not produce the notified goods during any continuous period of 15 days or more in a month, the duty calculated on a proportionate basis shall be abated in respect of such period whereas in the present matter, the appellant had produced notified goods from 01.09.2016 to 16.09.2016, thus there was no production continuously for 14 days only in the month of September, 2016 and hence period prescribed for claiming abatement under Rule 10 of the Rules was not satisfied and therefore, the appellant was not eligible for abatement of duty of Rs. 21,21,005/- under Rule 10 of the Rules.

3. The Show Cause Notice F.No. V/15-04/Prev/COM. LEVY/2016-17 dated 15.12.2016 issued by the Assistant Commissioner, Central Excise Division, Junagadh wherein it was proposed to reject the claim for abatement of duty of Rs. 21,21,005/- for the month of September, 2016 under Rule 10 of the Rules. The above mentioned Show Cause Notice was adjudicated by the lower adjudicating authority vide his impugned order wherein he reject the claim for abatement of duty of Rs. 21,21,005/- for the month of September, 2016 under Rule 10 of the Rules filed by the appellant.

4. Being aggrieved with the impugned order, the appellant preferred the present appeal, *inter-alia*, on the following grounds:

1. The impugned OIO dated 05.01.2017 passed by the respondent is abuse of process of law inasmuch as the respondent has on identical facts in the case of the appellant allowed abatement of duty and inspite of the fact that there is no change of law applicable to facts of earlier abatement orders and the facts leading to issuance of impugned Show Cause Notice and the respondent disallowed the claim of the appellant for abatement of duty. The appellant states that in the facts of the present case, the conduct of respondent in issuing the impugned OIO dated 05.01.2017 is arbitrary and unreasonable within the meaning of Article 14 and 19 of the Constitution of India apart from the fact that the impugned Review Order is untenable.

2. Regarding whether the Appellant did not produced notified goods for a

continuous period of 15 days or more or otherwise:

2.1 As far as legality of the OIO is concerned, it is submitted that Rule 10 of the said Rules casts condition -

"In case a factory did not produce the notified goods during any continuous period of 15 days or more, the duty calculated on a proportionate basis shall be abated in respect of such period .....".

[emphasis supplied]

The appellant stated that the provision does not state that non-production should be 'within a month' as sought to be contemplated by the respondent in the impugned OIO.

The inscription in para 11 of the impugned OIO that is highlighted hereinafter -

".... ....as the said Rule 10 of the said Rules provides that in case a factory did not produce the notified goods during any continuous period of 15 days or more in a month, ..."

is addition by the respondent in the statutory provisions which is impermissible and untenable. The plain language of the said Rules leaves no room for interpretation that abatement of duty contemplated under the Rules is pertaining to 15 days of non-production in a Calendar Month. In fact, the Appellant is confusing assessment excise duty (emphasis supplied) which is on a monthly basis and abatement of duty (emphasis supplied)as contemplated in the said Rules. It is submitted that though both of these are parts of assessment of excise duty, they are entirely different propositions.

2.2 In support of this contention, the appellant relies on decision of Ld. Commissioner (Appeals), Rajkot in the case of C.C.E. & C., Rajkot V/s. M/s Atul Kurmuri Pvt. Ltd. being Appeal No. 51/EA2/RAJ/2011, Hon'ble Allahabad High Court in the case of C.C.C.E. & S.T. V/s. Dharampal Satyapal Limited, reported at 2013 (9) TMI 77, Kamal KishorJarda Bhandar V/s. C.C.E. & S.T., Bhopal reported at 2015 (12) TMI 1488 - CESTAT New Delhi.

2.3 The appellant also put on record that present Rule 10 is *parimateria* with Rule 10 of the Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 (hereinafter referred to as the 'PMPM Rules'), the relevant

portion reproduced hereunder:

"Rule 10. Abatement in case of non-production of goods: In case factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period ....."

[emphasis supplied]

While interpreting the provisions of the said Rule 10 of the PMPM Rules, Hon'ble High Courts and various co-ordinate benches of Hon'ble CESTAT consistently held that non-production for the period should be for 15 days or more and the said non-production period may fall in two calendar month. The appellant, therefore, also relies on the following judgments -

(a) C.C.E. V/s. K.P. Pan Products Pvt. Ltd. Reported at 2013 (9) TMI 771 - Allahabad High Court;

(b) C.C.E. & C, Nasik V/s. Prakash products reported at 2011 (3) TMI 1204 - CESTAT Mumbai;

(c) R. G. Food products V/s. CCE, Delhi-I in Appeal No. 50462/2014-EX(DB) - CESTAT New Delhi;

2.4 The appellant further stated that in view of above referred facts coupled with the respondent has allowed abatement of duty to the appellant in the earlier periods on identical facts and in view of statutory provisions and also judicial pronouncements as obtaining on the present subject, the impugned OIO is untenable and claim for abatement of excise duty of Rs.21,21,005/- is required to be allowed.

3. Regarding whether grant of abatement and adjustment of the abatement so granted against future liability is permissible under Rule 10 of the said Rules:

It is further alleged that grant of abatement and allowing adjustment of the same in payment of Central Excise Duty liability for the subsequent period is not permissible under Rule 10 of the said Rules and that the appellant is required to file a claim of refund of the abated amount which should have been paid on merits and that there is nothing in the said Rules to allow adjustment of abated amount against the duty liability for the other month and therefore, abatement order allowing

adjustment of abated amount of Rs.22,30,800/- to the Respondent against their duty liability for the month of September 2016 is legally incorrect. Against this, the Respondent submits that the said contention of the Department is patently untenable for the reasons stated herein after:

3.1 As submitted hereinabove, the appellant did not produce the notified goods during a continuous period of 14 days from 17.09.2016 to 30.11.2016 and accordingly entitled to abatement of duty on a proportionate basis for the period when the factory was not producing notified goods. The alleged contention in the impugned OIO is that abatement amounts to refund and, therefore, the procedure for availing refund is required to be followed. In this regard, it may be noted that the expression "abatement" has not been defined anywhere in the Act or in the Rules. Therefore, the popular or dictionary meaning of the said expression is required to be looked into, which is as under –

- In Black's Law Dictionary, the term "abatement" has been defined as a reduction, a decrease, or a diminution; the suspension or cessation, in whole or in part, of a continuing charge, such as rent. In the context of tax, abatement has been stated to be diminution or decrease in the amount of tax imposed.
- In the New Oxford Dictionary of English, "abatement" has been defined as the ending, reduction or lessening of something.
- In the Dictionary of English Language, "abatement" has been defined as an amount abated, a deduction from the full amount of tax.

On the other hand, "refund" has been defined as to pay back "money" to give or to put back. Tax abatement is ordinarily known as reduction of or exemption from tax by a Government for a specific period. A tax incentive is also stated to be a form of tax abatement. Thus, the ordinary meaning of abatement is reduction, diminution and, therefore, when the appellant is entitled to abatement of duty, he is entitled to reduction of duty to that extent and not refund thereof as is sought to be

contended in the impugned OIO. It would have been a different matter if the rules prescribed for the manner in which abatement has to be granted. However, in the absence of any rule in this regard or any specific provision providing for the mode of availing abatement, the course of action adopted by the appellant cannot be said to be in violation of any rule or any provision of the Act. As can be seen on a plain reading of rule 10 of the Rules, the same merely provides that in case of factory which has not produced the notified goods during a continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period. The abatement, however, is subject to the condition stipulated in rule 10, namely that, the manufacturer of such goods is required to file an intimation to that effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of such period, who on receipt of such information, is required to direct sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period. In the case of present appellant, all these conditions are fulfilled and also not in dispute. Therefore, as stipulated under rule 10 of the Rules, the appellant is entitled to get abatement calculated on a proportionate basis, which is required to be abated against future duty liability.

3.2 Further, the said Rule 10 does not make any stipulation about the abatement having to be claimed by filing an application, therefore, although it does not imply anything to be contrary either.

Whereas the Rule 9 of the said Rules in its proviso stipulates that *"in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by 20th day of the following month."*

When seen in the light of this proviso, it amply clear that when the intention of the Government was that the amount should be refunded, an express provision was made therefore; in the said

Rule 10, there is no such provision, hence the said Rule 10 provides for abatement and the said abatement so determined required to be adjusted against future liability.

4. Regarding whether Appellant is required to file refund application instead of claim for Abatement:

Against the allegation as to the filing of Refund Application instead of claim for Abatement, the appellant submits that present Rules under compounded levy scheme stipulate method, time and manner of payment of duty, interest and penalty and same being a comprehensive scheme in itself, the general provisions of Central Excise Act and Rules stand excluded. This issue is considered by Hon'ble Supreme Court in the case of Hans Steel Rolling Mill vs. CCE, Chandigarh 2011 (3) TMI 2 (SC) / [2011 (265) ELT 321 (SC)], wherein it is held that the compounded levy scheme is a separate scheme from the normal scheme for determination of excise duty of goods manufactured. Rules under compounded levy scheme stipulate method, time and manner of payment of duty, interest and penalty and same being a comprehensive scheme in itself, the general provisions of Central Excise Act and Rules stand excluded. The Hon'ble Supreme Court has further observed that the importing one scheme of tax administration to a different scheme is not appropriate and would disturb the smooth functioning of such unique scheme.

In view of the Hon'ble Supreme Court's judgment, provisions of the filing of refund application under Section 11B of the Act is not applicable, therefore, allegation as to the failure to file Refund Application is illegal and liable to be dropped at once.

The appellant further stated that it is also fortified in its contention in view of following decisions of Hon'ble High Court and various coordinate Benches of CESTAT -

- The Commissioner V/s. M/s. Thakkar Tobacco Products Pvt. Ltd., reported at 2015 (11) TMI 319 - Gujarat High Court;
- M/s. Thakkar Tobacco Products Pvt. Ltd. & Vishnu Pouch Packaging Pvt. Ltd. V/s. CCE., Ahmedabad - II reported at 2015 (2) TMI 606 - CESTAT Ahmedabad;

- M/s. Zest Packers Pvt. Ltd., & Unicorn Packers Pvt. Ltd. V/s. CCE., Ahmedabad-II reported at 2015 (8) TMI 25 - CESTAT Ahmedabad;
- CCE. Bhopal V/s. M/s. JagdambayFlavours reported at 2016 (11) TMI 104 - CESTAT New Delhi;
- M/s. Raja Pouches V/s. Commissioner of Central Excise, Raipur reported at 2016 (11) TMI 152 - CESTAT New Delhi.

5. Whether any application required to be submitted to grant Abatement or Refund under this Rules:

It is submitted that third limb of the impugned OIO about necessity to file separate refund application instead of application for abatement is squarely covered by decision of Hon'ble High Court of Gujarat reported at The Commissioner V/s. M/s. Thakkar Tobacco Products Pvt. Ltd. In the said decision, Hon'ble Gujarat High Court has specifically rejected contention of the Department that the assessee is required to file separate refund application instead of application for abatement of duty.

Further submitted that the assesse can *suomotu* take abatement and adjust the same against future duty payment liability, as the said Rule 10 does not debar from doing so. In support of this submission the appellant relies on judgment of Hon'ble Gujarat High Court in the case of M/s. Thakkar Tobacco Products Pvt. Ltd.

The said decision is pronounced by Hon'ble Gujarat High Court which is jurisdictional High Court for all Offices of Central Excise within Gujarat State. In view of Law of Precedence and principle of judicial discipline, the OIO passed is abuse of process of law as it is issued in utter disregard to law laid down by Hon'ble Gujarat High Court. Therefore, also impugned OIO required to be quashed and set aside.

6. The personal hearing in the matter was attended by Shri Jatin Mehta, Advocate and Paresh V. Sheth, Advocate. They reiterated grounds of appeal; that there are many judgements of the Hon'ble High Court & CESTAT on the subject; that the then Commissioner (Appeals), Rajkot vide his Order-In-Appeal dated 30.01.2012 in case of M/s. Atul Kurmuri Pvt. Ltd., Metoda, Rajkot has already allowed such abatement and the Department has accepted that order; that they would file affidavit that neither DGCEI or Preventive branch of the

Commissionerate have found intimation filed by them as fake/wrong till date; that since our bonafide has been proved, we should be allowed to get abatement as permitted under the Rules and as held by the High Courts & CESTAT and Commissioner (Appeals).

FINDINGS:

7. I have carefully gone through the facts of the case, the impugned order, appeal memorandums and the written and oral submissions of the appellant. The issue to be decided in this appeal is as to whether the abatement of duty of Rs. 21,21,005/- for the closure of the factory from 17.09.2016 to 30.09.2016 for 14 days in the month of September, 2016 under Rule 10 of the Rules rejected by the lower adjudicating authority is correct or otherwise.

8. I find that the issue is relating to abatement of Central Excise duty as defined under Rule 10 of the Rules, which is re-produced below for ready reference:

> ***10. Abatement in case of non-production of goods.*** *- In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that the packing machines so sealed cannot be operated during the said period :*
>
> *Provided that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period:*
>
> *Provided further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise.*
>
> (Emphasis supplied)

8.1 The Rule is very clear, which stipulates that in case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period. It no where says continuous 15 days or more in a calendar month but continuous period of 15 days or more.

8.2 I find that the contention of the adjudicating authority that they have not produced the notified goods during continuous period of 15 days or more in the month of September, 2016 as the production took place from 01.09.2016 to 16.09.2016 and no production took place continuously from 17.09.2016 to 30.09.2016 only for 14 days in the month of September, 2016. It is on record that packing machine of the appellant remained sealed for the subsequent month of October, 2016 and November, 2016. Therefore, the findings of the lower adjudicating authority that no abatement is available because non-production took place continuously for 14 days only in the month of September, 2016 and hence the period prescribed for claiming abatement under Rule 10 of the Rules is not satisfied is totally misplaced and misconceived as there is no such words like in a calendar month in Rule 10 of the Rules. Here, the words 'in a month' have been mentioned by the lower adjudicating authority on his own without authority of law. Bare reading of the Rule 10 of the Rules, shows that the appellant is entitled to abatement provided there has been no production in the factory for a continuous period of 15 days. The rule nowhere provides that continuous non-production of excisable goods should be during a given calendar month. Admittedly in this case, there was no production in the factory of the appellant from 17.09.2016 to 30.11.2016 for a continuous period of more than 15 days and the only single FFS machine was sealed by the Range Superintendent during the entire period. The finding of the lower adjudicating authority is without basis and beyond law.

8.3 In this regard, I rely on Final Order in the case of Shree Flavours Pvt. Ltd. reported as 2014 (304) E.L.T. 441 (Tri. - Del.), wherein the Hon'ble Tribunal held as under:

> "4. We find that on the said issue, there are number of decisions of the Tribunal laying down that the period of 15 days closure, need not fall within the same calendar month. It is sufficient if the unit is closed for a continuous period of 15 days, irrespective of the fact that the said period falls within two calendar months. One such reference can be made to the Tribunal decision in the case of CCE, Bhopal v. Kaipan Pan Masala Pvt. Ltd. reported in 2012 (285) E.L.T. 296 (Tri. - Del.). As such, we find no merits in the above reasoning of the Revenue."
>
> (Emphasis supplied)

8.4 The above order of the Hon'ble CESTAT has been affirmed by the Hon'ble High Court of Punjab & Haryana reported as 2015 (321) E.L.T. A152 (P & H). Therefore, I am of the considered view that the claim of the appellant for abatement is fully justified under Rule 10 of the Rules and the impugned order is not tenable.

8.5 I also find that the lower adjudicating authority vide his impugned order has found that since the Department has preferred an appeal before the Commissioner (Appeals), Rajkot against the abatement order pertaining to June, 2016, the appellant is not admissible for adjustment of the same for the duty liability for the month of September, 2016 in terms of provisions of Rule 10 of the Rules and the appellant was required to file refund claim of the abated amount, which would have been decided on merits and that there is nothing in the said Rules to allow adjustment of abated amount against the duty liability for the month and therefore, the abatement order allowing adjustment of the abated amount of Rs. 22,30,800/- against duty liability for September, 2016 was legally incorrect.

8.6 I find that it is not in dispute that the factory was closed for more than 15 days from 18.06.2016 to 31.08.2016 and the required procedure of due intimation of closure, sealing and due intimation of re-opening had been followed by the appellant. In other words, it is not in dispute that all requirements stipulated in Rule 10 of the said Rules were fulfilled by the appellant. The said Rule 10 does not stipulate any where for filing of refund claim to avail abatement of duty. Rule 9 of the said Rules stipulates that "in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by 20th day of the following month" whereas there is such provision in Rule 10 for abatement of duty due to closure of the factory operation under the Rules.

8.7 Rule 10 of the Rules provides for abatement of duty calculated on the proportionate basis in case the factory does not produce notified goods during any continuous period of fifteen days or more. However, such abatement is subject to the conditions stipulated thereunder as referred to hereinabove. Once such conditions are satisfied, the assessee becomes entitled to abatement of duty to the extent of the days the factory did not produce the notified goods. On plain reading of Rule 10 of the Rules, it is apparent that while the same provides that duty calculated on a proportionate basis shall be abated, it does not provide for any procedure for doing so. Rules 96ZQ, 96ZO and 96ZP of the Central Excise Rules, 1944, which were also compounded levy scheme, there were express provisions for making an order of abatement by the Commissioner whereas Rule 10 of the Rules is silent in this regard. Hence, it can be inferred that the Government has consciously omitted to make such provisions. In absence of any specific provision for abatement, it cannot be said

that the action of the appellant is required to file refund claim under Section 11B of the Act instead of calculating duty on a proportionate basis and setting off the same against the duty payable in the succeeding month, which is not violative of the rules, in any manner.

8.8 The issue of filing refund of claim vis-à-vis abatement by passing order has been decided by the Hon'ble Supreme Court in the case of Hans Steel Rolling Mills reported as 2011 (265) ELT 321 (SC) wherein it has held that filing of refund claim by the respondent is not required as the compounded levy scheme is a separate scheme from the normal scheme for determination of excise duty of goods manufactured. Rules under compounded levy scheme stipulate method, time and manner of payment of duty, interest and penalty and same being a comprehensive scheme in itself, the general provisions of Central Excise Act and Rules stand excluded. The Hon'ble Supreme Court has further observed that the importing one scheme of tax administration to a different scheme is not appropriate and would disturb the smooth functioning of such unique scheme.

8.9 I find that my above views are also supported by decision of the Hon'ble CESTAT in the case of M/s. Thakkar Tobacco Products Pvt. Ltd. reported as 2015 (328) E.L.T. 473 (Tri. - Ahmd.) and duly upheld by Hon'ble Gujarat High Court reported as 2016 (332) E.L.T. 785 (Guj.). In view of above, I find that the appellant is eligible for the adjustment of abatement of duty as per order dated 01.09.2016 and the findings of the lower adjudicating authority not to allow such abatement are not legal and proper.

9. In view of above facts, findings and discussions, I set aside the impugned order and allow the appeal filed by the appellant.

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

9.1 The appeal filed by the appellant is disposed of in above terms.

18/12/2017

(कुमार संतोष)
आयुक्त (अपील्स)