



::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: cevappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क अपील / फाइल संख्या /
Appeal / File No.
V2/175/BVR/2017

मूल आदेश सं /
O.I.O. No.
02/Supdt./AR-II/SH/2016-17

दिनांक /
Date
10.02.2017

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

BHV-EXCUS-000-APP-129-2017-18

आदेश का दिनांक /
Date of Order: 14.02.2018

जारी करने की तारीख /
Date of issue: 15.02.2018

15.02.2018

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिनूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्डे ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्जे की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है।

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

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 Arihant Industries, Survey No. 107P to 110P, Sihor Ghanghli Road, Village : Ghanghli Taluka Sihor, Dist : Bhavnagar

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, . द्वितीय तल, बहुमाली 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) 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/-.

- (ii) 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 प्रतियों 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 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.

- (iii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टैट) के प्रति अपीलों 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 करते 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, बशर्त 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

- धारा 11 डी के अंतर्गत रकम
- सेनवेट जमा की ली गई गलत राशि
- सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त 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 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 :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- 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 परलुक 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 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 केंद्रीय 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 an 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 समायाविधि 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 केंद्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण 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 केंद्रीय 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, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेट्टी कार्य 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, notwithstanding 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, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित 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.

ORDER IN APPEAL

M/s Arihant Industries, Survey No. 107P/108P/109P/110P, Sihor-Ghanghali, Village: Ghaghali, Taluka: Sihor, Dist.: Bhavnagar-364 240(hereinafter referred to as "the appellant") had filed the present appeal alongwith an Application for Condonation of Delay dated 16.05.2017 against Order-in-Original No.02/Superintendent/AR-II/AH/2016-17 dated 10.02.2017 (hereinafter referred to as the "impugned order") passed by the Superintendent, Central Excise, AR-II, Sihor (hereinafter referred to as "the Adjudicating Authority").

2. The brief facts of the case are as under:-

(i) The appellant are engaged in the manufacture of excisable goods falling under Chapter Heading 72 of the Central Excise Tariff Act, 1985 and holding common Central Excise Registration No. AASFA3043PEM002. The appellant was availing CENVAT Credit of Central Excise duty and Service Tax paid on inputs, capital goods and input services under Rule-3 of the Cenvat Credit Rules, 2004 (herein after referred to as 'CCR,2004'). From ER-1 Excise Return for the month of February,2015, it was observed that the appellant had declared closing balance of Education Cess Rs.29,715/- and Secondary& Higher Education Cess of Rs. 14,881/- on account of input and capital goods credit, which were admissible under Rule-3 of CCR,2004 for payment of Education Cess and Secondary& Higher Education Cess, as notified under Notification No. 27/2007-CE(NT) dated 12.05.2007. The appellant was requested vide letter dated 04.02.2016 to pay with interest if they had utilized the said accumulated credit Education Cess and Secondary& Higher Education Cess in the subsequent months, but the appellant did not reply to it. Lateron, scrutiny of the ER-1-Excise Return for the month of April,2015 filed by the appellant, it was observed that the appellant utilized the said closing balance of Education Cess and Secondary& Higher Education Cess, for payment of Central Excise Duty as self assessed and declared by them. The said act of utilization was in contravention of the provisions of Rule-3 of CCR,2004 read with the Notification No. 27/2007-CE(NT) dated 12.05.2007. These facts culminated into issuance of a Show Cause Notice dated 27.04.2016 issued to the appellant.

(ii) The Adjudicating Authority under the impugned order disallowed cenvat credit utilized for Rs.44,596/- (Education Cess Rs.29,715/- and Secondary& Higher Education Cess of Rs. 14,881/-) and ordered to recover the same alongwith interest under the provisions of Rule 14(ii) of Cenvat Credit Rules, 2004 read with Notification No. 27/2007-CE(NT) dated 12.05.2007 with imposition of penalty of Rs. 44,596/- under Rule 15 (1) of Cenvat Credit Rules, 2004.

Alcel
→

55

3. Being aggrieved by the impugned order, the appellant had filed present appeal alongwith an Application for Condonation of Delay dated 16.05.2017 and also Additional Written Submission dated 08.02.2018 on the grounds interalia mentioned as under:-

(i) There was delay of 26 days in filing the appeal as their consultant was busy in the Income Tax matter post demonetization. Apart, the delay is not intentional and if not condoned, there will be irreparable loss to them. Reliance placed on various decisions of the higher judicial forum in support of their above contention.

(ii) The appellant contended that they had made various submission and oral arguments before the Adjudicating Authority. However, the Adjudicating Authority had clearly overlooked the same and mechanically confirmed the demand under the impugned order. Therefore, the impugned order is non speaking order.

(iii) When the Credit for Education Cess and Secondary & Higher Education Cess in respect of input/capital goods and input services received on or after 01.03.2015/01.06.2015 can be permitted for payment of CENVAT and Service Tax, then there should be no embargo in permitting the utilization of the said accumulated credit of Education Cess and Secondary & Higher Education Cess, lying in balance as on 28.02.2015.

(iv) As in the Budget speech, the Hon'ble Finance Minister stated that "Education Cess and SHE cess has been subsumed with Basic Rate of duty and as such, propose to levy 12.5% basic CENVAT rate", which clearly showed the intention of the government to merge both Cesses with Basic Cenvat rate. As there was no need of payment of Cesses after, 01.03.2015, the balance of credit of both Cesses was also automatically subsumed with Basic duty Cenvat closing balance. That is why, the government has not come out with any specific amendment in the rules for the closing balance of such cesses as on 28.02.2015 and further amendment is made only for the fresh credit on receipts after 01.03.2015 to allow such credit for utilization against basic duty.

(v) As per Rule -6 of CCR,2004, no cenvat credit is available if the final product is exempted from payment of duty. As in the present case, the excisable goods are exempted from ED cess/SHE Cess and hence, as per said Rule-6, credit is not eligible for such cesses after 01.03.2015. In order to overcome the above situation, the government had come out with an amendment in the rules to enable the assessee to take such credit and utilize the same after 01.03.2015. The same principle is also applicable for closing balance of said credit of Education Cess and Secondary & Higher Education Cess.

(vi) Relying on the decision in the case of Mahindra & Mahindra Ltd-2007(211)ELT 481(Tri. Mum.), it is contended that as ED Cess and SHE Cess are the duty of excise only and that is why in terms of Clause (a) of sub-rule (4) of Rule-3



54

CCR,2004, credit can be utilized for payment of any duty of excise on any final product. Thus, utilization of said credit by them is correct.

(vii) Further, penalty cannot be imposed as there was an ambiguity. Reliance is placed on decision in the case of Maruti Suzuki Ltd. V/s CCE, Delhi-III- 2009(240) ELT 641(SC).

4. Hearing was held on 31.01.2018, wherein Shri Madhav N. Vadodaria, Chartered Accountant and Authorized Representative appeared on behalf of the appellant and reiterated the submission of the appeal memorandum and also sought one week time for filing the additional written submission which on being allowed, was filed on 08.02.2018.

5. I have gone through the appeal memorandum, written and oral submission made as well as documents submitted during personal hearing. I proceed to decide the case on merits since the appellant has made payment of mandatory deposit of Rs.3345/- (7.5% of the Cenvat Credit of Rs.7,06,126 vide Challan CIN No.00022881205201700388 dated 12.05.2017 and thus, complied the requirement of fulfillment of mandatory pre deposit in pursuance to the amended provisions of Section 35F of the Central Excise Act,1944.

6. I find that in the case before me the appeal has been filed on 19.05.2017 after receipt of the impugned order on 24.02.2017 by the appellant. As per the provisions of Section-35 (1) of the Central Excise Act,1944, an appeal was required to be presented before the Commissioner, Central Excise (Appeals) within 60 days from the date of receipt of the impugned order. I find that the appeal should have been filed within 60 days from 24.02.2017 but the same was filed on 19.05.2017 and thus, there is a delay of 24 days in filing the appeal, for which the appellant filed a Condonation of Delay Application dated 16.05.2017(received on 19.05.2017) pleading for the condoning the delay as their consultant was busy in the Income Tax matter post demonetization. Further, contended that the delay is not intentional and if not condoned, there will be irreparable loss to them. Reliance placed on various decisions of the higher judicial forum in support of their above contention. Looking to the facts of the case and delay for the period of 24 days apart from the various decisions of the higher judicial forum as relied upon by the appellant in support of their above contention, I condone the said delay and proceed to consider the appeal on merits.

7. The issue to be decided in the present appeal is whether or not the Adjudicating Authority has correctly disallowed cenvat credit utilized for Rs.44,596/- (Education Cess Rs.29,715/- and Secondary & Higher Education Cess of Rs. 14,881/-) and

ordered to recover the same alongwith interest under the provisions of Rule 14(ii) of Cenvat Credit Rules, 2004 read with Notification No. 27/2007-CE(NT) dated 12.05.2007 with imposition of penalty of Rs. 44,596/- under Rule 15 (1) of Cenvat Credit Rules, 2004. I find that there is no dispute that the appellant was having in balance cenvat credit utilized for Rs.44,596/-(Education Cess of Rs.29,715/- and Secondary & Higher Education Cess of Rs. 14,881) on 28.02.2015. The Adjudicating Authority has observed that as per ER-1 Excise Returns for the month of April,2015, the appellant had utilized the said balance of unutilized cenvat credit for Rs.44,596/- for payment of Central Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985, for the month of April,2015 which was not admissible to them under the provisions of Rule-3 of the CCR,2004 read with Notification No.27/2007-CE(NT) dated 12.05.2007.

7.1 For better appreciation of the issue on hand, the relevant portion of the provisions of Rule-3 of the CCR,2004 duly amended vide Notification No.27/2007-CE(NT) dated 12.05.2007 and Notification No.27/2007-CE(NT) dated 12.05.2007 are reproduced as under.

"Rule-3 of the CCR,2004

(7) Notwithstanding anything contained in sub-rule (1) [, sub-rule (1a)] and sub-rule (4), -

(a) ----

[(b) CENVAT credit in respect of-

(iii) ...

[**Provided** that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services :

Provided further that the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher Education Cess on taxable services :] "

From above provisions of CCR,2004, I find that the first and second Proviso, were inserted in the said Rule-3 (7) (b) of CCR,2004 vide Notification No.27/2007-CE(NT) dated 12.05.2007 from which it is crystal clear that the credit of the education cess on excisable goods and the education cess on taxable services can be utilized, either for payment of the education cess on excisable goods or for the payment of the education cess on taxable services and similarly, the credit of the Secondary and Higher Education Cess on excisable goods and the Secondary and Higher Education Cess on taxable services can be utilized, either for payment of the Secondary and Higher Education Cess on excisable goods or for the payment of the Secondary and Higher

Education Cess on taxable services. Thus, it is clear that during the relevant period, credit in respect of Education Cess and SHE Cess can not be utilized for payment of Central Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985. Further, levy of Education Cess and SHE Cess on goods cleared on or after 01.03.2015 has been dispensed with. In view of these provisions, the balance of unutilized cenvat credit for Rs.44,596/- (Education Cess Rs.29,715/- and Secondary & Higher Education Cess of Rs. 14,881/-) as on 28.02.2015 can not be utilized for payment of Central Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985 on or after 01.03.2015.

7.2 Further, the following proviso inserted in the said Rule-3 vide Notification No. 12/2015-CE (NT) dated 30.04.2015.

[Provided also that the credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods received in the factory of manufacture of final product on or after the 1st day of March, 2015 can be utilized for payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act.

From the above, it is clear that credit of Education Cess and Secondary and Higher Education Cess paid on inputs or capital goods can be utilized towards payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act, provided the inputs or capital goods the credit of Education Cess and Secondary and Higher Education Cess paid thereon, are received in the factory of manufacture of final product on or after the 01.03.2015. Since, balance credit of Rs. 44,596/- was in respect of Education Cess and SHE cess in respect of inputs/capital goods which were received before 01.03.2015, hence, this balance credit can not be utilized towards payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act.

7.3 Thus, combined reading of the above provisions of Rule-3 *ibid*, makes it amply clear that the utilization of cenvat credit for Rs.44,596/- (Education Cess Rs.29,715/- and Secondary & Higher Education Cess of Rs. 14,881/-) lying in balance as on 28.02.2015, for the payment of Central Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985 in the month of April, 2015 was wrong. The decision of the Tariff Conference held on 28th & 29th of the October, 2015 circulated by CBEC vide letter F.No. 96/85/2015-Cx.1 dated 07.12.2015 also supports my above decision.

8. On the appellant's contention on the Budget speech of the Hon'ble Finance Minister as interalia mentioned at para-3(iv) above, I find that the speech of the Hon'ble Finance Minister did not say anything of allowing the utilization of cenvat credit for Education Cess and Secondary & Higher Education Cess for the payment of Central



51

Excise duty leviable under the first Schedule to the Central Excise Tariff Act, 1985. Further, I find that Hon'ble Apex Court in the case of B.K. Industries V/s UOI-1993 (65) E.L.T. 465 (S.C.) has very categorically held that "The Finance Minister's speech is not law". Further, The CEGAT, Special Bench 'C', New Delhi in the case of Jayalakshmi Cotton & Oil Products (P) Ltd V/s C.C.E., Guntur- 1995 (80) E.L.T. 307 (Tribunal) very categorically held as under.

"4.... As regards the appellants' contention that the Department was estopped from recovering Cess on cotton seed oil produced by them during the relevant period in view of the assurance given by the Hon'ble Finance Minister in his Budget Speech on 28-2-1986 that Cess on certain Vegetable Oil would be withdrawn, we are inclined to agree with the finding of the Collector (Appeals) that there cannot be any promissory estoppel against express provisions of law."

Further, from the above amendments in the Rule-3 *ibid*, I find that there is no ambiguity and hence, reliance on budget speech by the appellant is of no help to them. Reliance is placed for this on the decision of the Hon'ble High Court, Gauhati in the case of Duken Hengra Tea Pvt. Ltd- 2003 (161) E.L.T. 24 (Gau.) wherein it is held that "It is correct that legislative intendment, speech of Finance Minister or parliamentary proceeding or legislative history, all are irrelevant when the language of the statute is clear, in such a situation it is the language which must be taken care of. But if there is ambiguity, doubt or legislation is not clear the external aid must be taken into account."

Reliance is also placed on the following decisions of the higher judicial forum in support of my above view..

- (i) Diwan Saheb Fashions Pvt. Ltd.V/s Commissioner of C. EX., Delhi-I-2013 (288) E.L.T. 529 (Tri. - Del.)
- (ii) Indore Bottling Co. V/s UOI-1997 (94) E.L.T. 70 (M.P.)

In view of the facts and discussion herein above, I reject this contention of the appellant being not sustainable in the eyes of law.

9. The contention on the Rule -6 of CCR,2004 as interalia mentioned at para-3(v) above, I find that this is rather mis-placed as vide above amendment in Rule-3 *ibid*, the excisable goods are not exempted from ED cess/SHE Cess as contended by the appellant. Thus, this contention is of no help to the appellant.

10. On the appellant's contention after relying on the decision in the case of Mahindra & Mahindra Ltd-2007(211)ELT 481(Tri. Mum.),as interalia mentioned at para-3(vi) above, I find that the facts in that case was different than in the present case in as much as in that case though tractors were exempted, the assessee continued paying Ed. Cess which was not objected by the department and also the issue involved is of Rule-6 *ibid* therein and hence in that context, it was held that Ed. Cess is duty of

50

excise. Further, in the present case, in view of the amendments in the provisions of Rule-3 ibid as discussed in foregoing paras, there is no ambiguity about non admissibility of credit of ED Cess/SHE Cess lying in balance on 28.02.2015 for utilisation thereto towards payment of the duty of excise leviable under the First Schedule to the Excise Tariff Act. Thus, this contention is also of no help to them.

11. In view of the facts and discussion herein above, I uphold the impugned order disallowing cenvat credit utilized for Rs.44,596/- and ordering to recover the same alongwith interest under the provisions of Rule 14(ii) of Cenvat Credit Rules, 2004 read with Notification No. 27/2007-CE(NT) dated 12.05.2007.

12. With regards the imposition of penalty, the appellant had contended as interalia mentioned at para-3(vii) above. However, I do not find force in the said contention of the appellant since as discussed in the foregoing paras, there was no any sort of ambiguity on this issue. Further, I find that as mentioned at para-5 of the impugned order, the appellant was requested by Range Officer vide letter dated 04.02.2016 to pay the same with interest if they had utilized the said accumulated credit of Education Cess and Secondary & Higher Education Cess in the subsequent months, but the appellant neither replied to nor acted on it. In view of these facts, I hold that penalty of Rs. 44,596/- has been correctly imposed under Rule 15 (1) of Cenvat Credit Rules, 2004.

13. In view of the facts and discussion herein above, I uphold the impugned order disallowing the cenvat credit and also the order for Interest as well as imposition of penalty.

14. The appeal filed by the appellant is thus, rejected.

Abhi
14/12/2018

(Gopi Nath)
COMMISSIONER (APPEAL)/
ADDITIONAL DIRECTOR GENERAL(AUDIT)

BY R.P.A.D.

To,
M/s Arihant Industries,
Survey No. 107P/108P/109P/110P,
Sihor-Ghanghali, Village: Ghaghali, Taluka: Sihor,
Dist: Bhavnagar-364240.

Copy To:-

1. The Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Principal Commissioner/ Commissioner, CGST, Bhavnagar.
3. The Commissioner (Appeals), Rajkot.
4. The Superintendent, CGST, AR-II, Sihor.
5. The Assistant Commissioner (Systems), CGST, Rajkot.
6. Guard File.
7. P.A. File.