



आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क: O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan, रेस कोर्स रिंग रोड, / Race Course Ring Road, राजकोट / Rajkot - 360 001



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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/27/GDM/2016	11/AC/2015-16	15.02.2016

6450 70 6454

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

**KCH-EXCUS-000-APP-127-2017-18**

आदेश का दिनांक / 11.12.2017 जारी करने की तारीख / 14.12.2017  
Date of Order: Date of issue:

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

ग अथवा आयुक्त/ आयुक्त/ उप-आयुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गण्डीधाम। द्वारा उपरलिखित जारी मूल आदेश से नृत्तित।  
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. Rudraksh Detergent & Chemicals P. Ltd.Grinding Unit, Survey No. 157, Village : Padana Gandhidham - 370 201, Dist : Kutch

इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके से उपयुक्त प्रतिकारी / प्राधिकरण के समक्ष अपील दाखल 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 अपील 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) विशेष न्यायांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, ईस्ट ब्लॉक नं 2, अर. के. पुरम, नई दिल्ली, को की जानी चाहिए।/  
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

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

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) विधिसूचिका, 2001, के नियम 6 के अंतर्गत निर्धारित फॉर्म सप्ले एफ-3 को चार प्रतियों में देने किंचित जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की राशि, ब्याज की राशि 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति अलग-अलग करे। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी शार्वरिजिक बैंक के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होता है।  
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 demanded/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) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर विधिसूचिका, 1994, के नियम 5(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी है, उसकी प्रति साथ में संलग्न करे (उसमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की राशि, ब्याज की राशि 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति अलग-अलग करे। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी शार्वरिजिक बैंक के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होता है।  
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 5(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 fee 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 दंड की गयी अपील, सेवाकर विधायक, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की जायेंगी। (उपरोक्त में एक प्रति प्रामाणिक होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उप-युक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपील/सहायक आयुक्त को आदेश दंड 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 of 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 अपील/सहायक आयुक्त (सेनॉट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 15एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपील/सहायक आयुक्त में अपील करने समय उत्पाद शुल्क/सेवाकर का साथ में 10 प्रतिशत (10%), जब साथ में जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बतौर कि इस धारा के अंतर्गत जहां कि जाने वाली अपील/सहायक आयुक्त को दंड देना नहीं चाहिए। / केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'सांग किए गए शुल्क' में निम्न शामिल है
- (i) धारा 11 डी के अंतर्गत रकम
  - (ii) सेनॉट जमा की गयी रकम
  - (iii) सेनॉट जमा विधायक के नियम 6 के अंतर्गत देय रकम
- बतौर यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के अंतर्गत से पूर्व किसी अपील/सहायक आयुक्त के तहत विचारणीय स्थिति अर्थात् अपील को लागू नहीं होगी। /
- For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
- Under Central Excise and Service Tax, "Duty Demanded" shall include
- (i) amount determined under Section 11 D;
  - (ii) amount of erroneous Credit taken;
  - (iii) amount payable under Rule 5 of the 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 पारुक्त के अंतर्गत अपील/सहायक आयुक्त, भारत सरकार, पुनरीक्षण आवेदन कुंआई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद भवन, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA, 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
- (i) यदि 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 अभी नई 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) मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इष्टी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा निर्यात की गईं तारीख अथवा समावृत्ति पर या बाद में पारित किए गये 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 फॉर्म सख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) विधायक, 2001, के नियम 9 के अंतर्गत निर्धारित है, इस आदेश के संघर्ष के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की प्रतियों के साथ-साथ 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 प्रतियों की जानी चाहिए। / जहां 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 is 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 दंड से किया जाना चाहिए। इस लक्ष्य के होते हुए भी की निम्न पट्टी कार्य से बचने के लिए वधानविधि अपील/सहायक आयुक्त को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाना है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.D. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellate 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) घास/संशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं संशुद्ध आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
  - (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील/सहायक आयुक्त (कार्य विधि) विधायक, 1982 में उल्लिखित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले विधायक 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 अपील/सहायक आयुक्त को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपील/सहायक आयुक्त के वेबसाइट [www.cbec.gov.in](http://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](http://www.cbec.gov.in).



**:: ORDER IN APPEAL ::**

M/s. Rudraksh Detergent & Chemicals Pvt. Ltd., Survey No. 157, Village Padana, Gandhidham, Kutch – 370 201 (*hereinafter referred to as 'the appellant'*) filed this appeal against the Order-In-Original No. 11/AC/2015-16 dated 23.02.2016 (*hereinafter referred to as "the impugned order"*) passed by the Assistant Commissioner, Central Excise Division, Gandhidham, Kutch (*hereinafter referred to as "the lower adjudicating authority"*).

2. The facts of the case are that Appellant had not availed full amount of available Cenvat credit, shown in the relevant 10 invoices detailed in Show Cause Notice and thus wrongly availed the benefit of re-credit / refund as available under the area based Notification No. 39/2001-CE dated 31.07.2001 (*hereinafter referred to as "the said Notification"*) as it was alleged that it was mandatory under the said Notification for manufacturer to first utilize whole of Cenvat Credit available to them on the last date of the month, and whatever duty remained to pay through cash/PLA, after fully utilizing the Cenvat Credit.

2.1 Show cause notice issued to Appellant was adjudicated against them by ordering recovery of Central Excise duty of Rs. 1,21,224/-, along with interest and equivalent penalty was imposed under Section 11AC of the Central Excise Act, 1944, with option to avail reduced penalty @ 25 %, if duty, interest and reduced penalty are paid within a period of 30 days of the impugned order as under :-

"25. Thus, from the above, it is clear that the notice has amended the invoices *suo motu* and availed lesser Cenvat Credit.

26. Factually, the raw material suppliers has paid the duty and the notice is eligible for Cenvat Credit as mentioned in the invoices, unless the notice get the said invoice cancelled / amended from the supplier as per Section 68 of Income Tax Act, 1961. However, in the case in hand, the notice has neither get corrected the said invoices from the raw material suppliers nor they have issued debit / credit notes, for the said correction of duty, quantity and value portion.

27. I agree with the noticee's contention that Cenvat Credit is available on amount of inputs so received within the factory and they were not eligible for availing Cenvat Credit on the inputs not received within the factory or on the quantity short received at the factory. But it is subject to condition that the noticee should get the invoice amended from the raw material supplier or they issue the credit notes to that extent for accounting purpose. However, in the instant case, the noticee has not followed the condition and therefore, they are eligible for Cenvat credit, which has been paid by the raw material supplier.

28. I find that the Hon'ble High court of Gujarat in the case of M/s. Commissioner of C.Ex. and Customs, Daman V/s. Narendra Impex 2011 (265) E.L.T. 332 (Guj.) has observed that unless there is diversion of inputs received under any invoice to any other use is found, the assessee is entitled to avail the Cenvat Credit in terms of the invoices issued by the supplier. Relevant text of the 1said case law is as reproduced below:-

"Thus, the undisputed facts of the case are that except for the 3-CD Income Tax Return, there is no evidence on record to indicate that there



was in fact shortage of raw material on account of short receipt thereof, and that the assessee had availed credit of duty as reflected in the invoices for the inputs. It was also found that during the process of below moulding some process loss was likely to occur during and that the loss claimed by the assessee was not on the higher side. Thus, it is not in dispute that there is no diversion of goods covered under the invoices in question and that the entire inputs received have been used as inputs in the end product manufactured by the assessee and have not been put to any other use. The mode of proof of quantity and payment of duty on inputs received and used as input is by producing invoices. Unless the invoices are found to be wrong or diversion of inputs received under any invoice to any other use is found, the assessee is entitled to avail of the Cenvat credit in terms of the invoices issued by the supplier. In the absence of any evidence to indicate short receipt of material, merely because there is some discrepancy between the quantity stated in the invoice and that shown in the 3-CD report, it cannot be presumed that there was in fact short receipt of raw material.

29. From the above text, it is very much clear that the noticee is eligible for Cenvat Credit as shown in the invoices by the suppliers."

[Emphasis supplied]

3. Being aggrieved with the impugned order, the appellant preferred appeal, *inter-alia*, on the grounds that although the lower adjudicating authority has accepted that Appellant could not avail Cenvat credit, confirmed the demand on the ground that the excisable invoices have not been amended by the original manufacturer supplier; that they failed to produce evidence for non-payment of duty; that at Para 27 of the impugned order the lower adjudicating authority found that Cenvat credit was available on inputs received within the factory and they were not eligible for availing Cenvat credit on the inputs not received within the factory or on the quantity short received at the factory and therefore basis of issuing the Show Cause Notice is incorrect; that at the time of receipt of inputs under cover of excisable invoice, lesser quantity of inputs were received and as per the provisions of Cenvat credit, they had accounted for the actual quantity received in the factory in their statutory records; that Cenvat credit to the extent of actual receipt of the inputs was only available as Cenvat credit; that in respect of some invoices they deducted the excess amount charged by the supplier and paid only the differential value and duty to their supplier; that since they did not pay for excess value; that proportionate excess Central Excise duty, was not available for availment of Cenvat credit; that the supplier was eligible to claim refund of the said excess of excise duty as the burden of the same has not been passed on to them; that differential duty on the excess value was not eligible to the manufacturer and they took Cenvat credit of the contracted value, as per the purchase order.

3.1 Appellant submitted that as per provisions of Para – 1(a) of the said Notification, it was bounden duty of manufacturer to first utilize whole of Cenvat credit available to him on the last day of the month for payment of duty; that such Cenvat credit should be legally available in the Cenvat account at the end of the month; the said Notification did not give any relaxation for availment of Cenvat credit without actual receipt of inputs or without bearing the burden of duty by the manufacturer.

3.2 Appellant submitted that manufacturer supplier after clearing the excisable goods under cover of invoice under Rule 11 of the Central Excise Rules, 2002 did not have any power to rectify the excisable invoice.

3.3 Appellant submitted that invoking the larger period of demand under Section 11A of the Central Excise Act, 1944 and imposition of equivalent penalty to duty under Section 11AC of the Central Excise Act, 1944 is not correct; that they have shown availment of the Cenvat credit in the Cenvat register and since the information was available from the statutory records there cannot be any allegation for suppression of facts.

4. Personal hearing in the matter was attended to by Shri Rajesh Devpura, General Manager (Commercial), who reiterated grounds of appeal and submitted that correct rate of duty was paid to their suppliers and only to that extent Cenvat credit was taken, though their supplier had paid excess duty for reasons not clear; they could take Cenvat credit only to the extent duty paid by them to their suppliers, which they did; that the Department contention that lesser Cenvat credit taken by them resulted in more refund from the Department under Notification No. 39/2001-CE is not correct, as they can take refund, only in respect of what amount of duty is paid by them on their final products i.e. duty payable, minus Cenvat credit taken by them; that if less, but correct Cenvat credit is taken, then they have paid more Central Excise duty and whatever Central Excise duty is paid by them is only to be refunded to them under Notification No. 39/2001-CE; that their appeal should be allowed as impugned order and Show Cause Notice are illegal and without basis. Personal Hearing notice was also sent to the Department, however, none appeared.

5. Appellant filed written submissions dated 09.10.2017, received on 11.10.2017 reiterating the grounds of appeal and further added that the entire proceedings have no revenue impact to the Department and therefore requested to set aside the impugned order.

#### **FINDINGS:-**

6. I have carefully gone through the facts of the case, the impugned order, appeal memorandum, as well as oral and written submissions made by Appellant. The issue to be decided is as to whether availment of less Cenvat credit by the appellant is correct or it is only to avail higher cash refund under the area based Notification No. 39/2001-CE ?

7. I find that the lower adjudicating authority relying upon the case of M/s. Narendra Impex reported as 2011 (265) E.L.T. 332 (Guj.) and the said Notification,



decided the proceedings against Appellant. The relevant portion of the said Notification reads as under :-

*"1A. In cases where all the goods produced by a manufacturer are eligible for exemption under this notification, the exemption contained in this notification shall be available subject to the condition that, the manufacturer first utilises whole of the CENVAT credit available to him on the last day of the month under consideration for payment of duty on goods cleared during such month and pays only the balance amount in cash."*

[Emphasis supplied]

7.1 It is, thus, amply clear that the manufacturer has to first utilize Cenvat credit for payment of monthly duty at the end of the month before taking recourse to payment in cash or PLA and the assessee has done that. The dispute is that department says that the appellant availed less Cenvat credit than what they were entitled to on relevant 10 invoices.

7.2 Let's examine as to whether Cenvat credit availed by the appellant is correct or not as they have contended that they had received less quantity than what has been shown in the invoices and hence can't take full Cenvat credit as per invoices. I find it legally correct. No assessee can take Cenvat credit on the goods, which they have not received as not received goods cannot be used in the manufacture of the final products. I am of the considered view that there is no need to get the invoices amended at suppliers end but to record the quantity received by the appellant at his end only and to take proportionate credit. Thus, the impugned order fails and appeal is allowed to this extent.

7.3 The second dispute is that the invoices even if charged at higher rate of duty then the correct/actual rate of duty were required to be amended at suppliers end whereas appellant says that credit is available only on correct rate of duty. There can't be any dispute on the appellant contention, in my view. It has not been stated anywhere in the Show Cause Notice or in the impugned order that contention of the appellant the duty has been charged at higher rate is not correct. The impugned order only says that the invoices should have been got amended by the appellant at suppliers end and the appellant can't *suo moto* change the Cenvat credit available to them as per invoices. I find that any amount paid in excess of what is payable as duty can't be considered as duty but only amount and Cenvat credit is available only on duty payable. Hence, even on this account, the impugned order fails and appeal needs to be allowed.

7.4 Since Cenvat credit is admissible has only been taken by the appellant, it cannot be held violation of notification No. 39/2001-CE has been incorrectly availed

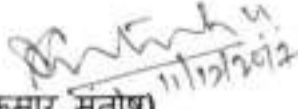
by the appellant only to avail higher Cash refund.

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8. In view of above discussion and findings, I set aside the impugned order and allow the appeal on merits.

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

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

  
(कुमार सतोष)  
आयुक्त (अपील्स)

**By Regd. Post AD**

To,

M/s. Rudraksh Detergent & Chemicals  
Pvt. Ltd.,  
Survey No. 157,  
Village Padana,  
Gandhidham,  
Kutch – 370 201.

मे. रुद्राक्ष डिटर्जेंट & केमिकल्स प्राइवेट  
लिमिटेड, सर्वे नो। 157, विल्लेज- पडना  
गांधीधाम (कच्छ) - 370 201.

**Copy for information and necessary to:-**

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Kutch Commissionerate, Gandhidham
- 3) The Assistant Commissioner, GST & Central Excise Division, Gandhidham.
- 4) The Range Superintendent, GST & Central Excise, Gandhidham Division
- 5) Guard File.