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

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/194/RAJ/2016	01/ADC/BKS/2016-17	21.04.20165

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

RAJ-EXCUS-000-APP-001-2017-18

आदेश का दिनांक / Date of Order: **25.04.2017** जारी करने की तारीख / Date of issue: **26.04.2017**

श्री उमा शंकर, आयुक्त (अपील-III) द्वारा पारित /
Passed by **Shri Uma Shanker**, Commissioner (Appeals-III)

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

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता / Name & Address of the **Appellant &** Respondent :-

M/s. Pukar Tobacco - Processors & Packers, Plot No. G/ 1039-1040, Lodhika GIDC Ind. Estate, Metoda, Rajkot,

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 अपील सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अे-20, न्यू मेन्टल हॉस्पिटल कम्पाउंड, मेघाणी नगर, अहमदाबाद-380016, को की जानी चाहिए ।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad: 380016, in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 की चार प्रतियों में दायर किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ब्याज की माँग 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 रजिस्ट्रार 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 Tribonal 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 (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ब्याज की माँग 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 रजिस्ट्रार 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/-

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(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अन्तर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (जिसमें 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.

(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 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 शुल्कांशों का 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) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट 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-35 ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के 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 इयूटी क्रेडीट 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 नियत की गई तारीख अथवा तत्पश्चात् 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 संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदनें 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 लिखा पढ़ी 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, 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 ओर इंगित एवं अन्य संबन्धित 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.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और संशोधित प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है । /
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

000191

:: ORDER IN APPEAL ::

The present appeal has been filed by M/s. Pukar Tobacco Processors & Packers, Plot No. G/1039-1040, Lodhika G.I.D.C., Industrial Estate, Metoda – 360 021, Rajkot **(hereinafter referred to as "the appellant")** against the Order-in-Original No.01/ADC/BKS/2016-17 dated 21.04.2016 **(hereinafter referred to as "the impugned order")** passed by the Additional Commissioner, Central Excise, Rajkot (**hereinafter referred to as "the adjudicating authority**").

2. Brief facts of the case are that the appellant are engaged in manufacturing of Un-manufactured Branded Tobacco and paying duty in accordance to Notification No.11/2010 CE (NT) dated 27.02.2010. The appellant had paid Rs.29,59,000/- on 02.10.2014 for manufacturing of 5 gms. Pouches of unmanufactured branded tobacco on account of one installed FFS packing Machine for the month of October-2014. The appellant had filed refund claim amounting to Rs.21,95,387/- vide their letter dated 03.11.2014 on the ground that they had carried out manufacturing activities from 06.10.2014 to 13.10.2014 i.e. for 8 days. Accordingly, the appellant had filed refund claim for duty towards 23 days as the machine was closed for the period from 01.10.2014 to 05.10.2014 (5 days) and from 14.10.2014 to 31.10.2014 (18 days) when FFS machine remained sealed in terms of Rule 10 of the Chewing Tobacco and Un-manufactured Tobacco Packing Machine Rules, 2010. The refund claim was sanctioned by the jurisdictional Assistant Commissioner vide Order-in-Original No.2990/2014 dated 02.12.2014. Aggrieved with the said OIO, the department had preferred appeal before Commissioner (Appeals), Central Excise, Rajkot. Accordingly, protective demand was issued to the appellant on 23.11.2015 for recovery of refund amount erroneously sanctioned under Section 11A of Central Excise Act, 1944 alongwith interest under Section 11AA of the Act. The Commissioner (Appeals), Central Excise, Rajkot vide Order-In-Appeal No. Raj-Excus-000-APP-47-15-16 dated 30.11.2015 allowed the appeal filed by the department and set aside the refund order. Consequently, the adjudicating authority vide impugned order confirmed the demand of Rs. 21,95,387/- being the wrongly sanctioned and refunded, under Section 11B of the Act alongwith interest readwith the Chewing Tobacco and un-manufactured Tobacco Machines (Capacity Determination and Collection of Duty) Rules, 2010 **(hereinafter referred to as "the Rules")**.

3. Being aggrieved with the impugned order, the appellant preferred the present appeal mainly on the following grounds:

(i) The adjudicating authority failed to appreciate the correct facts of the case submitted before him and has blindly confirmed the SCN whilst ignoring the undisputed factual scenario, the evidences in the form of various letters, the evidences in the form of photographs, the evidences in the form of records of cross examination. In para 18 of the impugned order, the adjudicating authority has reiterated and highlighted the typing mistake/clerical mistake which has occurred on part of the appellant herein, in mentioning at Point No. 4(ii) of Form-2 dated 13.10.2014 filed under Rule 9 of the Rules that "Two packing machine installed in our factory, and we have operated machine No. 2 for packing of notified goods unmanufactured branded Calcutti Tobacco without lime tube of each retail sale price of Rs. 3". According to the said para of the impugned order, though, the appellant herein had very clearly explained that the word 'installed' was a result of clerical error and that machine was all throughout sealed and uninstalled and it was not kept in installed position, whilst completely ignoring the said factual situation, vide para 19 of the impugned order concluded that since the number of machines installed as declared in Form-2, were two, duty was payable and no refund could have been sanctioned. The adjudicating authority has ignored the documentary evidences, photographs, letters as also records of cross examination of Supdt. Of Central Excise which clarified that both the machines were not only sealed but were uninstalled during the relevant period of time.

(ii) Vide letter dated 08.08.2014, the appellant requested the Asstt. Commissioner that they wish to stop production with the use of machine No. 2 from 14.08.2014. It was particularly mentioned that the machine may be sealed and uninstalled. Likewise vide letter dated 26.09.2014, appellant requested the Asstt. Commissioner to de-seal and install the said machine. Likewise vide letter dated 09.10.2014, the appellant requested to once again uninstall and seal the said machine No. 2 w.e.f. 14.10.2014 and vide letter dated 25.11.2014, the appellant requested to install and de-seal machine No. 2 w.e.f. 01.12.2014. Therefore, it becomes ample clear that machine No. 2 was kept in sealed and uninstalled position during the period from 14.08.2014 to 05.10.2014 and during the period from 14.10.2014 to 01.12.2014. Therefore, as regards the month of Oct.-2014, the said machine was sealed and uninstalled from 01.10.2014 to 05.10.2014 (5 days) and from 14.10.2014 to 31.10.2014 (18 days). Simply because there was a small clerical error in Form-2, it cannot be said that the machine No. 2 was in installed position during the said period of 23 days.

(iii) As regards machine No. 1, even the same was lying uninstalled and sealed during the month of Oct-2014 as could be seen from letter and Form-1. Vide letter dated 03.04.2014 the appellant requested to uninstall and seal the machine No. 1

w.e.f. 09.04.2014 and likewise vide Form-1 filed on 15.10.2014 it was informed that the said machine No. 1 was sold in sealed and uninstalled condition. Therefore the said machine was not an operating machine all throughout the month of Oct-2014. Thus, no duty in regard to the same was payable under the Rules.

(iv) During the course of cross examination of the Supdt. Of Central Excise before the adjudicating authority that on each occasion, before sealing the machines, the said machines were dismantled by removing the plate, hopper and cylinder. Despite this clear fact on record, the adjudicating authority has chosen to ignore the same and simply placed reliance on aforesaid clerical error being made in filing up Point No. 4(ii) of Form-2 dated 13.10.2014.

(v) The photographs clearly demonstrate as to how sealing was carried out according to the same a sealed machine would always be dismantled machine in the case of appellant, because on request of the appellant first the hopper, plate and cylinder were removed and thereafter, the seals were applied. It would be revealed that once the hopper is removed, on the flat table top of the machine the paper seal was applied. It being so, very clear that the sealed machines were all the time uninstalled.

(vi) The only reason from confirming the SCN by the adjudicating authority as per the impugned order, is that, in another matter culminating out of the very same refund wherein the aforesaid refund order was challenged, the Commissioner (Appeals) has decided the matter in favour of the department. However, it is submitted that while deciding an appeal filed by the Central Excise department against the aforesaid refund order, the Commissioner (Appeals) was not having the benefit of outcome of cross examination of the Supdt. of the Central Excise who has carried out the sealing and uninstalling activity of the machines in question. It may be appreciated that what is binding is the ratio of any law which may have been settled and that any judgment/order on facts could not be applied in another matter in which few vital facts are revealed which were not before the authority passing the former. The appellant has already filed an appeal against the said OIA dated 30.11.2015 before Hon'ble CESTAT, Ahmedabad vide Appeal No. E/10325/2016-SM and is pending.

(vii) Even otherwise, Rule 10 of the Rules does not contemplate any requirement of uninstalling/dismantling the machine in order to claim abatement in case of non-production of goods. Neither does the said Rule contemplate that in order to claim abatement, a particular machine should not be a "working machine/operating machine" in terms of Rule 8 of the Rules or for that matter any other provision of the

said rules. Though while drafting Rule 8 the legislature has very consciously provided that a machine must be uninstalled and sealed both or that the number of operating packing machines for the month shall be taken as the maximum number of packing machines installed on any day during the month, as against that, while drafting Rule 10 the legislature has very consciously chosen to omit the words 'uninstalled'. It is very carefully drafted in the said Rule 10 that the AC or the DC, on receipt of intimation from the assessee, shall direct for sealing of all the packing machines available in the factory for the purpose of abatement. This means that, deliberately the requirement to uninstall a machine is done away with by the legislature for the purpose of granting abatement. Even in that view of the matter, even if it is assumed that the machines were not uninstalled but were simply sealed by the Central Excise officers in accordance with the said Rule 10 of the Rules, the abatement claimed by the appellant is rightly available.

4. The personal hearing in the matter was held on 24.03.2017 which was attended by Shri P.D. Rachchh, Advocate and Shri Nilesh H.Sejpal, Partner of the appellant. The Advocate reiterated the grounds of appeal and made additional written submission with all annexure wherein the grounds of appeal has been reiterated.

5. I have carefully gone through the facts of the case, the impugned order, appeal memorandums and the written and oral submissions of the appellant. Here limited issue to be decided is that whether the impugned order confirming demand of Rs. 21,95,387/- being amount erroneously refunded and sanctioned, is legal and correct, or otherwise.

6. I observe that the present proceedings have been initiated consequent upon appeal made by the department against Refund Sanction Order No. 2990/2014 dated 02.12.2014 passed by the Assistant Commissioner, Central Excise, Division-I, Rajkot. The said departmental appeal has been decided by me in favour of the department, wherein it has been held as under:-

> 9. I find that the Rule 7 of the Rules provides that duty payable for a particular month shall be calculated on the basis of number of operating packing machines in the factory during the month by application of appropriate rate of duty specified in the notification. The Rule 8 of the Rules states that the number of operating packing machine for the month shall be taken as the maximum number of packing machines installed on any day during the month. Further, as per proviso to Rule 8 that in case of non-working of any packing machine during the month shall be deemed to be operating packing machine for the month. Accordingly, the factor relevant for determining the duty payable is the number of packing machines installed in the factory, whether it is working or not. Therefore, in a particular month, the duty

payable is determined on the basis of the number of packing machine installed in a factory as declared in Form-2 dated 13.10.2014 under Rule 9 of the Rules. In view of above, I find force in the argument of the Department.

10. Now, I turn to the written submission / cross objection filed by the Respondent. Since, it is the admission by the Respondent in the relevant statutory declaration by themselves that status of the Machine(s) installed; I find that the Respondent's argument that there was a typographical mistake in the Form-2 is nothing but afterthought, so the same cannot be accepted. And accordingly, I do not find any force in their other arguments also. Had it been so, the Respondent should have got corrected the same after filing the Form – 2 by applying to the jurisdictional Division / Range office. In view of the above facts, findings and discussions, I set aside the impugned order passed by the adjudicating authority and allow the appeal filed by the appellant (Department) to the extent of recovery of erroneous refund of Rs.21,95,387/- alongwith interest at appropriate rate.

In view of the above findings, I refrain to accept the arguments putforth by the appellant in the present appeal. I am of the considered view that the appellant is not entitled for the refund amount and therefore the refund amount erroneously granted to the appellant is required to be recovered from them alongwith interest under Section 11A/11AA of the Central Excise Act, 1944.

7. In view of the above, I uphold the impugned order and reject the appeal filed by the appellant.

८. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

8. The appeals filed by the appellant stands disposed off in above terms.

(उमा शंकर)
आयुक्त (अपील्स - III)

By R.P.A.D.

To,
M/s. Pukar Tobacco Processors & Packers,
Plot No.G/1039-1040, Lodhika GIDC Industrial Estate,
Metoda-360 021, Dist: Rajkot.

Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Principal Commissioner, Customs and Central Excise, Rajkot.
3. The Deputy/ Assistant Commissioner, Central Excise Division-I, Rajkot.
4. The Superintendent, Central Excise Range- IV, Rajkot.
5. PA to the Commissioner (Appeals- III), Central Excise, Ahmedabad.
6. Guard File.