



आयुक्त (अपील) 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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सायबेर जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या Appeal / File No	मूल आदेश सं / OIO No.	दिनांक / Date
	V2/239 & 240/RAJ/2016	06/ADC/PV/2016-17	12.09.2016

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

**RAJ-EXCUS-000-APP-049-TO-050 -2017-18**

आदेश का दिनांक / Date of Order:	12.09.2017	जारी करने की तारीख / Date of issue:	13.09.2017
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कुमार संतोष, आयुक्त (अपील), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ सहायक आयुक्त/ अत्यायुक्त/ सहायक अत्यायुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गांधीधाम) द्वारा उपरलिखित जहाँ मूल आदेश से मुक्ति /  
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 :-**  
1. M/s. Everest Fertilizers & Chemicals Pvt. Ltd., NH 8-B,, Veraval, Rajkot  
2. Shri Renish V. Bhalani (Patel), Director , M/s. Everest Fertilizers & Chemicals Pvt. Ltd.,

इस आदेश(अपील) से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके में अपील पत्रिका / प्रतिकरण के समस्त 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 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) विशेषीकरण मूल्यांकन से सम्बन्धित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद 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 बतलाए गए अपीलों के अलावा शेष सभी अपीलीय सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (गिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , दक्षिणीय तल, बहुमाली भवन असावा अहमदाबाद- 360016 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, Asawa Ahmedabad-360016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समस्त अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की सीमा, प्रयाज की सीमा और प्रत्याशित राशि क्रमशः, रुपा 5 लाख या उससे कम, 5 लाख रुपा या 50 लाख रुपा तक अथवा 50 लाख रुपा 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 जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपा 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 समस्त अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (इनमें से एक प्रति समाहित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहाँ सेवाकर की सीमा, प्रयाज की सीमा और प्रत्याशित राशि क्रमशः, रुपा 5 लाख या उससे कम, 5 लाख रुपा या 50 लाख रुपा तक अथवा 50 लाख रुपा 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 जहाँ संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपा का निर्धारित शुल्क जमा करना होगा /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees. in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated, Application made for grant of stay shall be accompanied by a fee of Rs.500/-.



(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दंड की गयी अपील, सेवाकर विधायक, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित धारा S.T.-7 में की जा सकती एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करे (जहाँ से एक प्रति प्रमाणित होती चाहिए) और आयुक्त द्वारा महायुक्त आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दाने 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 (सेस्टैट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर राशि के 10 प्रतिशत (10%) जब राशि 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 इस कोई स्तर से अधिक न हो।

- केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मान किए गए शुल्क" में निम्न शामिल है
- (i) धारा 11 डी के अंतर्गत रकम
  - (ii) सेनवेट जमा की गई राशि राशि
  - (iii) सेनवेट जमा विधायक के नियम 6 के अंतर्गत देय रकम
- बशर्त यह कि इस धारा के प्राधान्य वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विवादशील प्रकरण नहीं एवं 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 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 की पुनरीक्षण आवेदन :  
Revision application to Government of India:  
इस आदेश की पुनरीक्षण प्राधिकार निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पैराग के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन टॉप 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 ग्राहक के किसी मुकदमा के मामले में, जहां मुकदमा किसी ग्राहक को किसी कारखाने से भंडार गृह के परिवहन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह परिवहन के दौरान, या किसी भंडार गृह में या भंडारण में ग्राहक के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में ग्राहक के मुकदमा 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 ग्राहक के विनिर्माण में प्रयुक्त कच्चे ग्राहक 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 exposable 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 ग्राहक 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 इच्छा है इच्छा 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 निष्कासित की गई तरीक अथवा समयावधि पर या बाद में पारित किए गए हैं। / Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां धारा संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) विधायक, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस आदेश के संश्लेषण के 3 महीने के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहाँ संलग्न रकम एक लाख रुपये या उसी 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 इन से किया जाना चाहिए। इन तथ्य के होते हुए भी की सिद्धा नहीं बशर्त से बचने के लिए पर्याप्तित अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाना है। / In case, if the order covers various numbers of order- its Original, fee for each O.I.O. 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 existing Rs. 1 lakh fee of Rs. 100/- for each.

(E) बंधास्तोपि न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन 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 अपीलीय न्यायाधिकरण (कार्य विधि) विधायक, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील टाकिस करने से संबंधित विस्तृत और नवीनतम प्रावधानों के लिए, अपीलकर्ता विभागीय 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 ::**

The appeals listed herein below have been filed by the assessee/person named against Order-In-Original No. 6/ADC/PV/2016-17 dated 12.09.2016 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the lower adjudicating authority").

Sr. No.	Name of the Appellant	Appeal File No.	Appellant No.
01.	M/s. Everest Fertilizers & Chemicals Private Limited, N.H. No. 8B, Veraval (Shapar), Rajkot - 360 024	V2/239/RAJ /2016	Appellant No. 1
02	Shri Renish V. Bhalani (Patel), Director, M/s. Everest Fertilizers & Chemicals Private Limited, Rajkot.	V2/240/RAJ /2016	Appellant No. 2

2. Since the issue involved is common in nature and connected with each other, the same are taken up together for disposal.

3. The facts of the case are that the appellant no.1 is a Private Limited Company, engaged in the manufacture of various types of fertilizers (NPK mix Fertilizers, NPK water soluble fertilizers, Mix micronutrient fertilizers, etc. in granular/powder form), falling under Chapter 31 of the First Schedule to the Central Excise Tariff Act, 1985. A search was carried out by the Preventive Officers, Rajkot on 16.01.2016 and noticed that the appellant had commenced manufacture of various types of fertilizers in the year 1991 and have registered with Central Excise Department on 27.02.2014 and paid Central Excise duty along with interest for the period from February, 2013 to January, 2014 on 06.03.2014. However, they did not pay Central Excise duty for the period from 01.03.2011 to 31.01.2013 as per Notification No. 01/2011-CE dated 01.03.2011.

3.1 The investigation led into issuance of Show Cause Notice No.V.31/AR-VRL/RJT-11/ADC/BKS/199/2015-16 dated 17.03.2016 proposing confiscation of fertilizers valued at Rs. 18,44,75,086/- under Rule 25 of Central Excise Rules, 2002; demanding central excise duty of Rs. 19,00,093/- under Section 11A (4) of the Central Excise Act, 1944 along with interest under Section 11AA of the Act, imposing penalty under Section 11AC of the Act read with Rule 25 of the Rules and also imposing penalty under Rule 26 of the Central Excise Rules, 2002.

3.2 The SCN was adjudicated by the lower adjudicating authority vide impugned order wherein he confirmed demand of Central Excise duty of Rs. 19,00,093/- under Section 11A(4) of the Act; also confirmed recovery of interest



under Section 11AA of the Act; imposed penalty of Rs. 9,50,047/- upon appellant No. 1 under Rule 25(1) of the Rules read with Section 11AC(1)(b) of the Act, and imposed penalty of Rs. 5,00,000/- upon appellant No. 2 under Rule 26(1) of the Rules.

4. Being aggrieved with the impugned order, the appellant no. 1 filed appeal, *inter alia*, on the following grounds:-

(i) The impugned order confirming demand of Central Excise duty by invoking extended period under Section 11A(4) of the Act is not sustainable as the lower adjudicating authority failed to judge allegation of willful suppression of facts with intent to evade payment of Central Excise duty in terms of Section 11A of the Act. The confirmation of allegation of intent to evade payment of Central Excise duty, suppression of facts, etc. are far from truth and self contradictory. It is admitted fact that the appellant had obtained Central Excise registration from 27.02.2014 and have paid Central Excise duty for the period from February, 2013 to January, 2014. However, details of appellant's letter dated 10.03.2014 informing the department about obtaining Central Excise registration, payment of duty for the period from 01.02.2013 to 31.01.2014 along with interest and submission of proof of payment were not included in the notice. The appellant had also invited attention towards Section 11A(2) of the Act and accordingly department had not issued SCN for the period from February, 2013 to February, 2014. When department had concluded the matter for the period February, 2013 to February, 2014, the lower adjudicating authority cannot claim suppression of facts with intent to evade payment of duty for prior period in the notice after lapse of more than two years' time. The appellant relied on decision of Hon'ble Apex Court in the case of Nizam Sugar Factory reported as 2006 (197) ELT 465 (SC).

(ii) It is settled position of law that mere failure to make payment of duty, not obtaining Central Excise Registration, etc. does not amount to suppression of facts, etc. None of the element of Section 11A of the Act is present in the case which is abundantly clear from the facts of the case. The appellant relied on following decisions:

- Uniworth Textiles Ltd. – 2013-TIOL-13-SC-Cus
- H.M.M. Ltd. – 2002-TIOL-120-SC-CX
- Eastland Combines – 2003-TIOL-26-SC-CX

(iii) When the appellant had obtained registration on 27.02.2014; filed quarterly return for quarter starting from January, 2014; paid duty of Central Excise from February, 2013 to February, 2014 along with interest and intimated department about the same on 10.03.2014, there cannot be any suppression, etc. in this case. Therefore, even if the department intended to issue notice for the prior period, it



was required to be issued within normal period of one year from the relevant date under Section 11A(1)(a) of the Act. In the instant case for quarter ending March, 2013 it was supposed to file return on 10.04.2013 and one year was completed on 10.04.2014, whereas the SCN was issued as late as on 17.03.2016, therefore, it was time barred.

(iv) The lower adjudicating authority's belief of suppression of facts appears to be based on grounds that – (i) prior to 10.03.2014, there was no communication from appellant about doubt in its mind and (ii) the Director deposed in his statement that consequent to raids being conducted by Central Excise department, they got themselves registered in February, 2014. None of these would lead to draw an inference that appellant had suppressed anything from department at the material time with intent to evade payment of Central Excise duty. It is clear from appellant's letter dated 10.03.2014 that they were not paying duty because of opinion obtained from the Assistant Commissioner, Central Excise Division, Paldi, Ahmedabad by its Association and that it was learnt at subsequent stage that exemption from payment of Central Excise duty was not available. Besides, it was also clarified by appellant's Director in his statement that they had obtained registration only after getting second legal opinion. The allegation of suppression of facts cannot be sustained unless *mens rea* is established by the department. The appellant relied on following decisions:

- Uniworth Textiles Ltd. – 2013-TIOL-13-SC-Cus
- Chemphar Drugs & Liniments – 1989 (40) ELT 276 (SC)
- Padmini Products – 1989 (43) ELT 195 (S.C.)

5. The appellant No. 2 filed appeal, *inter alia*, on the following grounds:-

(i) The grounds of appeal narrated in his Company's appeal may be considered as part of his appeal.

(ii) He further submitted that no penalty was imposable upon him under Rule 26(1) of the Rules as ingredients required under the said Rule for imposition of penalty are not attracted in this case. Penalty can be imposed when it is proved on record that person concerned had acted in a manner stipulated under Rule 26(1) of the Rules with excisable goods and he had reason to believe that such goods were liable to confiscation. There is nothing on record to suggest that appellant was aware that any of the goods manufactured and cleared by his company was liable to confiscation. The allegations made in the SCN were vague and mere assumptions as there is nothing on record to substantiate it. The appellant has nowhere deposed in his statement that he being Director of the Company, was aware that the fertilizers manufactured and cleared by this company during



disputed period was liable to Central Excise duty or that any goods were liable to confiscation or that he had reason to believe so. To attend daily affairs of his company is not an offence under any of the laws. It does not automatically infer that he was aware that any of the goods manufactured and sold by his company during relevant time were liable to confiscation under provisions of the Central Excise law. He relied on decision in the case of Nirmal Inductomelt Pvt. Ltd. reported as 2010 (259) ELT 243 (Tri.-Del.). There was confusion at the material time about levy of central excise duty on fertilizers and therefore, their Association had made reference to the then Assistant Commissioner, Central Excise Division, Paldi, Ahmedabad on 09.03.2011 for clarification in the matter. Subsequently, after obtaining second legal opinion in February, 2014, they got registered and started paying appropriate duty. They also paid Central Excise duty for the period of February, 2013 to January, 2014 along with interest on 06.03.2014.

6. Personal hearing in the matter was attended to by Shri P.D. Rachchh, Advocate, who reiterated grounds of Appeal and submitted that there was confusion in the Fertilizers manufacturing industries whether 1% Central Excise duty is payable by NPK Fertilizers manufacturers or not; that they represented before Divisional Asstt. Commissioner in March-2011; that Asstt. Commissioner, Central Excise Division clarified that duty is payable; that then they contacted other Advocates/Consultants but opinion/view was divided and no clear cut view emerged whether Central Excise duty is payable in view of Notification No. 1/2011-CE dated 01.03.2011 and Notification No. 12/2012-CE dated 17.03.2012; that they paid Central Excise in March, 2014 for the normal period but did not pay for extended period; that the SCN issued on 17.03.2016 for the period from 01.03.2011 to 31.01.2013 is time barred in view of Section 11A(1)(b) of the Act read with Section 11A(2) and Section 11A(3); that the Hon'ble Supreme Court has decided the issue of limitation of time in the case of Nizam Sugar Factory reported as 2006 (197) ELT 465 (SC).

#### Findings:

7. I have carefully gone through the facts of the case, impugned order, appeal memorandum and records of the personal hearing. The issue involved in the present appeal is whether the demand is hit by bar of limitation in this case or not.

7.1 I find that the appellant No. 1 has vehemently argued that the SCN was time barred as ingredients of suppression and malafide intention were not present in view of their intimation to the department on 10.03.2014 and on the ground that there was ambiguity regarding applicability of Notification No. 1/2011-



only on 27.02.2014 and paid the duty on 06.03.2014 for the period from Feb, 2013 to January, 2014 i.e. for immediately preceding 12 months. Thus, the fact remains that the appellant took more than three years in the name of removing ambiguity with regard to duty liability on their products and to pay Central Excise duty even when there was no change in Notification No. 01/2011-CE dated 01.03.2011 through which levy was imposed @ 1% on goods falling under Chapter 31 of first schedule to the Central Excise Tariff Act, 1985. I also find that the appellant, even after clarification by the department in March, 2011 itself did not pay Central Excise duty from March, 2011. It cannot be any one's plea that a taxpayer will wait till the satisfaction of his own, and will end up with payment of taxes pertaining to shorter period of liability to escape a major portion of tax liability. Thus, the action of the appellant cannot be construed as "mere inaction" but qualifies as a 'positive act of conscious and deliberate withholding of information' with regard to their product being taxable as it fulfills the parameters stipulated in Notification No. 1/2011-CE dated 01.03.2011. Thus, I hold that that paying duty at a later stage after a long period of three years for 12 months only and not paying Central Excise duty for the period from when levy has been imposed, in the guise of ambiguity, does not justify their bonafide, but attract deliberate evasion of paying duty in contravention of existing Law/Notification.

7.3 I further observe that the appellant had referred Assistant Commissioner, C Excise, Division-IV, Paldi, letter dated 14.03.2011. I observe that the said Assistant Commissioner, in response to Gujarat State NPK Granulated Fertilizer Mfg Association's letter NO. GSGFA/10-11/11 dated 08.03.2011, has opined as under: \_

*"Therefore, if the NPK Granulated Mixed Fertilizer, manufactured by you does not fall under the category other than those which are clearly not to be used*

*(a) as fertilizers ; or*

*(b) in the manufacture of other fertilizers, whether directly or through the stage of an intermediate product, the same would presently be exempted from excise duty"*

7.4 I find that the Assistant Commissioner has categorically clarified the conditions mentioned in the notification. Thus, where any exemption is subjected to any condition, fulfillment of such condition cannot be decided in advance and examination of it rests with the assessee only. Hence, withholding payment of Central Excise duty despite Notification issued by the Government of India and despite clarification issued by the Department, the appellant chose not to pay Central Excise duty for 3 long years. It is nothing but non-payment in defiance of law/contravention of law with intent to evade payment of Central Excise duty. In the

era of self assessment regime, theory of universal knowledge cannot be attributed to the department especially where exemption and rate of tax is subjected to condition of end use of the product. Therefore, decision in the case of CCE Vs Chemphar Drugs & Liniments reported as 1989 (40) ELT 276 relied upon by the Appellant is not applicable in the present case.

7.5 I further observe that the appellant has relied upon the Hon'ble Supreme court's decision in the case of M/s. Padmini Products reported as 1989 (43) ELT 195 (S.C.). Relevant portion of the same is reproduced as below for the sake of ready reference.

“...  
 ... Mere failure or negligence on the part of the manufacturer either not to take out a license or not to pay duty in case where there was scope for doubt does not attract the extended limitation unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a license.

7.6 It must be noted that the Hon'ble Apex Court has categorically used the words “Unless there is evidence that the manufacturer knew that goods were liable to duty or he was required to take out a license”. In the present case, it is clear that the appellants were well aware that there was a levy of duty on their products falling under Chapter 31 of the Central Excise Tariff Act, 1985 with effect from 1.3.2011. Many Consultants as well as Department had opined, as per their submissions also that Central Excise duty has been levied w.e.f. 01.03.2011 on their products but even then the appellants did not pay Central Excise duty for three years. Hence, I am of firm view that the above judgment is not applicable in the present case.

7.7 The appellants have relied upon the decision in the case of M/s. Nizam Sugar Factory reported as 2006 (197) ELT 465 (SC). In the present matter, it is not the case that the SCN is issued for one period and proceedings covered in the impugned SCN is for subsequent period proposing extended period. An intimation of payment of Tax for a period cannot be termed as proceedings concluded for all period. Merely writing a letter to the Assistant Commissioner of Central Excise, Ahmedabad by their Association raising a query does not mean that onus had shifted to department, more so when the department gave clarification within 2 weeks to pay duty. In self assessment regime, where exemption and effective rate of duty is subjected to actual use of the product, onus lies on the assessee to determine their duty liability and pay it up.

7.8 The appellants have contended that the department was having knowledge from the day when the appellant had obtained registration on 27.2.2014; they had filed quarterly return for duty involved in March, 2011 for





quarter starting from January, 2014; had paid duty from February, 2013 to January, 2014 along with interest and intimated department about the same on 10.3.2014. Thus, demand served on 17.3.2016 is time barred as the same was required to have been served within one year period from 10.3.2014. I find that the appellant had not obtained Central Excise registration and had not paid Central Excise duty w.e.f. 1.3.2011, even though levy of Central Excise duty had been imposed by Central Government vide Notification No. 1/2011-CE(NT) dated 01.03.2011. The appellant, after obtaining Central Excise registration in February, 2014 paid Central Excise duty for the period from February, 2013 to January, 2014 but did not pay Central Excise duty for the clearances made for the past period. This action on the part of the appellants established their intent to evade payment of Central Excise duty for the period from March, 2011 to January, 2013. Thus, I am of the view that SCN demanding Central Excise duty for the period from March, 2011 to January, 2013 has correctly been issued invoking extended period as provided under Section 11A(4) of the Act. I find that Hon'ble Gujarat High Court in the case of M/s. Neminath Fabrics – 2010 (256) ELT 369 (Guj) has held that:-

".....

16. The termini from which the period of "one year" or "five years" has to be computed is the relevant date which has been defined in sub-section (3)(ii) of Section 11A of the Act. A plain reading of the said definition shows that the concept of knowledge by the departmental authority is entirely absent. Hence, if one imports such concept in sub-section (1) of Section 11A of the Act or the proviso thereunder it would tantamount to rewriting the statutory provision and no canon of interpretation permits such an exercise by any Court. If it is not open to the superior court to either add or substitute words in a statute such right cannot be available to a statutory Tribunal.

17. The proviso cannot be read to mean that because there is knowledge the suppression which stands established disappears. Similarly the concept of reasonable period of limitation which is sought to be read into the provision by some of the orders of the Tribunal also cannot be permitted in law when the statute itself has provided for a fixed period of limitation. It is equally well settled that it is not open to the Court while reading a provision to either rewrite the period of limitation or curtail the prescribed period of limitation.

18. The Proviso comes into play only when suppression etc. is established or stands admitted. It would differ from a case where fraud, etc. are merely alleged and are disputed by an assessee. Hence, by no stretch of imagination the concept of knowledge can be read into the provisions because that would tantamount to rendering the defined term "relevant date" nugatory and such an interpretation is not permissible.

19. The language employed in the proviso to sub-section (1) of Section 11A, is clear and unambiguous and makes it abundantly clear that moment there is non-levy or short levy etc. of central excise duty with intention to evade payment of duty for any of the reasons specified there under, the proviso would come into operation and the period of limitation would stand extended from one year to five years. This is the only requirement of the provision. Once it is found that the ingredients of the proviso are satisfied, all that has to be seen as to what is the relevant date and as to whether the show cause notice has been served within a period of five years therefrom.

20. Thus, what has been prescribed under the statute is that upon the reasons stipulated under the proviso being satisfied, the period of limitation for service of show cause notice under sub-section (1) of Section 11A, stands extended to five years from the relevant date. The period cannot by reason of any decision of a



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Court or even by subordinate legislation be either curtailed or enhanced. In the present case as well as in the decisions on which reliance has been placed by the learned advocate for the respondent, the Tribunal has introduced a novel concept of date of knowledge and has imported into the proviso a new period of limitation of six months from the date of knowledge. The reasoning appears to be that once knowledge has been acquired by the department there is no suppression and as such the ordinary statutory period of limitation prescribed under sub-section (1) of Section 11A would be applicable. However such reasoning appears to be fallacious inasmuch as once the suppression is admitted merely because the department acquires knowledge of the irregularities the suppression would not be obliterated.

(Emphasis supplied)

7.9 In view of the above, I find that the appellant's plea of time barred on this count is also not acceptable and adjudicating authority has rightly held that the appellant has suppressed the facts of the case with intent to evade the duty as discussed in *para supra*. In this circumstances, I am of the considered view that show cause notice is not hit by limitation as extended period is rightly invoked and decisions relied upon by the Appellant is not applicable in light of the facts and circumstances of the case on hand. Thus, the appeal is devoid of merits and is liable to be rejected on this count. I am of the considered view that appellant No. 1 is liable to pay Central Excise duty on fertilizers cleared during March, 2011 to January, 2013 along with interest. I also hold that penalty imposed @ 50% duty amount is proper in terms of Section 11AC (1)(b) of the Act and I uphold the same.

8. The appellant No. 2 has also contended that he was not aware that any of the goods manufactured and cleared by his company was liable to confiscation and hence no penalty under Rule 26(1) of the Rules can be imposed. I find that the appellant No. 1 had cleared the excisable goods fertilizers without payment of duty for the period from March-2011 to January, 2013, even though levy of Central Excise duty imposed on the said goods vide Notification No. 01/2011-CE dated 01.03.2011. When the department conducted search in 2014 on other units manufacturing fertilizers, they obtained Central Excise registration on 27.2.2014 and discharged central excise duty liability for the period from February, 2013 to January, 2014 on 10.3.2014, but even then they did not pay Central Excise duty for the period from 1.3.2011 to 31.1.2013, even though they were aware that the said goods attracted Central Excise duty right from 1.3.2011. The appellant No. 1 did not declare the said facts to the department till the investigations had been initiated. Had the investigation not been conducted, the non-payment of Central Excise duty for the period from March, 2011 to January, 2013 would have remained unnoticed. I also find that appellant No. 2 has admitted in his statement that he was the person concerned with manufacture and sale of excisable goods cleared without payment of Central Excise duty and got invoices issued for clearance of excisable goods without payment of Central Excise duty. Therefore, penalty imposed upon appellant No. 2 is justified, legal and proper.



8. In view of the above facts, I do not find any infirmity in the impugned order and reject the appeals filed by the appellants.

८.१. अपीलकर्ताओ द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

8.1. The appeals filed by the appellants stand disposed off in above terms.

*Santhosh V.*  
12/19/2018  
(कुमार संतोष)  
आयुक्त (अपील्स)

**By Speed Post**

To,

M/s. Everest Fertilizers & Chemicals Private Limited, N.H. No. 8B, Veraval (Shapar), Rajkot - 360 024	मै. एवरेस्ट फर्टिलाइजर्स एवं केमिकल्स प्रा. लिमिटेड, एन.एच. ८-बी, वेरावल (शापर), राजकोट - ३६० ०२४
Shri Renish V. Bhalani (Patel), Director, M/s. Everest Fertilizers & Chemicals Private Limited, N.H. No. 8B, Veraval (Shapar), Rajkot - 360 024	श्री रेनिश वी. भालानी (पटेल), डाइरेक्टर, मै. एवरेस्ट फर्टिलाइजर्स एवं केमिकल्स प्रा. लिमिटेड, एन.एच. ८-बी, वेरावल (शापर), राजकोट - ३६० ०२४

**Copy to:**

1. The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3. The Assistant Commissioner, GST & Central Excise, Division-II, Rajkot.
4. Guard File.

