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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

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealrajkot@gmail.com



संघीय प्रजा

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील संख्या / Appeal / File No	मूल आदेश सं / OIO No	दिनांक / Date
	V2/33/RAJ/2017	06/D/2016-17	29.11.2016

61207 8125 to 6132

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

**RAJ-EXCUS-000-APP-115-2017-18**

आदेश का दिनांक /  
Date of Order: 02.11.2017 जारी करने की तारीख /  
Date of issue: 07.11.2017

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

ग अथ आयुक्त आयुक्त आयुक्त सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जयजयपुर / संधीधाम। द्वारा उपरोक्तित जारी 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 :-**  
M/s. Shah Foils Limited, 1820/1, Sanjet Khatraj Road, Opp : Raj Nagar Bus Stop,Kalol - 382 721Dist : Gandhinagar

इस आदेश(अपील) से संबंधित कोई व्यक्ति विनियमित तरीके में उपरोक्त अधिकारी / अधिकरण 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 अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत विनियमित ढंग में जमा 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) विशेषांक न्यायालय में सम्बंधित सभी मामलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जायी जायित /  
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 बतारा गए अपील के अलावा सभी अपील सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (विस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहामनी भवन असावा अहमदाबाद-380016 को की जायी जायित /  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asawa 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) नियमवली, 2001 के नियम 6 के अंतर्गत निर्धारित फिल सर्वे फॉर्म EA-3 को चार प्रतियों में दर्ज किया जायित जायित। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा आठ लाख की सीमा और लगाया गया जुर्माना, रुपा 5 लाख या उससे कम, 5 लाख रुपा या 50 लाख रुपा तक अथवा 50 लाख रुपा से अधिक है तो कमसे 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करे। निर्धारित शुल्क का अग्रतन संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के पास से किया भी सर्वोच्च न्यायालय के बैंक द्वारा जारी रेकॉर्ड बैंक ड्राफ्ट द्वारा किया जायित जायित। संबंधित ड्राफ्ट का अग्रतन बैंक की उस शाखा में होना चाहिये जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। अथवा आदेश (ए.टी.ओ.) के लिए अग्रतन-पर के साथ 500/- रुपा का निर्धारित शुल्क जमा कराया जायित /  
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/-.

(iv) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर विनियमवली, 1994 के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती पर उसके साथ दिए आदेश के विरुद्ध अपील की जायी हो, उसकी प्रति साथ में संलग्न करे (उनमें से एक प्रति प्रमाणित होनी चाहिये) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की सीमा आठ लाख की सीमा और लगाया गया जुर्माना, रुपा 5 लाख या उससे कम, 5 लाख रुपा या 50 लाख रुपा तक अथवा 50 लाख रुपा से अधिक है तो कमसे 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करे। निर्धारित शुल्क का अग्रतन संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्टार के पास से किया भी सर्वोच्च न्यायालय के बैंक द्वारा जारी रेकॉर्ड बैंक ड्राफ्ट द्वारा किया जायित जायित। संबंधित ड्राफ्ट का अग्रतन बैंक की उस शाखा में होना चाहिये जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। अथवा आदेश (ए.टी.ओ.) के लिए अग्रतन-पर के साथ 500/- रुपा का निर्धारित शुल्क जमा कराया जायित /  
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 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) विद्यमान अधिनियम, 1994 की धारा 85 की उप-धाराओं (2) एवं (2A) के अंतर्गत टैक्स की राशि अपील, सेहतकर विधायिका, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित धारा S.T./7 में की जा सकती एवं उसके साथ अप्रत्यक्ष केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क, इत्यादि आदेश की प्रतियाँ संलग्न की जायेंगी। (जहाँ से एक प्रति प्रेषित होनी चाहिए) और अप्रत्यक्ष टैक्स सहायक आयुक्त अथवा उपसहायक, केन्द्रीय उत्पाद शुल्क सेहतकर, को अपील के आवेदनपत्र के अंतर्गत टैक्स की राशि का निवेदन देना वाले आदेश की प्रति भी साथ में संलग्न करनी होगी।  
The appeal under sub-section (2) and (2A) of the section 85 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 सेहतकर अपील के प्रावधान (सेहतकर) के प्रति अपील के अंतर्गत में केन्द्रीय उत्पाद शुल्क अधिनियम 1994 की धारा 35ए के अंतर्गत जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेहतकर को भी लागू की गई है। इस आदेश के प्रति अपील के प्रावधान में अपील करने समय उत्पाद शुल्क/सेहतकर का राशि के 10 प्रतिशत (10%), जब साथ एवं जुड़ोना विवादित है, या जुड़ोना, जब केवल जुड़ोना विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपीलित टैक्स राशि दस करोड़ रुपए से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेहतकर के अंतर्गत "जमा किए गए शुल्क" में विस्था शामिल है।  
(i) धारा 11 डी के अंतर्गत रकम  
(ii) सेहतकर जमा की गई राशि  
(iii) सेहतकर जमा निधायिका के नियम 4 के अंतर्गत टैक्स रकम  
- बशर्त कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के अंतर्गत में पूर्व किसी अपील के प्रावधानों के तहत विवादित राशिगत टैक्स की 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 be 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 Central Credit taken,  
(iii) amount payable under Rule 5 of the Central 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 वारंटिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पारुक्त के अंतर्गत अथवा सविध, भारत सरकार, पुनरीक्षण आवेदन ईकाई, किराया सहायक, राजस्व विभाग, लोदी भवन, जीएन टैप सदन, समूह ब्लॉक-110001, को किया जाता 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, Jawan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following cases, governed by first proviso to sub-section (1) of Section-35B ibid:  
(i) यदि ग्राहक के किसी नुकसान के मामले में, जहाँ नुकसान किसी ग्राहक को किसी कारखाने में अथवा गृह के परामर्श के दौरान या किसी अन्य कारखाने या फिर किसी एक अथवा गृह से दूसरे अथवा गृह परामर्श के दौरान, या किसी अथवा गृह से या अथवा में ग्राहक के परामर्श के दौरान, किसी कारखाने या किसी अथवा गृह में ग्राहक 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 एक या सेहत कर निर्यात का वह ग्राहक के विनिर्माण में प्रयुक्त अथवा ग्राहक पर भी गई केन्द्रीय उत्पाद शुल्क के छूट (रीबैट) के मामले में, जो भारत के बाहर किसी एक या सेहत कर निर्यात की गयी है।  
In case of rebate of duty of excise on goods exported to any country or territory outside India of an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.  
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को भेजा गया है।  
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.  
(iv) मुनिस्सिद्ध उत्पाद के उत्पादन शुल्क के अंतर्गत के लिए जो इच्छा के लिए इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत सत्य की गई है और ऐसे आदेश जो अप्रत्यक्ष (अपील) के द्वारा वित्त अधिनियम (सं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई तरीक अथवा सहायिका पर या बट में घोषित 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 प्रतियाँ साथ सहायक EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) विधायिका, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस आदेश के संघर्ष के 3 महीने के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35-EE के तहत निर्धारित शुल्क की आधारी के साथ के लिए 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 O.I.O. 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 आधारी 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 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 दंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की विद्या यही सत्य हो बचने के लिए परामर्शित अपील के प्रावधानों को एक अपील या केन्द्रीय 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 Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scripps work of excising Rs. 1 lakh fee of Rs. 100/- for each.  
(E) परामर्शित न्यायालय शुल्क अधिनियम, 1975 के अनुसूची (1) 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 सेहतकर अपील के प्रावधान (संघर्ष विधि) विधायिका, 1982 में उल्लिखित एवं अन्य संबंधित मामलों की प्रक्रियाएँ करने वाले विधायिका की और से धारा सम्बंधित 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) उपरोक्त अपील के प्रावधानों को अपील दायित्व करने से संबंधित जानकारी, विस्तृत और अधीनस्थ प्रावधानों के लिए, अपीलकर्ता विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) की 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 instant appeal has been filed by M/s. Shah Foils Ltd. 1820/1, Santej Khatraj Road, Oppp. Raj Nagar Bus Stop, Near GEB Sub-station, Taluka – Kalol, Dist. Gandhinagar, Gujarat - 382 721 (hereinafter referred to as "the appellant" or "M/s. SFL") against Order-in-Original No. 06/D/2016-17 dated 29.11.2016 (hereinafter referred to as "the impugned order") passed by the Deputy Commissioner, Central Excise Division, Morbi (hereinafter referred to as "the lower adjudicating authority").

2. Briefly stated facts of the case are that the officers of Directorate General of Central Excise Intelligence, Mumbai Zonal Unit visited the factory premises of Appellant on 10.07.2012 and carried out search of the various premises of the appellant. During search, various incriminating documents were recovered and further statements of various personnel of the appellant were recorded, which revealed that the appellant was only issuing invoices, without physically dispatching the excisable goods mentioned in the invoice and thus passed on ineligible Cenvat Credit to various persons by issuing excisable invoices only and for maintaining record of such type of transactions, they created a ledger account under heading "Billed Sales".

2.1 The lower adjudicating authority *inter alia*, passed the impugned order confirming the charges leveled in the show cause notice, as under :-

"23, Thus, in view of the above discussion and findings, I am of the considered view that as no Cenvatable goods were supplied by M/s. SFL to M/s. CCPL though M/s. SMDPL under the said invoices, and therefore the amount of Cenvat Credit availed by M/s. CCPL on the impugned Invoices Nos. 282/09.03.2012, 283/09.03.2012, 315/31.03.2012 and 316/31.03.2016 of M/s. SMDPL, becomes legally ineligible for availing the credit and therefore, the total amount of Cenvat credit i.e. Rs. 4,62,986/- availed by M/s. CCPL during the period of March, 2012, read with Section 11A(4) of the CEA, 1944 along with interest under Rule 14 of CCR, 2004, read with Section 11AA of the CEA, 1944. Further, as M/s. CCPL had already paid the amount of Rs. 4,62,986/- towards their Cenvat credit / duty liability and Rs. 2,29,235/- towards their interest liability thereupon, the same are required to be appropriated against their duty and interest demand respectively.

23.3 I further observe that M/s. SFL, as discussed earlier, have merely supplied Central Excise Invoice to M/s. CCPL (through SMDPL, a registered Dealer) without delivering corresponding goods to them, on the basis of which M/s. CCPL had taken and utilized inadmissible Cenvat credit under the CCR,

2004. Shri Kartik R. Shah, Director of M/s. SFL in his statement dated 28.01.2014 admitted that all invoices as reflected in M/s. SFL's ledger account "Bill Sales" issued to different parties were issued without delivering the goods mentioned therein. This act, on the part of M/s. SFL have rendered themselves liable to penal action under Rule 26(2) of the CCR, 2002."

2.2 The Show Cause Notice was decided against by the lower adjudicating authority who imposed penalty of Rs. 4,62,986/- on the appellant under Rule 26(2)(ii) of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules") for aiding and abetting offence of passing on the Cenvat credit without physically supplying the excisable goods mentioned in the duty paying documents.

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

(i) That allegation of clandestine clearance made by the Department is not supported by evidence and cannot be based on statement or entries in books of accounts found at the third party premises and to support their above contention they relied upon the decision of Hon'ble Gujarat High Court in the case of M/s. Dhruve Dyestuff Pvt. Ltd. reported as 2016 (339) ELT A131(Guj); that findings at Para 20.1 in the impugned order that the appellant has a sister concern viz., M/s. Sankalp Foils Pvt.Ltd. and the registered office of the appellant at the same address is incorrect as M/s. Sankalp Foils Pvt. Ltd. is not their sister concern; that findings at Para 20.1 of the impugned order that the hand written / computer sheets recovered from M/s. Ramesh Shah, Director of the appellant and from Shri Manojbhai were places other than the office of the appellant which itself created doubt regarding recording and storage of daily transactions at places other than the registered premises; the hand written / computer sheets seized from the lottery/ice cream stall of Shri Manoj Tanna and from the lockers at Venilal Safety Vaults Pvt. Ltd. did not belong to the appellant; that merely because the documents were found at places other than the office cannot be a ground to establish *mens rea*; that the findings at Para 22 of the impugned order that they passed on ineligible Cenvat Credit to other parties by issuing sales invoices without actual physical sale of the goods and Director of one such party, M/s. Swastik Metal Distributors Pvt. Ltd., in his statement dated 17.11.2014 accepted the said fact; that no goods which were manufactured by the appellant were sold to M/s. Swastik Metal Distributors Pvt. Ltd.; that findings of the lower adjudicating authority are not correct as the allegation made by relying upon a statement are required to be supported by evidence other than the statement in view of the decision of the Hon'ble CESTAT in the

cases of M/s. Kuber Tobacco India Ltd. reported as 2016(338) ELT0113 (Trib-Del); Jindal Drugs Pvt. Ltd. reported as 2016(340)ELT67(P&H); J & K Cigarettes Ltd. reported as 2009 (242) ELT 189 (Del) and M/s. Dhakad Metal Corporation reported as 2015(330)ELT561(Tri-Ahd).

(ii) That M/s. Clayris Ceramic Pvt. Ltd., Morbi (hereinafter referred to as "M/s. CCPL") i.e. eventual receiver of the excisable invoice, have not admitted to issuing invoices without actual physical sale of goods; that the findings of the lower adjudicating authority are incorrect as they have cleared the goods along with the Central Excise Invoice.

(iii) That no penalty is imposable on the appellant under Rule 26 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules") on the person who issue the invoice on the basis; that M/s. CCPL availed Cenvat Credit on the basis of invoices issued by the dealer, viz., M/s. Swastik Metal Distributors Pvt. Ltd., Vadodara, a registered excise dealer (hereinafter referred to as "M/s. SMDPL") and an another noticees; that to invoke provisions of Rule 26(2) of the Rules, the person ought to have issued or abetted in issuance of an excisable invoice or other document without delivery of goods on the basis of which the user of said invoice is likely to take or has taken any ineligible Cenvat credit; that it is not established that the goods were received by M/s. SMDPL or M/s. CCPL; that Shri Kumparam Patel of M/s. SMPDL in his statement dated 17.11.2014 stated that the broker on whom they placed an order for supply of goods, supplied the goods along with invoices; that the appellants cannot be said to have abetted the issuance of excisable invoices on the basis of which the user has taken ineligible Cenvat credit; that Shri Uday Patel of M/s. CCPL in his statement dated 16.12.2014 stated that out of three invoices received by M/s. CCPL from M/s. SMDPL they availed Cenvat credit on only two of the invoices and the goods received under one invoice were used to make platform for installation of machinery and thus not eligible for Cenvat credit; that in view of statement of Shri Uday Patel of M/s. CCPL the goods were actually delivered by M/s. SMDPL, along with their three invoices to M/s. CCPL and M/s. CCPL availed Cenvat credit only on two invoices as the goods received under third invoice were not eligible for Cenvat Credit; that in view of above M/s. CCPL had not availed ineligible Cenvat Credit and consequentially the imposition of penalty on the Appellant under Rule 26(2) of the Rules is not sustainable; that the appellant cannot be held responsible for any acts of contravention by the broker, if the broker diverted the goods to some other person and relied upon the decision of Hon'ble Tribunal in the case of Poneeri Steel Industries reported as 2008 (221) ELT 290 (Tri.)

and M/s. Woodmen Industries reported as 2004 (164) ELT 339 (Tri.) and confirmed vide 2004(170)ELTA307(S.C); that *mens rea* on the part of the appellant has not been proved and therefore imposition of penalty under Rule 26 of the Rules does not arise. To support their above contention they relied upon the case of Hindustran Steel Ltd. reported as 1978(2) ELT (J159) SC and Prompt Castings Pvt. Ltd. reported as 2012(284)ELT641(Cal.)

4. Personal hearing in the matter was fixed on 12.10.2017, however the appellant vide letter dated 09.10.2017 requested to decide the appeal based on the grounds of appeal and waived personal hearing. Personal Hearing notice was also sent to the Department, however none appeared.

#### **Findings :-**

5. I have carefully gone through the facts of the case, impugned order, grounds of appeal. The issue to be decided is whether the impugned order imposing penalty of Rs. 4,62,986/- under Rule 26(2)(ii) of the Rules on Appellant is correct or not.

6. I find that the Show Cause Notice has alleged that Cenvat credit has been passed on by the appellant by issuing excise invoices without physically accompanying the excisable goods. The lower adjudicating authority disallowed Cenvat Credit to M/s. Clayris Ceramics Pvt. Ltd., Morbi – 363 642 i.e. the receiver of the Cenvatable documents and imposed penalties under Rule 26(2) of the Rules on two upstream entities in the chain, who purportedly passed on Cenvat credit to M/s. Clayris Ceramics Pvt. Ltd. and the appellant is one such entity. It is important to note that other two noticees, namely M/s. Clayris Ceramics Pvt. Ltd. and M/s. Swastik Metal Distributors Pvt. Ltd., have accepted the impugned order dated 09.12.2016 and not preferred appeal before this appellate authority.

6.1 The appellant relying upon Section 9D(1) of the Central Excise Act, 1944 contended that a case cannot be made out only on the basis of confessional statement, without any corroborative documents.

6.2 The lower adjudicating authority has imposed penalty on the appellant under Rule 26(2)(ii) of the Rules, which is reproduced as under for better appreciation: -

*"(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made there under like claiming of*

*CENVAT credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."*

6.3 The lower adjudicating authority has observed as below while imposing penalty under Rule 26(2)(II) of the Rules on the Appellant :-

" 20. I observe that on the basis of the intelligence to the effect that M/s. SFL are engaged in the clandestine clearances of the manufactured goods, the DGCEI, MZU, Mumbai, had searched various premises on 10.07.2012, which were directly or indirectly related to M/s. SFL and recovered various incriminating documents under regular panchanama and during the course of investigation statements of various persons related to the case were recorded. On going through the facts as available on record, I observe that the investigation carried out in the case on hand revealed that M/s SFL was also engaged in supplying of invoices only, without accompanying the actual goods mentioned therein and thus, they had passed on ineligible Cenvat credit to their various buyers / customers and for maintaining the record of such type of transactions, they had created an ledger account named "Bills Sales". During the course of investigation, it revealed that the entries as mentioned in the ledger account of "Bills Sales" were having no counter entries reflecting the receipt of payment pertaining to the sale of goods in the relevant party's ledger account, but instead Journal Voucher Entries have been passed in a special ledger account "Smi(Cash) created for the purpose, wherein entries relating to all clandestine transactions effected by M/s SFL has been passed.

20.1 I also observe that M/s SFL was having a sister concern viz. M/s Sankalp Foils Pvt. Ltd., a registered dealer with the department, which was engaged in trading of the goods manufactured by M/s SFL. The registered office of M/s SFL and the trading office of M/s SEPL are at the same address. I further observe that the hand written / computer printed documents recovered in loose form / in bundle form, from Shri Rameshbhai M. Shah director of M/s SFL and Shri Manojbhai (having premises opposite to the office of M/s SFL), from the places other than the office of M/s SFL, itself creates doubt as to why those papers on which the daily transactions were recorded were kept at some other places in spite of having their own office and residence, which clearly indicated the mens rea of M/s SFL.

20.2 Also, by way of various statements having evidential value, recorded during the course of investigation, I observe that it has been brought on record by way of depositions of various key persons involved in the instant case that

*M/s SFL was engaged in clandestine clearances of their manufactured goods just by issuing Cervatable invoices only. I further observe after completion of the investigation in the instant case, a show cause notice has also been issued to M/s SFL, as mentioned at para (7) of the show cause notice dated 30.04.2015. Thus, I do not find it fit to go in deep for analyzing the facts related to clandestine clearances made by M/s SFL as the same is not the case on hand for adjudication with me."*

6.4 I also find that in Para 22 at Page 17 of the impugned order, the lower adjudicating authority has found :

*"..... Further quite importantly, I find that such facts, as discussed hereinabove, have also been accepted by Shri Uday H. Patel, Director of M/s. CCPL in his statement dated 16.12.2014 and in agreement to the facts, M/s. CCPL had already paid/reversed the entire amount of Cervat credit so availed on such invoices, alongwith the applicable interest....."*

6.5 I further find that Shri Kartik R. Shah, Director of the appellant in his statement recorded on 28.01.2014 has categorically admitted that all the invoices reflected in Appellant's ledger account named, "Bill Sales" issued to different parties were issued without delivering the excisable goods mentioned therein. Therefore, contentions of Appellant now that the case cannot be made out based on statements of other is not tenable.

7. I find that the inculpatory statements recorded during investigation have not been retracted. It is a settled position of law that a statement recorded under Section 14 of the Central Excise Act, 1944 are evidences and carry enormous weight and cannot be discarded as the appellant is trying them to be treated like. I also find that M/s. SMDPL, another dealer and M/s. CCPL actual user, who have also been found indulging in offence and, imposed penalty have not approached this authority for any relief and have accepted the consequences of their illegal acts. Under the given facts and circumstances, I find that the contentions raised by the appellants and the case-laws cited by them are of no avail.


8. I find that the admission of offence duly recorded as statement under Section 14 of the Central Excise Act, 1944 has evidentiary value and there have been entries of these under Billed Sales ledger – a corroborative documentary evidence. In view of the above, I hold that the appellant has aided and abetted the act of passing on Cervat credit without supplying the goods mentioned in the invoices - duty paying documents. I, therefore, do not find any infirmity in the impugned order imposing penalty upon the appellant under Rule 26 of the Rules.



9. In view of facts discussed above, I reject the appeal filed by the appellant.

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

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

  
(कुमार संतोष)  
आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Shah Foils Ltd. , 1820/1, Santej Khatraj Road, Oppp. Raj Nagar Bus Stop, Near GEB Sub-station, Taluka – Kalol, Dist. Gandhinagar, Gujarat - 382 721.	मेसर्स शाह फोइल्स लिमिटेड, 1820/1, सनतेज खटराज रोड., Oppp. राज नगर बस स्टॉप, Near GEB सब स्टेशन, तालुका - कलोल, गांधीनगर, गुजरात - 382 721.
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**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, Morbi.
- 4) The Range Superintendent, GST & Central Excise, Morbi Division.
- 5) Guard File.