



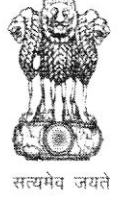
::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::  
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

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: 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
	V2/24/EA2/RAJ/2016	R/495/2016-17	26.09.2016

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

**RAJ-EXCUS-000-APP-117 -2017-18**

आदेश का दिनांक / Date of Order:	<b>06.11.2017</b>	जारी करने की तारीख / Date of issue:	<b>08.11.2017</b>
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**कुमार सतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

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., Lodhika GIDC, Kalawad Road,,Metoda,  
Taluka - Lodhika,,Rajkot-360021

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/  
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

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

- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेनटेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, 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
- धारा 11 डी के अंतर्गत रकम
  - सेनवेट जमा की ली गई गलत राशि
  - सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी 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 :
- amount determined under Section 11 D;
  - amount of erroneous Cenvat Credit taken;
  - amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) **भारत सरकार को पुनरीक्षण आवेदन :**  
**Revision application to Government of India:**  
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
- 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
  - 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 छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
  - 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.
  - सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी केडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं।/ Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.
  - 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 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.
  - पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए। The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
  - 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 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 Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
  - यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.
  - सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित 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.
  - उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी 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 present appeal has been filed by the Department (hereinafter referred to as "the appellant") against Order-in-Original No.R/495/2016-17 dated 26.09.2016 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise, Division-I, Rajkot (hereinafter referred to as "the adjudicating authority").

2. Brief facts of the case are that M/s. Pukar Tobacco Processors & Packers, Plot No. G/1039-1040, Lodhika G.I.D.C., Industrial Estate, Kalawad Road, Metoda, Taluka: Lodhika - 360 021, Dist.:Rajkot (hereinafter referred to as the "respondent") are registered with Central Excise Department as they are engaged in manufacturing of Unmanufactured Branded Tobacco and clearing the same for home consumption. The respondent had filed refund claim of Rs. 39,69,548/- on 06.09.2016 alongwith copies of challans evidencing payment of duty of Rs. 35,91,000 as compound levy for the month of December, 2015, as they intended to restart production of 5 grams pouches of unmanufactured branded tobacco bearing brand name "Pukar Punapatti" of RSP Rs. 3/- from 01.12.2015 through FPS packing machine.

2.1 However, investigation by Preventive Branch, Rajkot reveals that the respondent had utilized FFS packing machine in manufacturing of unmanufactured branded tobacco pouches of 8 & 10 grams having RSP of Rs. 5/- named "Pukar Poona Patti" and "Pukar Calcutti Patti". Accordingly a case was booked and the respondent was asked to pay monthly duty Rs. 55,85,000/- for the month of December, 2015. They paid differential amount of Rs. 20,00,000/- as duty vide challan No. 5/14.12.2015 Rs. 5,00,000/-, No. 4/01.01.2016 Rs. 5,00,000/- and 155/21.01.2016 Rs. 10,00,000/-.

2.2 A Show Cause Notice No. V.84/AR-IV/Div-I/RJT/ADC(BKS)/39/2016-17 dated 18.05.2016 was issued which was adjudicated vide Order-In-Original No. 01/ADC/RKC/2016-17 dated 22.08.2016 by the Additional Commissioner, Central Excise, Rajkot under which redemption fine of Rs. 15,000/- and penalty of Rs. 8,000/- was imposed on the respondent and personal penalty of Rs. 8,000/- was imposed upon Shri Nilesh Haribhai Sejjal, Partner of the respondent which were paid. The respondent paid Rs. 20,00,000/- towards duty liability of Rs. 19,94,000/-, interest of Rs. 32,055/- and penalty @15% amounting to Rs. 2,99,100/-

2.3 The respondent carried out manufacturing activities from 01.12.2015 to 09.12.2015 i.e. for 9 days, however, FFS machine remained sealed for the remaining days from 10.12.2015 to 31.12.2015 i.e. 22 days. They filed refund claim as

abatement in case of non-production of goods in terms of Para 10 of the Notification No. 11/2010-CE(NT) dated 27.02.2010 (hereinafter referred to as the "said notification").

3. The adjudicating authority passed the impugned order vide which he sanctioned refund claim of Rs. 39,69,548/- under Section 11B of the Central Excise Act, 1944 (hereinafter referred to as "the CEA") read with the "Chewing Tobacco and Unmanufactured Tobacco Machines (Capacity Determination and Collection of Duty) Rules, 2010" issued vide Notification No. 11/2010 dated 27.02.2010 (hereinafter referred to as "the Rules") as detailed under:

Duty paid on goods in advance for December, 2015	:	55,91,000/-
Duty liability for 9 working days from 01.12.2015 to 09.12.2015 (9 days X 55,85,000/-/31)	:	16,21,452/-
Refund amount eligible for 22 days from 10.12.2015 to 31.12.2015	:	39,69,548/-

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

4.1 The appellant relied upon Rule 4, 5, 6, 7, 9, 10, 11 and 13 of the Rules. After narrating the above procedures in terms of the said notification, the appellant stated that in the present case, a search was carried out by the officers of Central Excise Preventive Section, Rajkot, at the factory premises of the Respondent on 11-12-2015 in respect of evasion of Central Excise duty.

4.2. It was revealed during the search that the Respondent had installed one FFS automatic single track packing machine (without lime tube) for packing of tobacco pouches of 5 gms having MRP Rs. 3 for which production capacity is of 180 to 280 pouches/minute for which the requisite declarations have also been filed before the department which was found duly sealed by the Central Excise department on 10-12-2015, having the signature of Jurisdictional Central Excise Range officers on it.

4.3 However, during the search, the Unmanufactured Branded Tobacco pouches of "Pukar Poona Patti " and "Pukar Calcutti Patti" of 8 gms and 10 gms respectively, having MRP of Rs. 5.00 per pouch were found to have been manufactured through the FFS Automatic machine which was also admitted by the Respondent that they had also manufactured and packed the pouches of



Unmanufactured branded tobacco of PUKAR brand of 8 gms (Poona Patti) and 10 gms (Calcutti Patti) having MRP of Rs. 5.00 per pouch through the FFS (Form, Filling and Sealing) automatic single track packing machine by way of changing cylinders and other minor equipments of the said machine. It was also found that for clearance of MRP of Rs. 5.00 per pouch, none of the declaration was filed by the Respondent before the department nor any procedure in respect of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 [Notification No. 11/2010-C.E.(N.T.), dated 27.02.2010] was followed by the Respondent.

4.4. The Central Excise duty liability in terms of Table - 2 of Notification No. 05/2015-CE, dated, 01-03-2015) on the Unmanufactured branded tobacco having retail sale price of Rs. 5.00 - without lime tube/lime pouches comes to Rs. 55.85 lacs - per packing machine per month (Sl. No. 6 of Table-2) whereas, the Respondent had paid and discharged the Central Excise duty liabilities for the month of December'2015 to the tune of Rs. 35.91 lacs only i.e. on Unmanufactured branded tobacco pouches having retail sale price of Rs. 3.00, and thus, upon being caught by the department in evasion of Central Excise Duty, the Respondent had paid the short paid Central Excise duty to the tune of Rs. 19.94 lacs voluntarily, unconditionally and without any protest.

4.5 A Show Cause Notice bearing No. V.84/AR-IV/DIV-I/RJT/ADC(BKS)/39/2016-17, dated 18-05-2016 was accordingly issued to the Respondent and the matter was also decided vide the OIO No. 01/ADC/RKC/2016-17, dated 22-08-2016 passed by the Additional Commissioner, Central Excise & Service Tax Commissionerate, Rajkot.

4.6 However, after receipt of the said Show Cause Notice and before issuance of the said Order-In-Original, the Respondent had, vide letter dated 09-06-2016, admitted their Central Excise duty liabilities and paid an amount of Rs. 20.00 Lakhs during the course of investigation against differential duty liabilities of Rs. 19.94 Lakhs. It was informed by them that on 08-06-2016, they have also paid interest amounting to Rs. 32,055/- applicable on delayed duty payment & 15% penalty of Rs. 2,99,100/- involved in the said suppressed duty payment and requested to conclude the proceeding of Show Cause Notice under Section 11AC(1)(d) of the Central Excise Act, 1944. Thus, the said act of the Respondent was nothing but the acceptance of their misstatement and admittance of the Central Excise duty evasion made by them.

4.7 The provisions of rules/notifications, the conditions stipulated in the relevant rules/notifications and the criteria defined for mandatory obligations to be fulfilled by the assesseees are the procedures which are to be followed by the

assesseees if they intend to get any benefits stipulated under the respective notification. Opposite to that, the benefits granted under the rules cannot be awarded where the additional amount of duty / tax became recoverable from the assesseees on account of non-levy or non-payment or short-levy or short-payment by reasons of fraud or collusion or willful mis-statement or suppression of facts or contravention of any of the provisions of the Central Excise Act or of the rules made thereunder with the intent to evade payment of duty.

4.8 The appellant submitted that Respondent has totally disregarded the provisions/ conditions/obligatory-mandatory aspects and failed to follow any procedures as stipulated in the aforesaid notification so far as the subject unearthed duty evasion i.e. their Central Excise duty liability in terms of Table - 2 of Notification No. 05/2015-CE, dated, 01-03-2015) on the Unmanufactured branded tobacco having retail sale price of Rs. 5.00 - without lime tube/lime pouches comes to Rs. 55.85 lacs - per packing machine per month (Sl. No. 6 of Table-2) and thereby had evaded the Central Excise duty to the tune of Rs. 19.94 lakhs, which they were supposed follow in terms of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 [Notification No. 11/2010-C.E.(N.T.), dated 27.02.2010] such as : -

- **Declaration of quantity deemed to be produced in terms of Rule 5;**
- **Declaration to be filed by the manufacturer in terms of Rule 6 specifically if they intended to any subsequent changes with respect to any of the parameters which has been declared by him and approved by the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, in terms of sub-rule (2), such as changes relating to addition or removal of packing machines in the factory or making alterations in any part or section of the approved premises or in the number of machines to be used in such part or section or commencing manufacture of goods of a new retail sale price or discontinuation of manufacturing of goods of existing retail sale price, and similar other details, he shall file a fresh declaration to this effect at least three working days prior to such subsequent changes to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, who shall approve such fresh declaration and re-determine the annual capacity of production following the procedure specified in sub-rule (2).**
- **Calculation of correct duty payable by them in terms of Rule 7;**
- **Manner of payment of duty and interest in terms of Rule 9 ;**
- **Declaration of Retail sale price to be declared on the package in terms of Rule 11;**
- **Addition or removal of packing machines and other restrictions in terms of Rule 13;**

4.9 However, despite not following the entire proceedings as stated above, the Respondent had attempted for evasion of Central Excise duty and suppressed the facts from the department which was unearthed after visit by the Officers of

Preventive Section to the unit. The Respondent, admitting their act of duty evasion, had voluntarily and unconditionally paid the differential amount of duty pertaining to the month December-2015 in terms of the said notification, the interest and the penalty @15% on the said differential amount. However, subsequently, the Respondent has claimed the benefit in terms of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010 [Notification No. 11/2010-C.E.(N.T.), dated 27.02.2010 i.e. in terms of Rule 10 of the said rules prescribed for refund/abatement in case of non-production of goods.

4.10 The appellant stated that Rule 10 itself speaks interalia that “..the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period,...” which was also not followed by the Respondent.

4.11 Thus, it is evident from the said notification and the rules framed there under that the abatement cannot be refunded if it is found that a manufacturer has manufactured goods of those retail sale prices, which have not been declared by him in accordance with the provisions of these rules or has manufactured goods in contravention of his declaration regarding the plan or details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or Section.

4.12 Further, at Para 8 of the impugned refund order, the duty paid in advance for December-2015 has been shown as Rs. 55,91,000/- and the refund was sanctioned accordingly whereas, as per the Sl. No. 6 of Table -2 of Notification No. 5/2015-C.E., dated, 01-03-2015, the Rate of Duty per packing machine for Unmanufactured Tobacco (Without Lime Tube/Lime Pouches) - having sale price exceeding Rs. 4.00 but not exceeding Rs. 5.00 was Rs. 55.85 Lakhs per month. The additional payment made by the Respondent of Rs. 6,000/- cannot be treated as the refund as abatement under Rule 10 of the said notification and even if any refund arises for said excess payment of Rs. 6,000/-, the same should have been claimed and refunded in terms of Section 11B of the Central Excise Act, 1944 and the provisions so made for such excess payment of duty.

4.13 The appellant stated that the refund of Rs. 14,15,097/- out of the total sanctioned amount of refund of Rs. 39,69,548/-i.e. to the extent to the differential

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duty amount of Rs. 19,94,000/- (Rs. 19,94,000/- X 9/31) which was paid consequent to the investigation initiated, sanctioned vide the impugned order by the lower adjudicating authority and the refund amount of Rs. 6,000/- additional taken into calculation by the refund sanctioning authority is not legal and proper.

5. The respondent has filed Memorandum of cross objections (received in this office on 06.02.2017) wherein they submitted that the impugned appeal is not sustainable as the Memorandum of Appeal filed in EA-2 as well as certificate of verification is not signed by the appellant. That even otherwise, the impugned appeal is not sustainable on merits as can be seen from grounds of appeal that reviewing authority is not clear on the provisions of the rules and tried to mix the issues of refund and procedure to be followed for making payment etc. The reviewing authority intentionally twisted the same. The reviewing authority has re-produced the provisions of the Rules. The appellant in para 9 and 10 of the authorisation has reproduced the provisions of Rule 10 and made allegations which are far away from the reality in as much as they have filed requisite intimation and followed rules and regulations.

5.1 The respondent submitted that while collecting and appropriating the duty paid by them, the department has considered the said amount as duty within the meaning of said notification and rules but while refunding the same department tries to consider the same is not paid under the said rules or paid in contravention of the said provision which is merged after issue of order and concluding the proceedings of demand. That for trivial procedural lapse if any, substantial benefit cannot be denied.

5.2 The impugned appeal proposes to deny refund of Rs. 6000/- paid in excess to the amount payable under the said rules on the ground that it was additional payment and the same cannot be treated as refund in terms of Rule 10 of the said Rules as the respondent can claim its refund under Section 11B of the CEA. It was that the entire refund including Rs.6000/- is sanctioned and paid under Section 11B only, which is evident from the order portion.

6. The personal hearing in the matter was attended by Shri Pankaj D. Rachchh, who reiterated the submissions made by them in their Memorandum of cross objections; he submitted that the respondent had correctly declared start of production and closure; that they did not clear anything clandestinely; that the goods found without declaration was actually of trail production as stated during reply to SCN; that refund sanctioned by AC is as per law as provided under Rule 10 of the Rules; that duty had been paid due to insistence of the department; that the order passed by AC is correct and hence appeal should not be allowed. No one appeared



from the Department despite personal hearing notices sent to them.

**FINDINGS:**

7. I have carefully gone through the facts of the case, the impugned order, Appeal Memorandum, Memorandum of cross objections and written and oral submissions of the Respondent. The limited issue to be decided in this appeal is as to whether the refund sanctioned under Section 11B of the Central Excise Act, 1944 readwith the Rules vide impugned order is legal and proper, or otherwise.

8. I find that the respondent vide their letter dated 25.11.2015 addressed to the Assistant Commissioner, Central Excise Division-I, Rajkot had filed intimation regarding de-sealing of FFS pouch packing machine to commence production of 5 gm. pouches of unmanufactured branded tobacco of Pukar Punapatti having M.R.P. of Rs. 3.00, Supreme Pukar Punapatti having M.R.P. Rs. 3.00 and Pukar Calcutti Tobacco having M.R.P. of Rs. 3.00 from 01.12.2015 on Form Filling & Sealing Pouch Packing Machine as per declaration Form No. 1 filed by them on 30.10.2015. Accordingly, the FFS machine was de-sealed by the jurisdictional Range Superintendent on 01.12.2015. The respondent vide their letter dated 04.12.2015 addressed to the Assistant Commissioner, Central Excise Division-I, Rajkot filed intimation regarding uninstalling and sealing of FFS pouch packing machine to stop production of notified goods, Unmanufactured Branded Tobacco on FFS pouch packing machine from 10.12.2015. The appellant had stated that their duty liability is only for 9 days i.e. 01.12.2015 to 09.12.2015, whereas they have paid duty in terms of Sr. No. 4 of the Table-2 of Notification No. 05/2015-CE dated 01.03.2015, as detailed below and also declared the same in FORM-2 on 07.12.2015 before the Superintendent, Central Excise, Range-IV, Rajkot:

Date	Challan No.	Amount of Duty
05.12.2015	02215	897750
05.12.2015	02227	897750
05.12.2015	02242	897750
05.12.2015	02254	897750
	TOTAL	3591000

In FORM-2, the Noticee has declared that one FFS Pouch Packing Machine has been de-sealed and installed at their factory premises.

8.1 The respondent vide their letter dated 02.03.2016 had requested to conclude the inquiry initiated against them and not to issue Show Cause Notice showing agreement with the outcome of the inquiry. They further stated that so far as Central Excise duty for the month of December,2015 is concerned they had paid Rs.

35,91,000/- for the goods having MRP of Rs. 3.00 for the FFS machine without lime tube/lime pouch. Having been accepted the outcome of the investigation for the goods manufactured having MRP of Rs. 5.00 per pouch, the duty liability, as per Notification No. 05/2015-CE dated 01.03.2015, is Rs. 55.85 lakhs and therefore, they paid differential duty of Rs. 20.00 Lakhs voluntarily before the Department. They were also willing to pay interest as applicable on the differential duty alongwith penalty @15% on the evaded amount of Rs. 19.94 lakhs. The respondent requested to conclude the inquiry initiated against them and show cause notice may not be issued to them as they were waiving the show cause notice and ready to pay dues as stated above. However, the case of respondent does not fulfil the conditions as stipulated in the Board's letter F.No. 137/46/2015-Service Tax dated 18.08.2015, hence the request of the respondent was not accepted by the Department even though the respondent paid dues as discussed in above para.

8.2 On going through the records, I find that the respondent had filed intimation for production of goods having MRP of Rs. 3.00 per pouch and accordingly paid Central Excise duty of Rs. 35,91,000/- in terms of Notification No. 05/2015-CE dated 01.03.2015 (Sr. No. 4 of Table-2), whereas investigation established (also admitted by the respondent) that they had also manufactured the goods having MRP of Rs. 5.00 per pouch without any intimation to the Department whatsoever. Admitting their wrong doing, the respondent paid the differential duty of Rs. 20.00 lakhs as goods having MRP of Rs. 5.00 per pouch attracted Central Excise duty of Rs. 55,85,000/- in terms of Notification No. 05/2015-CE dated 01.03.2015 (Sr. No. 6 of Table-2).

8.3 The entire case had been concluded vide Order-In-Original No. 01/ADC/RKC/2016-17 dated 22082016 on the ground that since the respondent had manufactured the goods having MRP of Rs. 5.00 per pouch, they were liable to pay Central Excise duty of Rs. 55,85,000/- per month. The preventive wing has also taken the same stand as can be seen from the Show Cause Notice dated 18.05.2016 as well as Order-In-Original dated 22.08.2016. The basic fact that the respondent had carried out manufacture of the goods from 01.12.2015 to 09.12.2015 is neither disputed by the appellant nor by the respondent. For the rest of the month, there was no production at all as can be seen from the case records. It is on record that the respondent had manufactured the goods having MRP of Rs. 5.00 per pouch.

8.4 The respondent has rightly paid Central Excise duty of Rs. 55,85,000/- in terms of proviso to Rule 9 of the Rules, which is re-produced below for ready-reference:

*9. Manner of payment of duty and interest. - The monthly duty payable on notified goods shall be paid by the 5th day of the same month and an intimation in Form - 2 annexed to these*

rules shall be filed with the Jurisdictional Superintendent of Central Excise before the 10th day of the same month :

Provided that .....

Provided further that .....

Provided also that .....

Provided also that .....

Provided also that .....

Provided also that .....

Provided also that in case it is found that a manufacturer has manufactured goods of those retail sale prices, which have not been declared by him in accordance with provisions of these rules or has manufactured goods in contravention of his declaration regarding the plan or details of the part or section of the factory premises intended to be used by him for manufacture of notified goods of different retail sale prices and the number of machines intended to be used by him in each of such part or section, the rate of duty applicable to goods of highest retail sale price so manufactured by him shall be payable in respect of all the packing machines operated by him for the period during which such manufacturing took place :

The above proviso clearly states that in case it is found that a manufacturer has manufactured the goods of those retail sale prices, which have not been declared by him in accordance of provisions of Rule 6 of the Rules in contravention of declaration filed by the manufacturer for manufacture of notified goods of different retail sale prices, then the rate of duty applicable to goods of highest retail sale price so manufactured by the manufacturer shall be payable for the period during which such manufacturing took place.

8.5 In case on hand, the respondent had filed declaration for manufacture of notified goods vide their letter dated 25.11.2015 addressed to the Assistant Commissioner, Central Excise Division-I, Rajkot and had intimated regarding de-sealing of FFS pouch packing machine to commence production of 5 gm. pouches of unmanufactured branded tobacco of Pukar Punapatti, Supreme Pukar Punapatti and Pukar Calcutti Tobacco all having M.R.P. of Rs. 3.00 from 01.12.2015 on Form Filling & Sealing Pouch Packing Machine as per declaration Form No. 1 filed by them on 30.10.2015. However, in view of visit and search carried out by the Preventive Branch, Rajkot, it was found that the respondent has manufactured the notified goods having MRP of Rs. 5.00 per pouch also. Therefore, in terms of proviso to Rule 9, the rate of duty applicable to good of highest retail sale price so manufactured by the respondent shall be payable for the period during which such manufacturing took place. Here, it is proved that the respondent had manufactured the notified goods having MRP of Rs. 5.00 per pouch from 01.12.2015 to 09.12.2015 by way of changing cylinders and other equipments of the FFS automatic single track packing machine. Therefore, I am of the considered view that the respondent is liable to pay Central

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Excise duty for the notified goods having MRP of Rs. 5.00 per pouch which comes to Rs. 55,85,000/- in terms of Notification No. 05/2015-CE dated 01.03.2015 (Sr. No. 6 of Table-2).

8.6 With regard to arguments put forth by the appellant for non observance of procedures as prescribed under Rule 6, Rule, 7 Rule 9, Rule 10, Rule 11 and Rule, 13 of the Rules, I find force in these arguments. Sub-rule 6 of Rule 6 clearly stipulates that:

(6) In case a manufacturer wishes to make any subsequent changes with respect to any of the parameters which has been declared by him and approved by the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, in terms of sub-rule (2), such as changes relating to addition or removal of packing machines in the factory or making alterations in any part or section of the approved premises or in the number of machines to be used in such part or section or commencing manufacture of goods of a new retail sale price or discontinuation of manufacturing of goods of existing retail sale price, and similar other details, he shall file a fresh declaration to this effect at least three working days prior to such subsequent changes to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, who shall approve such fresh declaration and re-determine the annual capacity of production following the procedure specified in sub-rule (2).

It is a fact that the respondent had not filed any declaration to the effect that they were manufacturing notified goods having MRP of Rs. 5.00 per pouch. Therefore, the argument of Department of non observance of provisions of the Rules by the respondent is correct and tenable.

8.7 With regard to provisions of Rule 7 which stipulate calculation of correct duty payable by the manufacturer, I find that the respondent has violated the provisions and not paid the appropriate duty. However, on being caught by the Department, they paid the same alongwith interest and penalty.

8.8 With regard to provisions of Rule 11 which stipulate declaration of retail sale price to be declared of the package, I find that the respondent had filed declaration for notified goods having MRP of Rs. 3.00 per pouch, whereas, they, in fact, had manufactured notified goods having MRP of Rs. 5.00 per pouch, which is serious violation of the provisions of Rule 11 and the activity of the respondent has to be termed as fraud and suppression of facts on their part with intent to evade payment of duty.

8.9 I also find that Rule 13 is for addition or removal of packing machines and other restrictions. In this case, the respondent had manipulated the FFS machine by changing cylinders and other equipments to carry out production of pouches having MRP of Rs. 5/-, which was not declared in declaration filed with the Department. Furthermore, sub-rule (4) of the Rule 13 stipulates that "no manufacturer shall be allowed to keep in his factory any stock of packing material for goods of those retail

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sale prices which have not been declared by him in accordance with provisions of these rules." For this, the penalty for contraventions etc. has been prescribed in Rule 18 of the Rules which stipulates that "*subject to the provisions of rule 16 and Section 11AC of the Act, if any manufacturer produces or removes notified goods in contravention of any provisions of these rules, then, all such goods shall be liable to confiscation, and the manufacturer shall be liable to a penalty not exceeding the duty leviable on the notified goods in respect of which aforesaid contravention has been committed.*" I find that on visit of Preventive Branch it was found the stock of finished goods as well as packing material was lying in the factory premises of respondent. Thus, the respondent has violated the provisions of Rule 13.

8.10 The respondent has clearly violated the provisions of Rule 10 which prescribes abatement in case of non-production of goods. The excerpts are as under:

**Rule 10 stipulates that :-**

*"In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that the packing machines so sealed cannot be operated during the said period :*

**Provided** that during such period, no manufacturing activity, whatsoever, in respect of notified goods shall be undertaken and no removal of notified goods shall be effected by the manufacturer except that notified goods already produced before the commencement of said period may be removed within first two days of the said period :

**Provided** further that when the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise.

8.10.1 Therefore, respondent has filed wrong declaration in violation of Rule 10. On the day of visit of Preventive Wing on 11.12.2015, the department found that the goods were manufactured and were ready to be dispatched. Therefore, there was production on 11.12.2015 also. The respondent had also removed the notified goods before commencement of said period beyond two days in contravention of proviso to Rule 10. The proviso to Rule 10 stands violated and respondent is not eligible for refund of duty.

8.11 I find that as per the provisions of the Rules and said Notification, conditions stipulated therein and the criteria defined for mandatory obligations to be fulfilled by the respondent being procedures which are to be followed if they intend to get benefits stipulated under the Rule/said Notification. The benefits granted under the

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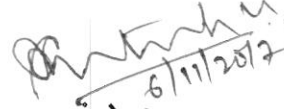
Rules/said Notification cannot be awarded where the additional amount of duty/tax became recoverable from respondent on account of non-payment of duty by reasons of fraud and with intent to evade payment of duty. Thus, I am of firm view that the respondent is not eligible for abatement as stipulated under Rule 10 of the Rules.

8.12 I find that arguments advanced by the respondent that the impugned appeal filed by department by re-producing various rules of the Rules are liable for rejection at not valid at all. I find that the provisions of various rules relied upon by the appellant are correct and justified in as much as the respondent had to follow but failed to follow. I find that the arguments of respondent are devoid of any merits and completely unjustified.

9. In view of the above facts, I find that the impugned order passed by the lower adjudicating authority is not correct, legal and proper. Hence, I set aside the impugned order for sanctioning refund of Rs. 14,21,097/- and allow the appeal filed by the Department. I direct the respondent to pay Rs. 14,21,097/- along with interest at appropriate rate.

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

9.1 The appeal filed by the department is disposed of in above terms.

  
 6/11/2022  
 (कुमार संतोष)  
 आयुक्त (अपील्स)

By R.P.A.D.

To,

M/s. Pukar Tobacco Processors & Packers,  
Plot No. G/1039-1040, Lodhika G.I.D.C.,  
Industrial Estate, Kalawad Road, Metoda,  
Taluka: Lodhika - 360 021, Dist.:Rajkot

मे. पुकार टोबेको प्रोसेसर्स एंड पैकर्स,  
प्लॉट संख्या जी/१०३९-१०४०, लोधीका  
जी.आई.डी.सी. इंडस्ट्रियल एस्टेट, कालावड़ रोड,  
मेटोडा, तहसील: लोधीका, जिल्ला: राजकोट -  
३६० ०२१.

Copy to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, GST & Central Excise, Rajkot.
- 3) The Assistant Commissioner, GST & Central Excise, Division - I, Rajkot.
- 4) The Superintendent, GST & Central Excise, AR-III, Rajkot.
- 5) Guard File.