



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

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

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

**रजिस्टर्ड डाक ए. डी. द्वारा :-**

क	अपील संख्या Appeal / File No.	मूल आदेश नं./ OIO No.	दिनांक / Date
	V2/374/RAJ/2017	2990/2014	02.12.2014
	V2/375/RAJ/2017	01/ADC/BKS/2016-17	21.04.2016

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

**RAJ-EXCUS-000-APP-210-TO-211-2017-18**

आदेश का दिनांक /  
Date of Order: **01.02.2018** जारी करने की तारीख /  
Date of issue: **02.02.2018**

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

ग अन्त आदेश संख्या/अपील संख्या/उपस्थित संस्था/अपील, केन्द्रीय उत्पाद शुल्क सेवाकर, राजकोट / जामनगर / गान्धीधाम, द्वारा उपरोक्तित जहाँ मूल आदेश से उत्पन्न। /

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 Appellants & Respondent :-**

**I.M/s. Pukar Tobacco Processors & Packers, GIDC, Plot No. G-1039-1040, Kishan Gate, Kalawad Road, Metoda, Rajkot- 360021.**

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

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत 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) सर्वोच्च न्यायालय से सम्बन्धित 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 जाती 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 बतलाया गया अपील के अलावा सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (विस्टेट) की पश्चिम क्षेत्रीय पीठ, द्वितीय तल, बहामती भवन असावा अहमदाबाद, 360016, को की जाती चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asarwa Ahmedabad-360016 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 अन्तर्गत निर्धारित किए गए फॉर्म EA-3 को चार प्रतियों में दूजे किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहाँ उत्पाद शुल्क की सीमा, धाराज की सीमा और लगाया गया जुर्माना, 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो कम से कम 1,000/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील 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 जहाँ संबंधित अपील न्यायाधिकरण की शाखा स्थित है। न्यूनतम आदेश (स्टे ऑर्डर) के लिए अपील-नग 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 demanded/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-

(B) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी है, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रामाणिक होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहाँ सेवाकर की सीमा, धाराज की सीमा और लगाया गया जुर्माना, 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो कम से कम 1,000/- रुपए अथवा 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील 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 जहाँ संबंधित अपील न्यायाधिकरण की शाखा स्थित है। न्यूनतम आदेश (स्टे ऑर्डर) के लिए अपील-नग 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 fee of Rs. 1,000/- 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 दंडों की राशि अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्दिष्ट फॉर्म ST-7 में की जा सकती है। एक प्रतियाँ एक साथ आवृत्त, केन्द्रीय उत्पाद शुल्क अध्याय आवृत्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न की (जिसमें से एक प्रति प्रमाणित होनी चाहिए) और आवृत्त द्वारा सहायक आवृत्त अथवा उपवृत्त, केन्द्रीय उत्पाद शुल्क सेवाकर, को अपीलार्थ न्यायाधिकरण को आवेदन दंड करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 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 अपीलार्थ न्यायाधिकरण (सेस्टैट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35ए के अंतर्गत, जो कि वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलार्थ न्यायाधिकरण में अपील करते समय उत्पाद शुल्कावकाश का लाभ के 10 प्रतिशत (10%), जब मात्र एवं दुर्लभा विवादित है, या दुर्लभा, जब केवल दुर्लभा विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत उक्त कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'मांग किए गए शुल्क' में निम्न शामिल है।  
(i) धारा 11 डी के अंतर्गत रकम  
(ii) सेस्टैट उक्त की ती गई राशि राशि  
(iii) सेस्टैट उक्त नियमवली के नियम 6 के अंतर्गत देय रकम  
- बशर्त यह कि इस धारा के प्रावधान वित्तीय (नं. 2) अधिनियम 2014 के अंतर्गत से पूर्व किसी अपीलार्थ न्यायाधिकरण के समक्ष विचारार्थीन स्थापित 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, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.  
Under Central Excise and Service Tax, "Duty Demanded" shall include :  
(i) amount determined under Section 11 D;  
(ii) amount of erroneous Cenvat Credit taken;  
(iii) amount payable under Rule 6 of the Cenvat Credit Rules  
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार को पुनरीक्षण आवेदन :  
**Revision application to Government of India:**  
इस आदेश की पुनरीक्षण प्राविका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रावण परन्तु के अंतर्गत अथवा अधिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, पीपी अडिज, जीवन टीप भवन, लवट 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:  
(i) यदि मात्र के किसी नुकसान के मामले में, जहां नुकसान किसी मात्र को किसी कारखाने से अथवा गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक अथवा गृह से दूसरे अथवा गृह पारगमन के दौरान, या किसी अथवा गृह से या अथवा गृह से मात्र के प्रवाहकरण के दौरान, किसी कारखाने या किसी अथवा गृह में मात्र 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) अथवा के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे मात्र के विनिर्माण में प्रयुक्त कच्चे मात्र या अथवा नई केन्द्रीय उत्पाद शुल्क के तुर (सिस्ट) के मामले में, जो अथवा के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की राशि है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.  
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को मात्र निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.  
(iv) सविधायन उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इच्छा केन्द्र इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मात्र की गई है और ऐसे आदेश जो आवृत्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तरीक अथवा सम्प्रदायिकि 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 प्रतियाँ फॉर्म संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमवली, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस आदेश के अद्यपय के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदनों के साथ मात्र आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्दिष्ट शुल्क की अद्यपय के अद्यपय 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 OIG 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 निर्दिष्ट शुल्क की अद्यपय की जानी चाहिए।  
जहां संलग्न रकम एक लाख रुपये या अथवा कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000/- का भुगतान किया जाए।  
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.
- (D) यदि इस आदेश में कई मात्र आदेशों का समावेश है तो प्रत्येक मात्र आदेश के लिए शुल्क का भुगतान, उपरोक्त इस से किया जाना चाहिए। इस तरह के होने हुए भी की विद्या पट्टी कार्य से बचने के लिए पर्याप्तिकरि अपेक्षित 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 filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
- (E) परामर्शार्थ न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मात्र आदेश एवं संलग्न 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-1 in terms of the Court Fee Act,1975, as amended.
- (F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थ न्यायाधिकरण (कार्य विधि) नियमवली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले विषयों की और भी ध्यान सम्भाल किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
- (G) उच्च अपीलार्थ न्यायाधिकरण को अपील दर्जित करने से संबंधित न्यायक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थ न्यायाधिकरण 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)

ORDERs-IN-APPEAL

0001-6

The present proceeding has arisen out of CESTAT Orders No. A/13048/2017 dated 06.10.2017 and A/13597/2017 dated 22.11.2017 passed in appeals preferred by M/s. Pukar Tobacco Processors & Packers, GIDC Plot NO. G-1039/1040, Kishan Gate, Kalawad Road, Metoda, Rajkot (*hereinafter referred to as the "Appellant"*) against Orders-in-Appeal No.RAJ-EXCUS-000-APP-47-15-16 dated 30.1.2015 and RAJ-EXCUS-000-APP-001-17-18 dated 26.04.2017 respectively. Hon'ble CESTAT, Ahmedabad remanded both appeal to first Appellate Authority, since both the Orders in Appeal pertain to said to be erroneous refund ordered to the Appellant and protective demand issued against the said erroneous refund and hence I proceed to decide both cases by a common order.

2. Brief facts of the case are that the Appellant was engaged in manufacturing of Un-manufactured Branded Tobacco (*hereinafter referred to as the 'specified goods'*) and was paying duty in accordance with Notification No.11/2010 CE (NT) dated 27.02.2010. The Appellant paid Rs.29,59,000/- on 02.10.2014 for the clearances of the specified goods i.e. unmanufactured branded tobacco on account of one installed FFS packing Machine for the month of October,2014 but filed refund claim on account of non-production of the specified goods in terms of Rule 10 of Chewing Tobacco and un-manufactured Tobacco Machines (Capacity Determination and Collection of Duty) Rules, 2010 (*hereinafter referred to as "the said Rules"*) amounting to Rs.21,95,387/- on the ground that they had carried out manufacturing activities from 06.10.2014 to 13.10.2014 i.e. for 8 days and machine remained un-installed and sealed for the period from 01.10.2014 to 05.10.2014 (5 days) and from 14.10.2014 to 31.10.2014 (18 days). The Jurisdictional Assistant Commissioner, Central Excise (*hereinafter referred to as "JAC"*) vide Order No.2990/2014 dated 02.12.2014 (*hereinafter referred to as "refund order"*) sanctioned the refund of Rs.21,95,387/- under Section 11B of the Central Excise Act, 1944 (*hereinafter referred to as "the Act"*) read with the said Rules. Aggrieved with the refund order, department preferred Appeal before the Commissioner (Appeals), Central Excise, Rajkot and simultaneously also issued protective demand Show Cause Notice dated 23.11.2015 demanding Rs.21,95,387/- of refund paid erroneously to the Appellant. The departmental appeal was allowed by the then Commissioner (Appeals) vide OIA No. RAJ-EXCUS-000-APP-47-15-16 dated 30.11.2015 and the adjudicating authority vide OIO No. 01/ADC/BKS/2016-17 dated 21.04.2016(*hereinafter referred to as "impugned order"*) confirmed the

protective demand of Rs.21,95,387/- holding that refund was erroneous and amount was recoverable from the Appellant along with interest. The Appellant preferred appeal against the impugned order which was rejected by the Commissioner (Appeals), Central Excise, Rajkot vide OIA No. RAJ-EXCUS-000-APP-001-2017-18 DATED 26.04.2017. The Appellant being aggrieved with the Orders-in-Appeal, preferred appeals in the CESTAT. Hon'ble CESTAT, in the matter of the OIA RAJ-EXCUS-000-APP-47-15-16 dated 30.11.2015, vide Order No. A/13048/2017 dated 06.10.2017 remanded the matter back to Commissioner (Appeals) Rajkot to issue a speaking order after considering the Appellant's submissions. Hon'ble CESTAT in the matter of OIA No. RAJ-EXCUS-000-APP-001-2017-18 dated 26.04.2017, vide Order No. A/13597/2017 dated 22.11.2017 held that impugned order is not sustainable as the demand has been confirmed on account of protective show cause notice and remanded the matter back in light of earlier order dated 06.10.2017 in the Appellant's own case.

3. A common Personal hearing in both the matter was attended to by Shri P. D. Rachchh, Advocate, who reiterated the grounds of Appeals and submitted that the appellant was having two machines from 29.01.2014 to 14.10.2014 whereas one new machine was received on 29.01.2014 and one old machine was sold on 15.10.2014; that only one machine was operating from 06.10.2014 as both machines were uninstalled with effect from 14.08.2014 and one old machine was never installed and used with effect from 09.04.2014 till 15.10.2014 when sold; that all these installation and un-installation had been done in presence of then Superintendent, Shri G.K. Jhala, who had accepted these facts in his cross examination held on 28.03.2016 before the lower adjudicating authority, then ADC, Shri B.K.Singh; that they had paid duty in October, 2014 in the beginning but did not operate any machine from 01.10.2014 to 05.10.2014, from 14.10.2014 to 31.10.2014 and only one machine was installed and operated from 06.10.2014 to 13.10.2014; that due to this refund granted by then JAC is correct and Departmental Appeal against the Refund order needs to be rejected and Appeal filed by the Appellant against the impugned order being protective demand confirmed against the sanction of refund needs to be allowed.

### **FINDINGS**

4. I have carefully gone through the facts of the case, Hon'ble CESTAT's orders, appeal memoranda, written as well oral submissions of the Appellant and records of personal hearing. The issue to be decided in the matter is whether

refund sanctioned by the JAC to the Appellant was correct, legal and proper or not and also whether demand confirmed needs to be set aside or not.

5. I find that the department had filed appeal before Commissioner (Appeals) against the order dated 02.12.2014 issued by JAC on the grounds that (i) Appellant was not eligible for refund as non working of any installed machine for what ever reason is to be considered as operating machine during the month and hence appellant had rightly paid the duty for the month of Oct, 2014 (ii) Appellant had Two (2) installed machines during the month of October, 2014 and hence they had short paid Central Excise duty to the tune of Rs.29,59,000/- towards second machine. I find that any refund on account of non production of specified goods is governed under Rule 10 of Chewing Tobacco and Unmanufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010, which reads as under:-

**"10. Abatement in case of non-production of goods. - 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."*

(Emphasis supplied)

5.1 I find that Appellant has produced copies of FORM -1 filed under Rule 6 and chronology of installation, uninstalation and re-installation of Machines under Rule 10 of the said Rules. I find that the Appellant had declared Two Un-installed and Sealed machine as on 01.08.2014 and had intimated that they "do not intend to operate Machine No.1". Simultaneously, Appellant vide their intimation dated 01.08.2014 under Rule 10 requested for re-installation of Machine No.2 with effect from 04.08.2014. Copy of Form 1 dated 01.08.2014 and request letter dated 01.08.2014 are reproduced as under:-

FORM-1  
(See rule 6)

EXHIBIT-

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- 01) Name of the manufacturer : PUKAR TOBACCO PROCESSORS & PACKERS
- 02) Address of the manufacturing premises: G.I.D.C.PLOT No. G/1039 & 1040  
KALAWAD ROAD, METODA, TAL. LODHIKA  
DIST. RAJKOT.
- 03) ECC No. : AAEFP1386J XM 001.
- 04) Address of other premises manufacturing the same products : NIL
- 05) Number of single track packing machine available in the factory. : 2 (TWO) UNINSTALLED AND SEALED.
- 06) Number of packing machines out of (5), which are installed in the factory. : 1 (ONE) MACHINE WILL BE INSTALL AT THE TIME OF COMMENCEMENT OF PRODUCTION.
- 07) Number of packing machines out of (5), which the manufacturer intends to operate in this factory for production of pouches of notified goods with lime tube : 1 (ONE) without lime tube.

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.....2.....

S. No	Packing Machine	Name of the manufacturer	Identification No.	Date of Purchase	Maximum packing Speed	With Lime Tube/ without Lime Tube
1.	AUTOMATIC FFS POUCH PACKING MACHINE SINGLE TRACK	HETBHAV ENGINEERING WORKS, AHMEDABAD	NO.1	27/05/2012	APPR. 160 POUCHES PER MINUTE SUBJECT TO IDEAL CONDITION	WITHOUT LIME TURE
2.	AUTOMATIC FFS POUCH PACKING MACHINE SINGLE TRACK	VAIBHAV PACKAGING AHMEDABAD	NO.2	29/01/2014	APPR. 230 POUCHES PER MINUTE SUBJECT TO IDEAL CONDITION	WITHOUT LIME TURE

12) Description of goods to be manufactured including whether unmanufactured tobacco or chewing tobacco or both, their brand names whether pouches shall contain lime tube or not, and other concerned details.

A: FOR MACHINE NO.1  
PRESENTLY THE MACHINE IS UNINSTALLED AND SEALED CONDITION WE DOES NOT INTEND TO OPERATE THIS MACHINE.

B: FOR MACHINE NO.2  
UNMANUFACTURED BRANDED TOBACCO POUCHES (WITHOUT LIME TUBE)  
1) PUKAR PURA PATTI QTY 5.00 GM  
2) SUPREME PUKAR PURA PATTI QTY 5.00 GM  
3) PUKAR CALCUTTI TOBACCO QTY 5.00 GM

13) Denomination of retail sale prices of the pouches to be manufactured during the financial year.

1) PUKAR PURA PATTI MRP 3.00  
2) SUPREME PUKAR PURA PATTI MRP 3.00  
3) PUKAR CALCUTTI TOBACCO MRP 3.00  
(R.S.F. REVISED FROM 01/08/2014)

FROM:  
 PUKAR TOBACCO PROCESSORS & PACKERS  
 P.I.D.C. PLOT NO.G 1039 & G1040,  
 GALANAD ROAD, METODA,  
 TAL. LODHIKA-360021  
 DIST. RAJKOT.

DATE: 01/08/2014

TO,  
 The Assistant Commissioner,  
 Central Excise DIV. I,  
 Excise Bhavan,  
 Race Course Ring Road,  
 Rajkot.

Sir,

Ref: Our letter dt. 21/07/2014.

Sub: Commencing production of Unmanufactured Branded Tobacco  
 on FFS pouch packing machine from 04/08/2014.

In this matter, we most respectfully submit as under:

We propose to commence production of 5 gm. pouches of Unmanufactured Branded tobacco bearing brand name Pukar Punapatti M.R.P. of Rs.3.00, Supreme Pukar Punapatti M.R.P. of Rs.3.00, and Pukar Culcatti Tobacco of 5 gm. pouches with M.R.P. of Rs.3.00 from 04/08/2014 on Form Filling & Sealing Pouch Packing Machine as per declaration FORM NO.1 filed by us on 01/08/2014.

We shall pay the appropriate duty within stipulated period.

We request you to please de-seal and reinstall the Form Filling and Sealing pouch packing machine to enable us to commence the production.

We further submit that earlier our product PUKAR CULCATTI TOBACCO of 5 GM Pouches were Retail Sale Price was Rs.2.00 and now we have Revised Retail Sale Price Rs.3.00 From 01/08/2014, we further submit that earlier our all Products of R.S.P. Rs.3.00 were packed on FFS Machine No.1, and now will be packed on FFS Machine No.2 as per declaration FORM NO.1 filed by us on 01/08/2014.

Kindly do the needful and oblige.

--- This is submitted for your kind information please.

Thanking you,  
 Yours faithfully,  
 Pukar Tobacco Processors & Packers.  
 H. S. Patel  
 Partner.

C.C. to: The Superintendent, Central Excise, Range AR VI, RAJKOT.

5.2 I find that the said Machine no.2 was uninstalled and sealed on 14.08.2014 and was subsequently re-installed on 6.10.2014 and again uninstalled and sealed on 14.10.2014. I also find that the Appellant in FORM-2 under Rule 9 intimated the department on 13.10.2014, payment of

Rs.29,59,000/- made by them on 02.10.2014 towards operation of Machine No.2 for the Month of Oct, 2014. Copies of intimation letters dated 26.09.2014 and dated 09.10.2014 are reproduced below:-


<p>TO:          PUKAR TOBACCO PROCESSORS &amp; PACKERS          P.I.D. PLOT NO.G 1039 &amp; G1040,          KALAWAD ROAD, METODA,          TAL. LODHIKA-360021          DIST. RAJKOT.</p>	<p><b>EXHIBIT-</b></p>
<p>DATE: 26/09/2014</p>	
<p>TO,          The Assistant Commissioner,          Central Excise DIV.1,          Excise Bhavan,          Race Course Ring Road,          Rajkot.</p>	
<p>Sir,</p>	
<p>Ref: Our letter dt. 26/08/2014.</p>	
<p>Sub: <u>Commencing production of Unmanufactured Branded Tobacco on FFS pouch packing machine from 06/10/2014.</u></p>	
<p>In this matter, we most respectfully submit as under:</p>	
<p>We propose to commence production of 5 gm. pouches of Unmanufactured Branded tobacco bearing brand name Pukar Punapatti M.R.P. of Rs.3.00, Supreme Pukar Punapatti M.R.P. of Rs.3.00, and Pukar Calcutti Tobacco of 5 gm. pouches with M.R.P. of Rs.3.00 from 06/10/2014 on Form Filling &amp; Sealing Pouch Packing Machine as per declaration FORM NO.1 filed by us on 01/08/2014.</p>	
<p>We shall pay the appropriate duty within stipulated period.</p>	
<p>We request you to please de-seal and reinstall the Form Filling and Sealing pouch packing machine to enable us to commence the production.</p>	
<p>Kindly do the needful and oblige.</p>	
<p>This is submitted for your kind information please.</p>	
<p>Thanking you,          Yours faithfully,          Pukar Tobacco Processors &amp; Packers,            Partner.</p>	
<p>c.c.to: The Superintendent, Central Excise, Range AR VI, RAJKOT.</p>	



EXHIBIT-

FROM:  
 PUKAR TOBACCO PROCESSORS & PACKERS  
 G.I.D.C.PLOT NO.G 1039 & G1040,  
 KALANAD ROAD, METODA,  
 TAL. LOJHIKA-360021  
 DIST. RAJKOT.

DATE-09/10/2014.

TO,  
 The Assistant Commissioner,  
 Central Excise DIV.I,  
 Excise Bhavan,  
 Race Course Ring Road,  
 Rajkot.

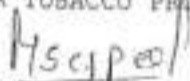
Sir,

ref:Our letter dt.26/09/2014.

Sub:Stopping of production of Unmanufactured Branded Tobacco  
 on FFS packing machine from 14/10/2014.  
 Intimation under Notification No.11 (NT) DT.27/2/2010  
 (RULE 10)

With reference to the above captioned subject, We hereby intimate you that we intend to stop the total production of notified goods, Unmanufactured Branded Tobacco on FFS packing machine from 14/10/2014 we earlier requested the department vide our letter dated 26/09/2014 that we intend to start the production and on our request the departmental authorities had de-sealed and reinstall our FFS machine on 06/10/2014. We now hereby intimate and request you to uninstall and seal our above packing machine from 14/10/2014.

This is submitted for your kind information and record.

Meanwhile, thanking you,  
 Yours faithfully,  
 (Sd) UKAR TOBACCO PROCESSOR AND PACKERS  
  
 PARTNER.

c.to: The Suprintendent, Central Excise, Range AR VI, RAJKOT.

5.3 I further find that Appellant vide intimation letter dated 10.10.2014 intimated the department that Machine No.1 lying in sealed condition since 09.04.2014 is sold by them and would be delivered on 13.10.2014 and also filed fresh FORM-1 on 15.10.2014 reflecting single machine available with them in uninstalled condition. Appellant produced copy of Records of Cross Examination held on 28.03.2016 before the Adjudicating Authority during adjudication of the Protective Demand Show Cause Notice. I find that the then jurisdictional Range Superintendent has categorically accepted that only one machine was installed

and operated during the period from 06.10.2014 to 13.10.2014 and both the machines remained uninstalled and in sealed condition for the remaining period. The records of cross examination of Shri G.K. Zala, then Range Superintendent, is reproduced below:-

EXHIBIT-

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**RECORDS OF CROSS EXAMINATION HELD DURING THE COURSE OF PERSONAL HEARING HELD ON 28.03.2016**

NAME OF THE PERSON CROSS EXAMINED :	Shri G. K. Zala, Superintendent, Central Excise, Rajkot
NAME OF THE PERSON WHO HAS CROSSED EXAMINED AND ON WHOSE BEHALF:	Shri Devashish Trivedi, Advocate appeared on behalf of M/s. Pukar Tobacco Processors & Packers, Rajkot.

A letter of M/s. Pukar Tobacco Processors & Packers, Rajkot dated 08.08.2014 addressed to The Assistant Commissioner, Central Excise, Division-II, Rajkot, with a copy to Superintendent AR-VI, Rajkot was shown to Shri G. K. Jhala, Superintendent and ask the following Questions:

Q.1. Subsequent upon receiving above letter, have you visited the unit of M/s M/s. Pukar Tobacco Processors & Packers, Rajkot and carried out activity of un-installing and sealing of FFS machines on 14.08.2014 as requested in the said letter ?

Ans: Yes, I had visited the said premises and carried out activity of un-installing and sealing in accordance with the said letter on 14.08.2014.

Q.2. Sir, when you have visited the unit and carried out the aforesaid exercise on the said date, at that time was there any other operating machine in installed and unsealed condition in the factory?

Ans: No, at that time there was no other operating machine in installed and unsealed conditions in the factory.

A letter of M/s. Pukar Tobacco Processors & Packers, Rajkot dated 26.09.2014 addressed to The Assistant Commissioner, Central Excise, Division-II, Rajkot, with a copy to Superintendent AR-VI, Rajkot was shown to Shri G. K. Jhala, Superintendent and ask the following Questions:

Q.3. Subsequent upon receiving above letter, have you visited the unit of M/s M/s. Pukar Tobacco Processors & Packers, Rajkot and carried out activity of de-sealing in the FFS Machine in accordance with the said letter on 06.10.2014.

Ans. Yes, I had visited the said premises and carried out activity of de-sealing FFS machine in accordance with the said letter on 06.10.2014.

Q.4. Sir, when you have visited the unit and carried out the aforesaid exercise on the said date, at that time was there any other operating machine in installed and unsealed condition in the factory?

Ans: No, at that time there was no other operating machine in installed and unsealed conditions in the factory.

A letter of M/s. Pukar Tobacco Processors & Packers, Rajkot dated 09.10.2014 addressed to The Assistant Commissioner, Central Excise, Division-II, Rajkot, with a copy to Superintendent AR-VI, Rajkot was shown to Shri G. K. Jhala, Superintendent and ask the following Questions:

Q.5. Subsequent upon receiving above letter, have you visited the unit of M/s M/s. Pukar Tobacco Processors & Packers, Rajkot and carried out activity of un-installing and sealing of FFS machines on 14.10.2014 as requested in the said letter ?

Ans: Yes, I had visited the said premises and carried out activity of un-installing and sealing in accordance with the said letter on 14.10.2014.

Q.6. Sir, when you have visited the unit and carried out the aforesaid exercise on the said date, at that time was there any other operating machine in installed and unsealed condition in the factory?

Ans: No, at that time there was no other operating machine in installed and unsealed conditions in the factory.

Q.7. Is it true that before sealing the machine by way of paper seal and wire seal, each time the concern person of M/s Pukar Tobacco Processors & Packers, Rajkot, first removing the hopper, plate and cylinder of the machine and only there after you were sealing the machine?

Ans: Yes, It is true. It was done because the assesses requested that before sealing exercise is carried out, they may be allowed to remove the said three parts of the machine because the same would help them for maintenance purpose. On each occasion, it was requested that if parts are removed and maintenance is carried out during the time when the machines are in sealed condition, it will save assesses time after the machine is de-sealed on a subsequent occasion.

*G.K. Jhala*  
28/3/2016

(Shri G.K. Jhala)  
Name of Cross Examined person

*Shri Devashish Trivedi*  
28/03/2016

(Shri Devashish Trivedi)  
Advocate

*Shri B. K. Singh*  
28/3/2016

(Shri B. K. Singh)  
Addl. Commissioner

5.4 I find that the cross-examination as well as the related documents clearly establish that only Machine no. 2 was operational during the period from 06.10.2014 to 13.10.2014 which justify the merits of the appellant's contention. The Departmental appeal relies on provisions of Rule 8 of the Rules which speaks as under:-

**"8. Alteration in number of operating packing machines.** - In case of addition or installation or removal or uninstallation of a packing machine in the factory during the month, the number of operating packing machines for the month shall be taken as the maximum number of packing machines installed on any day during the month :

Provided that in case a manufacturer commences manufacture of goods of a new retail sale price during the month on an existing machine, it shall be deemed to be an addition in the number of operating packing machine for the month :

*Provided further that in case of non-working of any installed packing machine during the month, for any reason whatsoever, the same shall be deemed to be a operating packing machine for the month".*

5.5 Proviso to Rule 8 clearly speaks non-working of installed packing machine shall be deemed operating packing machine for the purpose of duty liability for that particular month. As discussed above, the facts of the case are that machines were un-installed and were in sealed condition under the statutory provisions of Rule 10 of the said Rules. Rule 8 says deemed operative machine for any reason other than legitimate closure of machine for non-production under Rule 10. If the contention of departmental appeal is to be allowed then the provisions of Rule 10 would become redundant. Therefore, machines un-installed under same set of Rules can not be held as operational to demand duty. The deemed operating machine is different from the un-installed machine and hence I find merit in Appellant's submissions that they are eligible for refund under then Central Excise Law and refund sanctioned by the JAC is correct.

6. I find that department has also contended that Appellant has short paid the central excise duty as it was required to pay Central Excise duty for second machine too. I find that there is nothing on record to establish that duty was payable for Machine No.1 also and hence refund due to the Appellant. I am, therefore, of the considered view that contention raised by the department has no justification and hence I do not find any merit in the departmental appeal and reject the departmental appeal.

7. I also find that the adjudicating authority while confirming the protective demand had solely relied upon the Commissioner (Appeals), Rajkot's Order No. RAJ-EXCUS-0000-APP-47-15-16 dated 30.11.2015 and had not considered the facts and evidences produced by the Appellant as well as the facts even recorded by him in the Cross Examination of the then Jurisdictional Range Superintendent. The adjudicating authority only referred Form -2 dated 13.10.2014 submitted by the Appellant to incorrectly hold that Two Machines were installed but failed to consider all other relevant facts, evidences like photographs of sealed machine and explanation of the Appellant made before him and revelations made during the cross examination and erred in holding that two machines were operational. I find that the Appellant is eligible to get refund under Rule 10 of the Rules and therefore the impugned order is not correct, legal and proper. I, therefore, set aside the impugned order and allow the Appeal filed by the Appellant.



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8. In view of the foregoing discussions and findings, I reject the Appeal filed by the department against the refund order and allow the Appeal filed by the Appellant against the impugned order.

९. दर्ज की गई दोनों अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।  
9. The two appeals filed stand disposed off in above terms.

*(कुमार संतोष)*  
(कुमार संतोष) 11/2/2018  
आयुक्त (अपील्स)

By R.P.A.D.

To

M/s. Pukar Tobacco Processors & Packers, GIDC Plot NO. G-1039/1040, Kishan Gate, Kalawad Road, Metoda, Rajkot	मेसर्स पुकार टोबैको प्रोसेसर्स एंड पैकर्स जीआईडीसी प्लॉट नं जी -१०३९/१०४०, किशान गेट, कलावाड रोड , मेटोडा राजकोट
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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 & C Excise Division-I, Rajkot.
4. Guard File.
5. F No. V2/375/RAJ/2017