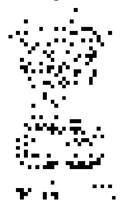


[illegible]
O/O THE PRINCIPAL COMMISSIONER (APPEALS), CENTRAL EXCISE [illegible]

[illegible]

[illegible]

[illegible]

[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	Date
[illegible]	[illegible]	[illegible]

BJN-EXCUS-[illegible]-APP-[illegible]-2019

Date of Order: [illegible]-2019 | Date of issue: [illegible]

[illegible]

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

[illegible]

Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, [illegible]

[illegible] Name & Address of the Appellant & Respondent :-

Shanker Industries, 2-A, Ratan Udyognagar, Surendranagar – 363001.

[illegible]

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]

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) [illegible]

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) [illegible]

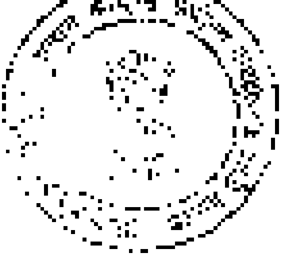
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-1(a) above.

(iii) [illegible]

[illegible]

(B) [illegible]

[illegible]



:: ORDER-IN-APPEAL ::

M/s Pioneer Industries, 2-A, Jintan Udyognagar, Surendranagar filed below listed appeals against Orders-in-Original (*hereinafter referred to as 'impugned orders'*) passed by the Asst. Commissioner, Central GST and Central Excise, Surendranagar Division, Bhavnagar Commissionerate (*hereinafter referred to as 'lower adjudicating authority'*).

Sl. No.	Appeal No.	Order-in Original No. & Date
1.	V2/74/BVR/2018-19	274/R/2017 dated 9.3.2018
2.	V2/15/BVR/2019	30/R/2018-19 dated 21.2.2019

1.1 Since issue involved in both the above appeals is common, both appeals are taken up together for decision vide this common order.

2. The facts of the case are that the Appellant was engaged in manufacture of "Fiber Aluminum Bobbins Dynamically Balanced" (hereinafter referred to as "said product") and holding Central Excise Registration No. SNR III/CH/84/4/92. The appellant filed classification lists classifying their final product under Ch. 8448.00 of the Central Excise Tariff Act, 1985. The said classification lists were provisionally assessed under Rule 173B read with Rule 98 of the Central Excise Rule, 1944 by the then Assistant Collector of Central Excise Division II, Rajkot vide order issued from F.No.V/C/SNR/8487/CL-1/86 dated 21.04.1992 and 22.07.1993 classifying the product under Ch. No. 7616.90. The Appellant was asked to execute Bond and furnish Bank Guarantee of 25% of Bond amount to cover differential duty amount. However, the Appellant refused to execute Bond/Bank Guarantee and hence, Show Cause Notice No. CEX/SNR-III/Demand/PI/93 dated 14.10.1993 was issued to the Appellant for the period from April, 1993 to Sept, 1993 amounting to Rs. 6,73,748/- and Show Cause Notice No. CEX/SNR III/Demand/PI/93 dated 19.11.1993 for October, 1993 amounting to Rs. 1,83,281/-.

2.1 The above two Show Cause Notices were adjudicated by the Asst. Collector, Central Excise Division II, Rajkot vide Order in-Original No. 143 to 145/CL D/93 dated 26.11.1993 who finally approved the said classification lists classifying the said product under Ch. No. 7616.90 and confirmed Central Excise duty of Rs. 8,57,029/- under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as "Act").

2.2 Being aggrieved, the appellant filed appeal before the Commissioner (Appeals), Central Excise, Ahmedabad, who classified the said product under Ch.

No. 3923 and ordered to finalize assessment accordingly vide Order-In-Appeal No. 388/96(223-AHD)CE/COMMR(A)/AHD dated 16.08.1996. The Assistant Commissioner, Central Excise Division-II, Rajkot vide Order in Original No. 130 to 131/1996 dated 13.12.1996 and fixed assessment of the said product on Ch. No. 3923.90 and re-adjudicated Show Cause Notices dated 14.10.1993 and 19.11.1993 and confirmed demand of Central Excise duty of Rs. 8,57,029/- under Section 11A of the Act.

2.3 Being aggrieved, the Appellant and the Department preferred appeals before the Commissioner (Appeals), Central Excise, Ahmedabad, who vide Order-in-Appeal No. 78 & 79/2002/Commr(A)/Raj dated 14.02.2002 dismissed the appeal of the Appellant for non prosecution and allowed the appeal of the Department.

2.4 Being aggrieved, the Appellant filed appeal before the Hon'ble CESTAT, Mumbai, which was decided vide Order No. 562/2002-B dated 27.08.2002 by way of remand to the Appellate Authority to examine the issue on merit. In remand proceedings, the Commissioner (Appeals), Central Excise, Rajkot vide Order-in-Appeal No. 75 & 75A/28 & 28A/BVR)/Commr(A)/MM/Raj dated 30.01.2006 allowed the appeal of the Appellant by observing that neither the Appellant nor the Department had filed appeal against Order-in-Appeal No. 388/96(223-AHD)CE/COMMR(A)/ AHD dated 16.08.1996 and hence, the said Order-in-Appeal attained finality. Pursuant to this order, the Appellant filed refund claim of Rs. 8,57,029/-, which was rejected by the Asst. Commissioner, Central Excise Division, Surendranagar vide Order-in-Original No. 243/R/2007 dated 30.11.2007.

2.5 The Department challenged the said Order-in-Appeal dated 30.1.2006 before the Hon'ble CESTAT, Ahmedabad, which was decided vide Order No. A/150/WZB/AHD/2008 dated 29.01.2008 by way of remand to the Appellate Authority for fresh decision. In remand proceedings, Commissioner (Appeals), Central Excise, Ahmedabad vide Order-In-Appeal No. 41 to 42/2008(BVR)/KC/Commr(A)/Ahd dated 15.05.2008 allowed the appeal of the Department by classifying the product under Ch. No. 7616.90 and rejected the appeal of the Appellant.

2.6 The Appellant challenged rejection of refund claim vide Order-in-Original dated 30.11.2007 before the Commissioner (Appeals), Central Excise, Ahmedabad, who rejected appeal of the Appellant vide Order-in-Appeal No. 46/2008(BVR)/KC/Commr(A)/Ahd dated 7.5.2008.

2.7 Being aggrieved with above two Orders-in-Appeal dated 7.5.2008, the Appellant filed appeals before the Hon'ble CESTAT, Ahmedabad, which allowed both the appeals by classifying the product under Ch. No. 3923.90 along with consequential refund vide Order No. A/10754-10755/2017 dated 7.4.2017. Consequently, the Appellant filed refund claim of Rs. 8,57,029/- before the lower adjudicating authority.

2.8 The Department challenged the Order passed by the Hon'ble CESTAT before the Hon'ble Supreme Court but the same was dismissed by the Apex Court vide Order dated 22.1.2018 on monetary grounds.

2.9 Show Cause Notice No. V/18-270/Refd/17-18 dated 5.1.2018 was issued to the Appellant calling them to show cause as to why said product should not be re-assessed under Ch. No. 3923 as per CESTAT's Order dated 7.4.2017; why refund claim of Rs. 8,57,029/- should not be re-appropriated against duty payable after re-assessment under Ch. No. 3923 and why extra duty amounting to Rs. 25,83,068/- arising after re-assessment under Ch. No. 3923 should not be recovered from them under Section 11 of the Act.

2.10 The above said Show Cause Notice was adjudicated vide the impugned order listed at Sl. No. 1 of table above, which re-assessed the said product under Ch. No. 3923 and re-assessed duty payable as per CESTAT's Order to Rs. 25,83,068/-; sanctioned refund of Rs. 8,57,029/- under Section 11 of the Act and ordered appropriation against duty payable; confirmed duty demand of remaining differential duty of Rs. 17,26,039/- under erstwhile Rule 173B of Central Excise Rules, 1944 read with Section 11A of the Act.

3. Show Cause Notice dated 30.12.1993 was issued to the Appellant for the period from April,1991 to March, 1993 for demand of Central Excise duty of Rs. 31,65,651/- under Section 11A of the Act. The said Show Cause Notice was adjudicated by the Jt. Commissioner vide Order-in-Original No. BHV-EXCUS-000-JC-14-2015 dated 28.1.2016 who confirmed Central Excise duty of Rs. 31,65,651/- under Section 11A of the Act. Being aggrieved, the Appellant filed appeal before the Commissioner(Appeals), Central Excise, Rajkot who dismissed the appeal. The Appellant preferred appeal before the Hon'ble CESTAT, Ahmedabad, who allowed the appeal of the Appellant vide Order No. A/11729/2018 dated 30.7.2018. The Appellant filed refund application before the lower adjudicating authority for refund of pre-deposit of Rs. 5,54,070/-.

3.1 Show Cause Notice No. V/18-27/Refd/18-19 dated 28.9.2018 was issued to

the Appellant calling them to [illegible] as to why said product should not be re-assessed under Ch. No. [illegible] CESTAT's Order dated 30.7.2018; why refund claim of Rs. 5,54,070 [illegible] not be re-appropriated against duty payable after re-assessment [illegible] and why extra duty amounting to Rs. 55,78,077/- arising [illegible] under Ch. No. 3923 should not be recovered from them.

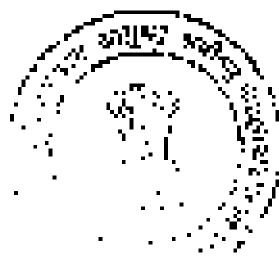
3.7 The above said Show [illegible] notice was adjudicated vide the impugned order listed at Sl. No. 2 of table [illegible] which re-assessed the said product under Ch. No. 3923 as per CESTAT's order dated 30.7.2018 and re-assessed duty payable to Rs. 55,78,077/- [illegible] of differential duty of Rs. 55,78,877/- in terms of [illegible] of Central Excise Rule, 1944 read with Section 11A of the Act [illegible] refund of pre-deposit of Rs. 5,54,070/- and ordered appropriation against [illegible] duty liability.

4. Being aggrieved with the impugned orders, the Appellant has preferred appeals on the various grounds [illegible] as follows:

(i) The Adjudicating authority [illegible] that there was no provisional assessment. Had it been provisional assessment, the Department would not have issued two show cause notices in [illegible]. In fact such notice would be void if the assessment was provisional. The issue framed in the SCN and impugned order is for reassessment of the said products [illegible] that the classification is now settled. The question of reassessment [illegible] arise only if the classification is open to examination. Therefore, it is not open to reassess the finalized assessment. In fact it is the [illegible] which was challenged in these proceedings [illegible] order.

(ii) That the Department had issued two SCNs in the year 1993 as referred in para 12 of the SCN. Had the assessment been provisional, the stage for issuing notice would not have arisen. [illegible] show cause were issued during the period when the classification of the [illegible] was under dispute. The proposal in the said show cause notices was to change the classification from Chapter 84 to Chapter 76. At that stage, Chapter 39 was nowhere in the horizon. As per the final assessment, the products were assessed under Chapter 76. Consequent upon the final assessment, both the notices were decided under OIO dated 26-11-97; that once there is final assessment or classification list, the question of classification being provisional and, therefore, subject to reassessment does not arise.

(iii) That SCNs were issued considering the classification lists were



provisionally approved and demanded duty under Chapter 76. The present proceedings directly relate to those two show cause notices. In the said two notices, there was no demand under Chapter 39. Under the circumstances, the SCNs cannot be decided under Chapter 39.

(iv) It is not permissible to go beyond the show cause notices. The show cause notices dated 14.10.1993, 19.11.1993 and 26.11.1993 never had any proposal or demand under Chapter 39. Therefore, the impugned order confirming demand under Chapter 39 is beyond the show cause notice and, therefore not tenable.

(v) That when the appellate authority approved the classification different from what was in issue, it is not permissible to demand duty for the past period. Therefore, question of raising demand under Chapter 39 does not arise. Such approval of classification under different head than involved in the proceedings would not revive the assessment.

(vi) That when the Appellant had filed appeal, it is not permissible to raise demand in excess of the impugned order in appeal and their appeal cannot result into higher liability than assessed.

(vii) That the extra duty demanded in the notice is sought to be recovered under Section 11 of the Act which is for recovery of duty. The recovery of duty can arise if there is assessed duty payable but not paid. Section 11 proceedings are different and distinct from Section 11A proceedings inasmuch as section 11A gives jurisdiction to the department to demand duty legally payable in a given fact. Section 11A notice proposes assessment and, therefore, the question of payment of duty arises. Section 11, on the other hand, is in respect of recovery of confirmed duty. Therefore, for any action under Section 11 primarily there should be a confirmed assessed duty payable which alone can be recovered.

(viii) The present show cause notice seeks action under Section 11 implying that there is confirmed duty payable. The preliminary question, therefore, arises as to where is the assessment order under which the confirmed liability has arisen, however, the show cause notice does not show any confirmed assessment order, wherein the duty sought to be recovered is confirmed. In the absence of confirmed assessed duty, question of recovery does not arise.

(ix) That under Notification No. 14/92 dated 01-03-92, as amended, the effective rate of duty in respect of all goods falling under Chapter 39.26 was 30% and as per Sr. No. 37 of the said Notification, all goods falling under Chapter 39.26 were fully exempted when made out of goods falling under Chapter 39.01

on 39.15 and no credit is [illegible] under [illegible](A). Since all the conditions of the notification are satisfied, the Appellant is eligible for exemption.

(XI) That the [illegible] order [illegible] dated 7.4.2017 is also in respect of the appeal arising out of Order-in-Appeal No. [illegible]/2008/BVR/ KC/Commr(A)/Ahd dated 07.05.2008. The said [illegible] appeal was against Order-in-Original No. 243/R/2007. Under the said [illegible] refund application was rejected. The refund application is for the [illegible] amount which is also now in these appeal proceedings. This refund application was sought to be rejected under show cause notice dated 14-07-2003 [illegible] upon the classification of the goods. The Tribunal's orders [illegible] consequential relief and, therefore, the refund is required to be sanctioned.

(XII) When the question of recovery is [illegible], the question of adjustment of refund does not arise.

(XIII) The impugned order [illegible] refund as applied by the Appellant, interest thereon has not been granted. [illegible] interest is [illegible]atutory, it must be granted.

4.1 In Personal Hearing, Shri [illegible] Vyas, Advocate, appeared on behalf of the Appellant and reiterated the grounds of both appeals and submitted copies of SCNs to Orders-in-Original to Order-in-Appeal to CESTAT's Order to Hon'ble Supreme Court Order; that CESTAT's order has become final because the Hon'ble Apex Court did not [illegible] with the order; that refund arising out of CESTAT's order needs to be given [illegible] that the demand of SCN has been decided by the Department [illegible] that the SCN dated 5.1.2018 issued for demand for the period from [illegible], 1992-93 and 1993-94 is time barred; that the assessment of these goods for the period from April, 1993 to October, 1993 and 1991-92 and 1992-93 is final and cannot be reopened now; that both these appeals may please be allowed as per legal position.

Findings:

5. I have carefully gone through the facts of the case, the impugned orders, the appeal memoranda and written as well as oral submissions made by the Appellant. The issue to be decided in the present appeals is whether, in the facts of the cases, confirmation of duty demand and appropriation of refund is correct, legal and proper or not.

6. On going through the records, I find that the Appellant had filed classification lists in the years 1991, 1992 and 1993 classifying their product

'Fiber Aluminium Bobbins Dynamically Balanced' under Ch. No. 8448. The Department provisionally assessed the said product under Ch. No. 7616.90 and asked the Appellant to execute Bond and furnish 25% Bank Guarantee to cover differential Central Excise duty. The Appellant refused to furnish Bond/BG, then the Department issued three Show Cause Notices proposing classification of product under Ch. No. 7616.90 and demanding differential Central Excise duty. I find that two Show Cause Notices dated 14.10.1993 and dated 19.11.1993 for the period April, 1993 to October, 1993 were adjudicated vide Order in Original No. 143-145/C/D/93 dated 26.11.1993 and one Show Cause Notice dated 30.12.1993 for the period April, 1991 to March, 1993 was adjudicated vide Order-in-Original No. RFV EXCUS-003-JC-14-2015 dated 28.1.2016 classifying the product under Ch. No. 7616.90 and confirming Central Excise duty demanded in the respective SCNs. The classification dispute was decided by the Hon'ble CESTAT, Ahmedabad vide Order No. A/10754-10755/2017 dated 7.4.2017, which held that product 'Fiber Aluminium Bobbins Dynamically Balanced' is classifiable under Ch. No. 3923.90. The Hon'ble Supreme Court vide judgement dated 22.1.2018 upheld the order of CESTAT. Hence, the CESTAT's order dated 7.4.2017 attained finality on 22.1.2018. Based on the classification decided by the Hon'ble CESTAT, two Show Cause Notices were issued to the Appellant on 5.1.2018 and on 28.9.2018 for re-assessing the said product under Ch. No. 3923.90 and for recovery of differential duty payable by the Appellant and also for appropriating refund claims filed by the Appellant. These two Show Cause Notices were decided by the lower adjudicating authority vide the impugned orders, which confirmed Central Excise duty and appropriated sanctioned refund of Rs. 8,57,029/- and Rs. 5,54,070/- respectively from the confirmed demand. The Appellant has contested these orders on the ground that when the Hon'ble CESTAT decided classification different from what was the view of the Department on the issue, it is not permissible for the Department to demand duty for the past period and hence, question of raising demand under chapter 39 does not arise; that it is not permissible to go beyond the impugned Show Cause Notices; that those SCNs were issued considering that the classification lists were provisionally approved and demanded duty on goods for classification under Chapter 76; that the Show Cause Notices never had any proposal or demand under Chapter 39; that the impugned orders confirming demand under Chapter 39 is beyond the scope of Show Cause Notices and therefore not tenable.

7. I have gone through Show Cause Notices dated 5.1.2018 and dated 28.9.2018 adjudicated vide the impugned orders. I find that both Show Cause

10. The Appellant has contended that the Show Cause Notices dated 14.10.1993, dated 19.11.1993 and dated 25.11.1993 had not proposed classification under Chapter 39 and therefore, the impugned orders confirming demand under Chapter 39 is beyond the scope of Show Cause Notices and not tenable. I find that the said three Show Cause Notices had proposed classification of the product of the Appellant under 7616.90 but the Hon'ble CESTAT, by allowing the appeals of the Appellant, decided the classification of their product under 3923.90 as submitted by the Appellant and the Orders of the Hon'ble CESTAT has now attained finality because the Appellant accepted that Order of CESTAT. Under the circumstance, it cannot be said that the impugned orders travelled beyond scope of Show Cause Notices, since the impugned orders have only implemented the orders passed by the Order of CESTAT duly upheld by the Hon'ble Apex Court and the Department is duty bound to re-assess the product under 3923.90 and thus, the contention of the Appellant is without merits.

11. In view of above, I do not find infirmity in the impugned orders and hence, uphold the impugned orders and reject appeals

12. अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

12. The appeals filed by the Appellant is disposed off as above.

सत्यापित / [illegible] / अधीक्षक (अपील्स)

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By R.P.A.D.

To,	सेवा में,
M/s Pioneer Industries,	मे. पायोनियर इंडस्ट्रीज,
2 A, Jintan Udyognagar,	2-ए, जिंतान उद्योगनगर,
Surendranagar.	सुरेन्द्रनगर।

प्रति:-

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, सुरेन्द्रनगर मण्डल को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।