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

द्वितीय तल,जी एस टी भवन / 2nd 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 / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date:
	V2/23/BVR/2019	BHV-EXCUS-000-ADC-011 to 12-2018-19	25/02/2019

ख अपीलआदेशसंख्या(Order-In-Appeal No.):

BHV-EXCUS-000-APP-222-2019

आदेश का दिनांक / Date of Order: **16.09.2019** जारी करने की तारीख / Date of issue: **17.09.2019**

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by **Shri Gopi Nath**, Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, 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/ST / GST, Rajkot/Jamnagar/Gandhidham :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants &** Respondent :-

M/s.Aditya Birla Nuvo Limited (Indian Rayon Ltd), Junagard-Veraval Road, Veraval, District Gir Somnath.

इस आदेश(अपील) से व्यथित कोइ 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 अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

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) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 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 माँग , ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 नियमवाली, 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) 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" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम

(ii) सेनवेट जमा की ली गई गलत राशि

(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

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 याचिका निम्नलिखित मामलो में, केंद्रीय 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:

(i) 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

(ii) 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.

(iii) 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.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट 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 है।/

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां 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.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो 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 नयाधिकरण को एक अपील या केंद्रीय 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.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I 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.

(F) 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 और 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.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट 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

:: ORDER-IN-APPEAL ::

M/s Aditya Birla Nuvo Ltd, Veraval filed appeal No. V2/23/BVR/2019 against Order-in-Original No. BHV-EXCUS-000-ADC-11TO12-2018-19 dated 25.2.2019 (*hereinafter referred to as* 'impugned order') passed by the Additional Commissioner, Central GST and Central Excise, Bhavnagar (*hereinafter referred to as* 'lower adjudicating authority').

2. The facts of the case are that the Appellant (holding Central Excise Registration No. AAACI1747HXM007) was engaged in manufacture of Viscose Filament Yarn, Caustic Soda Flakes, Chlorine and Hydrochloric Acid. During the course of Audit of the records of the Appellant, it was found that the Appellant was clearing Liquid Chlorine at ex-plant rate as per purchase order however, ex-plant rate was further bifurcated as ex-plant price and freight and the Appellant paid duty only on ex-plant price excluding freight charges; that the Appellant was not paying Central Excise duty on freight charges recovered by the Appellant from their buyers. It appeared to the Audit that the Appellant was delivering the goods at buyer's premises and hence, place of removal was not factory gate but the destination of buyer and therefore, the Appellant was required to include freight in assessable value in terms of Section 4 of the Central Excise Act, 1944 (*hereinafter referred to as* "Act").

2.1 Show Cause Notice No. 47/ADC/JC/GLT-6/ABNL/CED/NONCERA/ 2016-17 dated 11.5.2017 for the period from September, 2015 to December, 2016 was issued to the Appellant calling them to show cause as to why Central Excise duty of Rs. 1,13,17,343/- should not be demanded and recovered from them under Section 11A(1)(a) of the Act along with interest under Section 11AA of the Act and also proposing imposition of penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002.

2.2 Show Cause Notice No. V/15-9/DEM/HQ/LTU/2017-18 dated 11.12.2018 for the period from January, 2017 to June, 2017 was issued to the Appellant calling them to show cause as to why Central Excise duty of Rs. 50,31,673/- should not be demanded and recovered from them under Section 11A(1)(a) of the Act along with interest under Section 11AA of the Act and also proposing imposition of penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002.

2.3 The above said Show Cause Notices were adjudicated vide the impugned order which confirmed Central Excise duty of Rs. 1,63,49,016/- under Section 11A of the Act along with interest under Section 11AA of the Act and imposed

penalty of Rs. 1,63,49,016/- under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal on the various grounds, *inter alia*, as below :-

(i) The finding in the impugned Order that buyers' premises is the place of removal and not the factory gate in order to include the outward transportation charges in the assessable value for the purpose of payment of excise duty on goods manufactured and cleared by the appellants from the factory, is incorrect, contrary to the factual position and settled legal position and liable to be set aside.

(ii) As per Section 4(1)(a) of the Act, the value of excisable goods shall be the 'transaction value' to be determined on each removal of the goods, where the goods are sold by the assessee for delivery at the time and place of the removal, the assessee and the buyer of goods are not related, and the price is the sole consideration for the sale. In the present case, all the aforesaid conditions are satisfied

(iii) They arranged the transportation of the finished goods from the factory to the customer's premises. Such arrangement is independent to the sale transaction between the appellants and the customers. That delivery to transporter amounts to delivery to buyer. Goods are delivered to transporter at the factory-gate. LR in all cases shows the customers of the final products as 'consignee'. Hence, transfer of "property in goods" and "possession of goods" has taken place at the factory-gate of the appellants only.

(iv) In case of FOR Destination sales made from factory, if LR or similar documents of title to goods is in the name of the customer, the "delivery" will be complete at the factory gate and hence factory gate would be place of removal. Where LR mentions the buyer/customer as the consignee, the delivery of goods to the transporter would amount to 'constructive delivery' of goods to the buyer. This also would amount to passing of the property in the goods to the buyer. Therefore, the property in the goods as well as constructive delivery of the goods is complete at the factory gate of the appellants itself and not at the customer's premises as erroneously held in the impugned Order. Under these facts, it is submitted that the appellants' factory is the place of removal in terms of Section 4(3)(c) of the Act.

(v) The provisions contained in Sections 23(1) and 23(2),Section 39(1),Section 2(2) of the Sale of Goods Act,1930 lay down that the delivery of the goods to a

carrier for transmission to the buyer amounts to delivery of the goods to the buyer as held in the case of Mahabir Commercial Co. Ltd. Vs. CIT - AIR 1973 (SC) 430:

(vi) It is well settled that LR is a document of title to the goods meaning thereby that LR is a document which legally represents the goods and mentioning the buyer as the consignee in the lorry receipts operates as transfer of property in the goods. LR is a proof of possession and control of the goods mentioned therein. After LR is made, the appellants reserve no right to dispose/divert/re-route the goods. Hence, the property in the finished goods is unconditionally transferred to the customers at the factory gate of the appellants.

(vii) The above submissions prove that the place where transfer of possession takes place is the place where goods are handed over to the transporter and therefore even going by the department's logic, place of removal should be factory-gate where goods are handed over to transporter for delivery of finished goods to customer premises. This can be evidenced by perusal of sample copy of LR issued by the transporter.

(viii) In the present case, the finished goods are said to be sold as and when said goods are handed over to the transporter, at the factory gate of the appellants. The place of removal is therefore the factory gate of the appellants and accordingly freight from appellants' factory to the customer's premises will not be included in the assessable value of finished goods sold by the appellants during the period in dispute. Besides, the excise invoices also mentioned freight amount separately. Freight was charged over and above the price of the goods sold at the factory gate.

(ix) The Hon'ble Supreme Court in the case of Ispat Industries Ltd.-2015(324) ELT 670(SC) has distinguished its own decision in case of Roofit Industries Ltd. and has laid down a law that the customers' premise can never be considered as the place of removal. After the decision of the Hon'ble Supreme Court in case of Ispat Industries Ltd., irrespective of the terms and condition of the contract, the place of removal for the purpose of removal of goods could only be the premises of the manufacturer (i.e. factory, depots, etc.) and no other place.

(x) Penalty is not imposable on the appellant under Rule 25 of Central Excise Rules, 2002. There is no evidence produced in the show cause notice as well as Order-in-Original regarding suppression of facts with intention to evade payment of duty on the part of the appellants. Further, the appellants submit that they

were under a bonafide belief that they have correctly determined assessable value and paid excise duty on Liquid Chlorine cleared from the factory. Therefore, intention to evade payment of duty cannot be attributed to the appellant. Further, there was no suppression whatsoever on their part and the departmental authorities possessed full information with regard to the present case. The factory of the appellants was regularly audited by the central excise department and therefore, all relevant facts were known to the department.

4. In Personal Hearing, Shri Ashok Herma, AGM(Indirect Tax) appeared on behalf of the Appellant and reiterated submissions of Appeal Memorandum and submitted additional submission dated 13.8.2019 and Circular No. 1065/4/2018-Cx dated 8.6.2018 and requested to allow the appeal on the grounds contested therein.

4.1 In written submission dated 13.8.2019, it has been, *inter alia*, contended that,

(i) The appellant received Purchase Order from the Customers for purchase of liquid chlorine. The PO's separately mention the purchase price of chlorine and specifically mention the freight amount for delivery of goods from factory of the appellant to the premises of the customers. Liquid chlorine is delivered in special vessel known as 'toner' specially made for delivery of chlorine. Only trained drivers are required for handling these toners. Hence, most of their customers cannot arrange the transportation on its own and therefore, it was obligation of the Appellant to arrange transportation of goods to the buyer's premises.

(ii) On the basis of PO's received, the appellant had raised invoices showing the ex-works price of the finished goods and paid excise duty at the appropriate rate on such ex-works price only. The tax invoices raised by the appellant clearly shows the name of customers as 'consignee'. Further, the amount of freight mentioned in the purchase order has been charged separately in the invoices and no excise duty is paid on such amount.

(iii) The aforesaid goods are then dispatched by road and lorry receipts ('LRs') are obtained from the transporters. At the time of transporting the Liquid Chlorine, the LR was prepared by transporter in the name of the customer for supply of Liquid Chlorine. LRs clearly show the customer as the consignee and appellant as the consignor. Since ex-factory price of the finished goods is available, the freight separately recovered by the appellant from the customers will not form part of assessable value determined in terms of Section 4(1)(a) of Act. Therefore, the sale takes place at the factory gate of the appellant.

(iv) The delivery to transporter amounts to delivery to buyer. Goods are delivered to transporter at the factory-gate. LR in all cases shows the customers of the final products as 'consignee'. Hence, transfer of "property in goods" and "possession of goods" has taken place at the factory-gate of the appellant only. In case of FOR Destination sales made from factory, if LR or similar documents of title to goods is in the name of the customer, the "delivery" will be complete at the factory gate and hence factory gate would be place of removal. Where LR mentions the buyer/customer as the consignee, the delivery of goods to the transporter would amount to 'constructive delivery' of goods to the buyer. This also would amount to passing of the property in the goods to the buyer. Therefore, the property in the goods as well as constructive delivery of the goods is complete at the factory gate of the appellant itself and not at the customer's premises as held by the Adjudicating authority.

(v) As per provision of Section 23(1) and 23(2) of the Sale of Goods Act and the delivery as defined under Section 2(2) of the said Act provided that delivery of the goods to the carrier for transmission to the buyers amounts to delivery of the goods to the buyers. Therefore, once the goods are delivered to the transporter, the property of the goods is passed on from the appellant to the buyer at the factory gate and sale is completed at the factory gate; possession is transferred to the buyer from the appellant and the delivery is complete.

(vi) Thus, the impugned Order has been passed without appreciating the documentary evidence available on record and court ruling and hence, impugned Order is liable to be set aside.

Findings:

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and written as well as oral submissions made by the Appellant. The issue to be decided in the present appeal is whether freight charges collected by the Appellant is includible in assessable value for the purpose of payment of Central Excise duty as held by the adjudicating authority or otherwise.

6. I find that the lower adjudicating authority confirmed demand of Central Excise duty of Rs 1,63,49,016/- on the ground that 'place of removal' in respect of the said goods was premises of the buyers and Central Excise duty is chargeable on the transaction value, including freight amount collected by the Appellant, in terms of Section 4 of the Act. The Appellant has contended that the delivery to transporter amounts to delivery to buyer; that goods were

delivered to transporter at the factory-gate; that LR in all cases shows the customers of the final products as 'consignee' and hence, transfer of "property in goods" and "possession of goods" has taken place at the factory-gate of the appellant; that once the goods are delivered to the transporter, the property of the goods is passed on from the appellant to the buyer at the factory gate and sale is completed at the factory gate; that irrespective of the terms and condition of the contract, the place of removal for the purpose of removal of goods can only be the premises of the manufacturer and customers' premise can never be considered as the place of removal as held by the Hon'ble Supreme Court in the case of Ispat Industries Ltd.-2015(324) ELT 670(SC).

6.1 I find it is pertinent to examine provisions of Section 4 of the Act which are reproduced as under:

> "SECTION 4. Valuation of excisable goods for purposes of charging of duty of excise. — (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -
>
> (a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;"

6.2 The term 'place of removal' is defined under Section 4(3)(c) of the Act as under:

> "(c) 'place of removal' means -
> (i) a factory or any other place or premises of production or manufacture of the excisable goods;
> (ii) a warehouse or any other place or premises wherein the excisable goods have been permitted to be deposited without payment of duty;
> (iii) a depot, premises of a consignment agent or any other place or premises from where the excisable goods are to be sold after their clearance from the factory;
> from where such goods are removed;"

6.3 The provisions of Rule 5 of the Central Excise Valuation Rules,2000 are reproduced as under:

> "RULE 5. Where any excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of section 4 of the Act except the circumstances in which the excisable goods are sold for delivery at a place other than the place of removal, then the value of such excisable goods shall be deemed to be the transaction value, excluding the cost of transportation from the place of removal upto the place of delivery of such excisable goods.
>
> *Explanation 1.* - "Cost of transportation" includes -
> (i) the actual cost of transportation; and
> (ii) in case where freight is averaged, the cost of transportation calculated in accordance with generally accepted principles of costing.
>
> *Explanation 2.* - For removal of doubts, it is clarified that the cost of transportation from the factory to the place of removal, where the factory is not

the place of removal, shall not be excluded for the purposes of determining the value of the excisable goods."

7. For deciding whether premises of buyers in the present case to be considered as 'place of removal' as held by the lower adjudicating authority or factory gate of the Appellant was 'place of removal', as contended by the Appellant, it is pertinent to go through the judgement passed by the Hon'ble Supreme Court in the case of Ispat Industries Ltd reported as 2015(324) ELT 670 (SC), wherein the Hon'ble Court interpreted the phrase *"any other place or premises"* contained in Section 4(b)(iii) of the Act and held that the said phrase refers only to a manufacturer's place or premises from where excisable goods "are to be sold" to the buyer and such place or premises can only be the manufacturer's premises and can, in circumstances, be a buyer's premises. The Hon'ble Supreme Court further held that if the legislature intended that the buyer's premises be treated as the place of removal, then the words "are to be sold" should have been replaced by the words "have been sold" in Section 4(b)(iii) above. The relevant portion of the judgement is reproduced as under:

> "16. It will thus be seen that where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be the normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods *are to be sold* after their clearance from the factory are all places of removal. What is important to note is that each of these premises is referable only to the manufacturer and not to the buyer of excisable goods. The depot, or the premises of a consignment agent of the manufacturer are obviously places which are referable only to the manufacturer. Even the expression "any other place or premises" refers only to a manufacturer's place or premises because such place or premises is stated to be where excisable goods *"are to be sold"*. These are the key words of the sub-section. The place or premises from where excisable goods are to be sold can only be the manufacturer's premises or premises referable to the manufacturer. If we are to accept the contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to the buyer's premises.
>
> 17. It is clear, therefore, that as a matter of law with effect from the Amendment Act of 28-9-1996, the place of removal only has reference to places from which the manufacturer is to sell goods manufactured by him, and can, in no circumstances, have reference to the place of delivery which may, on facts, be the buyer's premises."

(Emphasis supplied)

7.1 In view of above judgement, it is beyond doubt that buyer's premises is not place of removal *per se,* even in cases where manufacturer arranges transportation on behalf of buyers and collects freight from the buyer. I find that after pronouncement of judgement in the case of Ispat Industries Ltd *supra,* Central Board of Indirect Taxes and Customs vide Circular No. 1065/4/2018-CX. dated 8-6-2018 has issued guidelines as under:

"3. General Principle : As regards determination of 'place of removal', in general the principle laid by Hon'ble Supreme Court in the case of *CCE* v. *Ispat Industries Ltd.* - 2015 (324) E.L.T. 670 (S.C.) may be applied. Apex Court, in this case has upheld the principle laid down in *M/s. Escorts JCB* (supra) to the extent that 'place of removal' is required to be determined with reference to 'point of sale' with the condition that place of removal (premises) is to be referred with reference to the premises of the manufacturer. The observation of Hon'ble Court in para 16 in this regard is significant as reproduced below :

"16. It will thus be seen where the price at which goods are ordinarily sold by the assessee is different for different places of removal, then each such price shall be deemed to be normal value thereof. Sub-clause (b)(iii) is very important and makes it clear that a depot, the premises of a consignment agent, or any other place or premises from where the excisable goods are to be sold after their clearance from the factory are all places of removal. What is important to note is that each of the premises is referable only the manufacturer and not to the buyer of excisable goods. The depot or the premises of the consignment agent of the manufacturer are obviously places which are referable to the manufacturer. Even the expression "any other place of premises" refers only to a manufacturer's place or premises because such place or premises is to be stated to be where excisable goods "are to be sold". These are key words of the sub-section. The place or premises from where excisable goods are to be sold can only be manufacturer's premises or premises referable to the manufacturer. If we were to accept contention of the revenue, then these words will have to be substituted by the words "have been sold" which would then possibly have reference to buyer's premises."

8. I find that in the present case goods were handed over to the transporter under Lorry Receipt (LR) mentioning the buyer as the consignee and it acted as transfer of property in the goods. LR is a proof of possession and control of the goods mentioned therein. After LR is issued, the appellant reserves no right to dispose/divert/re-route the goods. Hence, the property in the finished goods is unconditionally transferred to the customers at the factory gate of the Appellant. I also find that the Appellant cleared goods to their buyers under Central Excise invoices showing name and address of the buyers and on payment of VAT which indicates that the goods were sold at factory gate only. My views are affirmed by the judgement rendered by the Hon'ble Supreme Court in the case of Ispat Industries Ltd *supra*, wherein it has been held that,

"33. As has been seen in the present case all prices were "ex-works", like the facts in *Escorts JCB's* case. Goods were cleared from the factory on payment of the appropriate sales tax by the assessee itself, thereby indicating that it had sold the goods manufactured by it at the factory gate. Sales were made against Letters of Credit and bank discounting facilities, sometimes in advance. Invoices were prepared only at the factory directly in the name of the customer in which the name of the Insurance Company as well as the number of the transit Insurance Policy were mentioned. Above all, excise invoices were prepared at the time of the goods leaving the factory in the name and address of the customers of the respondent. When the goods were handed over to the transporter, the respondent had no right to the disposal of the goods nor did it reserve such rights inasmuch as title had already passed to its customer."

(Emphasis supplied)

9. I have also examined Apex Court's judgement passed in the case of Roofit Industries Ltd. - 2015 (319) ELT 221 (SC) relied upon by the Adjudicating

authority. In the said case, the assessee was responsible for transporting the goods upto the buyers' premises as per terms of the contract and till the goods reach the destination, the risk of damage or loss to the goods remained with the assessee. Further, the entire payment in respect of the goods was to be made after the goods were received and accepted by the buyers at their premises. The Hon'ble Supreme Court observed that the price of the goods was inclusive of the transportation cost and transit insurance and that the goods were to be accepted by the buyers only at their premise and concluded that ownership in the goods vested with the assessee till the goods reached at the premises of the buyer. In this peculiar facts of the case, the Hon'ble Supreme Court held that the place of removal was the buyers' premises and not the factory gate of the assessee. Whereas, in the present case, the Appellant arranged for transportation of goods on behalf of their buyers since Liquid chlorine was carried in special vessel known as 'toner' specially made for transportation of chlorine and most of their customers cannot arrange the transportation on their own. However, ownership of goods was transferred at factory gate when goods were handed over to transporters as explained in para *supra*. Thus, facts of present case is different and distinguishable from facts involved in case law of Roofit Industries Ltd and consequently not applicable.

10. In view of above, I hold that factory gate of the Appellant was 'place of removal' in respect of goods cleared by the Appellant as per Section 4 of the Act and consequently freight amount is not required to be added in assessable value. As a result, Central Excise duty demand of Rs. 1,63,49,016/- is not sustainable and required to be set aside and I do so. Since, demand does not survive, penalty of Rs. 1,63,49,016/- imposed under Section 11AC of the Act is also set aside.

11. In view of above, I set aside the impugned order and allow the appeal.

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

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

16/9/19

(गोपी नाथ)
आयुक्त (अपील्स)

सत्यापित,

विपुल शाह
अधीक्षक (अपील्स)

By R.P.A.D.

To, M/s Aditya Birla Nuvo Ltd (Indian Rayon Ltd), Junagadh-Veraval Road,Veraval, District Gir Somnath.	सेवा में, मे. आदित्य बिरला नुवों लिमिटेड, जूनागढ़-वेरावल रोड, वेरावल, जिल्ला गिर सोमनाथ ।

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) अपर आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।