



::प्रधानआयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::
O/O THE PRINCIPAL 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

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सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइल संख्या/ Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/4/EA2/GDM/2018-19	29/JC/2017-18	21/03/2018

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

KCH-EXCUS-000-APP-067-2019

आदेश का दिनांक / Date of Order:	21.06.2019	जारी करने की तारीख / Date of issue:	25.06.2019
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श्रीकुमार संतोष, प्रधानआयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by ShriKumar Santosh, Principal Commissioner (Appeals), Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर,
राजकोट / जामनगर / गांधीधामा द्वारा उपरलिखित जारी मूल आदेश में मुजित: /
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 Appellant & Respondent :-

**M/s. Indian Farmer Fertilizer Co-operative Limited (IFFCO), Finance & Accounts
Administration Building Department, Old Kandla, Kandla Port, Dist-Kutch-370210.**

इस आदेश (अपील) स व्याप्त काद व्याक्त निम्नलिखित तरीक म उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दावर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

- (A) मामा शुल्क केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रांत अपील, केन्द्रीय उत्पाद शुल्क आधोनेयम, 1944 का धारा 35B के अतगत एवं विक्त 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 बताया गए अपीलों के अलावा शेष सभी अपीलों में सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए।/
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 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 मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थान 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, विक्त अधोनेयम, 1994 का धारा 86(1) के अंतगत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थान 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 सकगी एवं उक्त माथ 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 (सेन्ट्रल) 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, वशत कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपय से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल हैं
(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
- वशत 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 होगा।
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 पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, ममद 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 में 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 छूट (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) मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट 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 समयावधि 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 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 साथ 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। जहां 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 आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान: उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding 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-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-1 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 संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने में 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.



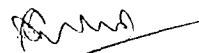
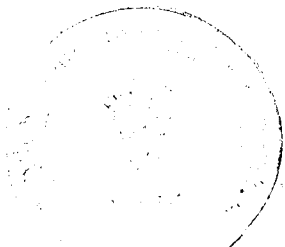
:: ORDER-IN-APPEAL ::

The present appeal has been filed by Assistant Commissioner, CGST Gandhidham Rural Division, Gandhidham on behalf of the Commissioner, Central GST & Central Excise Gandhidham (hereinafter referred to as "Department") in pursuance of the direction and authorization issued under sub-Section (2) of Section 35E of the Central Excise Act, 1944 against Order-in-Original No. 29/JC/2017-18 dated 21.3.2018 (*hereinafter referred to as 'impugned order'*) passed by the Joint Commissioner, Central Goods & Service Tax, Gandhidham (*hereinafter referred to as 'lower adjudicating authority'*) in the case of M/s Indian Farmer Fertilizer Co-operative Ltd (IFFCO) (*hereinafter referred to as 'Respondent'*).

2. The brief facts of the case are that the Respondent, holding Central Excise Registration No. AAAAI0050MXM002, was engaged in the manufacture of fertilizers, namely, DAP, NPK, Urea Phosphate etc. classifiable under Chapter 31 of the Central Excise Tariff Act, 1985 and was procuring Sulphuric Acid without payment of Central Excise Duty under Notification No. 12/2012-CE dated 17.03.2012 (Sl.No.86), as amended, for the manufacture of various Fertilizers as per condition no. 2 of the said Notification. The said Notification granted exemption to all goods used for manufacture of Fertilizers, if the procedure set out in the Central Excise (Removal of Goods at Concessional Rate of Duty for Manufacture of Excisable Goods) Rules, 2001 was followed.

2.1 The scrutiny of ER-1 Returns of the Respondent revealed that the Respondent was also engaged in the manufacture and clearance of Zinc Sulphate Monohydrate(hereinafter referred to as "ZSM"), a micronutrient classifiable under Chapter No. 28, using Sulphuric Acid procured duty free. It was alleged by the Department that ZSM is not fertilizer and hence, the Respondent was not eligible to use Sulphuric Acid procured duty free under Notification No. 12/2012-CE dated 17.3.2012 for manufacture of ZSM and hence, they were required to pay Central Excise duty on Sulphuric Acid procured duty free during the period from 1.4.2011 to 30.9.2016.

2.2 Show Cause Notice No. V.31/AR-I/Div.GIM/Jt. Commr/28/2016-17 dated 27.2.2017 was issued to the Appellant calling them to show cause as to why Central Excise Duty of Rs. 97,00,579/- should not be recovered from them under Section 11A of the Central Excise Act,1944 (hereinafter referred to as 'Act') read with Rule 6 of the Rules along with interest under Section 11AA read with Rule 6 of the Rules and penalty under Rule 25 of the Central Excise Rules, 2002 read

with Section 11AC of the Act be imposed on them.

2.3 The above Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order and dropped the proceedings initiated vide Show Cause Notice dated 27.2.2017 by holding that Circular No. 1022/10/2016-CX dated 6.4.2016 clarifying that micronutrients would not be classifiable under Chapter 31 as fertilizer from the date of Circular i.e. 6.4.2016 and prior to that ZSM(ZSM) was acknowledged as Fertilizer vide Board's Circular No. 79/79/94-CX dated 21.11.1994 and hence, the Respondent was eligible to procure duty free Sulphuric Acid under Notification No. 12/2012-CE dated 17.3.2012 for manufacture of ZSM(ZSM).

3. The impugned order was reviewed by the Department and appeal was filed on various grounds, *inter-alia*, as below:-

(i) The adjudicating authority has erred in relying upon Board's Circular No. 79/79/94-CX dated 21.11.1994 for dropping demand; that he failed to take cognizance of Board's Circular No. 392/25/98-CX dated 19.5.1998, which modified earlier Circular dated 21.11.1994.

(ii) Circular dated 19.5.1998 categorically clarified that notification issued under Fertilizer Control Order is irrelevant for deciding classification under Central Excise Tariff and appropriate consideration should be accorded whether it is separate chemically defined compound and whether it contains Nitrogen, Potassium or Phosphorus as laid down in the Explanatory Notes. The said Circular dated 19.5.1998 further clarified that if the micronutrient is a separate chemically defined compound, then classification under Chapter 31.05 is ruled out and it will be classifiable under Chapter 28/29. If the micronutrient is not a separate chemically defined compound and it contains Nitrogen, Potassium or Phosphorus as mentioned in the Explanatory Notes, then only it will be classifiable under Chapter 31.

(iii) The chemical composition of micronutrient as stated by the Respondent vide their letter dated 9.7.2016 discussed at para 3.1 of the impugned order, does not contain Nitrogen, Potassium or Phosphorus as essential element. In terms of Board's Circular dated 19.5.1998, ZSM cannot be termed as 'other fertilizer' so as to merit classification under Chapter 31.05; that the said clarification has been reinforced vide Circular No. 1022/10/2016-CX dated 6.4.2016.




(iv) The adjudicating authority, thus, erred in not following Circular No. 392/25/98-CX dated 19.5.1998, which was in force during the impugned period 2011-12 to Sept, 2016 and relied upon judgment of the Hon'ble Supreme Court passed in the case of Paper Products Ltd-1999(112) ELT 765.

3.1 The Respondent vide letter dated 15.4.2019 submitted Memorandum of Cross Objections, inter alia, submitting as under:

(i) The department issued the impugned SCN solely on the basis of CBEC Circular No. 1022/10/2016-CX dated 6.4.2016. Apart from that Circular, there is no other material to demand duty / interest / penalty. The adjudicating authority dropped the demand based on following:

- (a) CBEC Circular No. 79/79/94-CX dated 21.11.1994
- (b) Issuance of order in terms of Annexure 45 for duty free procurement of Sulphuric acid used in the manufacture of ZSM

(ii) The Department has filed the present appeal creating a new ground i.e. CBEC Circular No. 392/25/98-CX dated 19.5.1998 even if SCN has absolutely no mention of the Circular dated 19.5.1998. The Department came out with fresh / new ground in this appeal to contest the impugned order; that creating a fresh ground in appeal which was not part of the SCN is beyond the scope of appeal; that an order cannot be reviewed on new grounds not part of the SCN and for this argument, they relied upon following case laws:

- (a) Tag Overseas- 2018 (9) G.S.T.L. 282 (Tri. Del.)
- (b) Poonam Grover Associates - 2009 (14) STR 67 (Tri. Ahmd)

(iii) During the period 2013, 2014, 2015 & 2016, the department had consistently classified ZSM under CTH 3105 which attracts NIL rate of duty as is evident from various shipment cleared through Nhava Sheva Port (Mumbai) & Tughlakabad (Delhi) available in the public domain. It thus can be construed that the impugned product was allowed to be imported duty free without any objections/ restrictions.

3.3 In Personal Hearing, Shri Mohan Singh, Superintendent appeared on behalf of the Department and Shri S.R. Bommidi, Chief Manager(F&A) and Shri S.S. Patnaik, Consultant appeared on behalf of the Respondent and reiterated their respective grounds i.e. Department on their appeal and Respondent on their Memorandum of cross objections; that the Respondent made written submissions to say that the appeal has been filed on new ground; that CBEC Circular No. 392/25/1998 dated 19.5.1998 was not there in the Show Cause Notice or in the impugned order; that the demand is time barred; that extended period is not invokable as no facts had/have been suppressed by them from the Department;



that their Registration is for Zinc Sulphate only and not ZSM; that the appeal may be decided accordingly; that they sought time for submission of some additional documents for which 15 days time may be given.

3.4 The Appellant vide letter dated 6.6.2019 submitted, inter alia, as under:

(i) They intimated the Department in the year 2005 regarding their intent to manufacture ZSM and thereafter started its manufacturing.

(ii) The Appellant is paying Central Excise duty of more than Rs. 5 Crore every year and the unit has been periodically audited by the Department in terms of EA-2000. It is well within knowledge of the Department that ZSM is manufactured by them from duty free inputs. Hence, they have not committed any violation amounting to fraud or collusion or wilful mis-statement or suppression of facts, which would result attracting the provisions of Section 11A(4) of the Act and relied upon case law of Pragathi Concrete Products Pvt Ltd- 2005 (183) ELT 487 (Tri. Bang.).

Findings:

4. I have carefully gone through the facts of the case, the impugned order, contentions made by the Department in the Appeal Memorandum and by the Respondent in Memorandum of Cross-Objections as well as written and oral submissions made including during Personal Hearing. The issue to be decided in the present appeal is whether the impugned order not taking cognizance of CBEC Circular No. 392/25/98-CX dated 19.5.1998, which was not mentioned in the Show Cause Notice, is correct, legal and proper?

5. On going through the case records, I find that the proceedings were initiated against the Respondent on the ground that the Respondent was not eligible to avail exemption on Sulphuric Acid procured under Notification No. 12/2012-CE dated 17.03.2012, as amended, which was used to manufacture ZSM, which was/is a micronutrient falling under Chapter 28 and not fertilizer falling under Chapter 31. The Show Cause Notice contended that exemption under Notification *supra* was available only if Sulphuric Acid was used for manufacture of Fertilizers falling under Chapter 31 and ZSM cannot be considered as Fertilizer. However, the adjudicating authority dropped the proceedings initiated vide Show Cause Notice dated 27.2.2017 by holding that Circular No. 1022/10/2016-CX dated 6.4.2016, clarifying that micronutrient would not be classifiable under Chapter 31 as fertilizer, is applicable from the date of Circular i.e. 6.4.2016 and prior to that date ZSM was acknowledged/accepted as Fertilizer vide Board's Circular No. 79/79/94-CX dated 21.11.1994 and hence,




the Respondent was eligible to procure duty free Sulphuric Acid under Notification No. 12/2012-CE dated 17.3.2012 for manufacture of ZSM. The Department filed appeal on the ground that the adjudicating authority failed to take cognizance of Board's Circular No. 392/25/98-CX dated 19.5.1998, which modified earlier Circular dated 21.11.1994; that Circular dated 19.5.1998 clarified that notification issued under Fertilizer Control Order is irrelevant for deciding classification under Central Excise Tariff and appropriate consideration should be whether it is a separate chemically defined compound and whether it contains Nitrogen, Potassium or Phosphorus as laid down in the Explanatory Notes; that the said Circular dated 19.5.1998 further clarified that if the micronutrient is not a separate chemically defined compound and contains Nitrogen, Potassium or Phosphorus as mentioned in the Explanatory Notes, then only it will be classifiable under Chapter 31; that the chemical composition of micronutrient does not contain Nitrogen, Potassium or Phosphorus as an essential fertilizer element and hence, ZSM cannot be termed as 'other fertilizer', so as to merit classification under Chapter 31.05. The Respondent filed Memorandum of Cross Objections contesting that the Department filed the present appeal relying upon CBEC Circular No. 392/25/98-CX dated 19.5.1998, which was not even mentioned in the Show Cause Notice; that the Department has come out with new ground to contest the issue, which is beyond the scope of Show Cause Notice and hence, this appeal is not sustainable and they relied upon case laws of Tag Overseas- 2018 (9) G.S.T.L. 282 (Tri. Del.) and Poonam Grover Associates - 2009 (14) STR 67 (Tri. Ahmd).

5.1 I find that the Respondent procured Sulphuric Acid without payment of Central Excise duty during the period from 1.4.2011 to 30.9.2016 for use in the manufacture of ZSM, a micronutrient, in terms of Notification No. 12/2012-CE dated 17.3.2012 (Sl. No. 86). The Board vide Circular No. 1022/10/2016-CX dated 6.4.2016 issued clarification about classification, inter alia, of micronutrients, as under:

"2.1 Micronutrients are essential nutrients that are required in small quantities for the normal growth and development of plants. As on today, iron (Fe), manganese (Mn), zinc (Zn), copper (Cu), boron (B), molybdenum (Mo), nickel (Ni) and chlorine (Cl) are included in this category. These elements are also called minor or trace elements, but this does not mean that they are less important than macronutrients. Reply received from IARI on the subject, enclosed with the circular, may please be referred for further details. Inputs received from the trade indicates that these micronutrients are sold in the market as 'micronutrient fertilizer' supplying one or more of the eight essential nutrients listed above, namely iron to chlorine. However, in the trade parlance sale of micronutrients as 'micronutrient fertilizers' would not lead to classification thereof under chapter 31 as fertilizers for the purposes of Central Excise Tariff. For classification under chapter 31, at least one of the elements,




namely - nitrogen, phosphorus or potassium should be an essential constituent of the fertilizer as per chapter note 6 of chapter 31.”

5.2 Based upon the above Circular dated 6.4.2016, Show Cause Notice was issued to the Respondent on the ground that benefit of Notification No. 12/2012-CE dated 17.3.2012 is available only if Sulphuric Acid was used for the manufacture of fertilizer; that ZSM is a micronutrient and not fertilizer as clarified by the Board vide Circular dated 6.4.2016 and hence, the Respondent was called upon to pay duty on Sulphuric Acid. The adjudicating authority dropped demand on the ground that Circular dated 6.4.2016 was prospective in nature w.e.f. 6.4.2016 and that micronutrient was acknowledged as fertilizer vide Circular No. 79/79/94-CX dated 21.11.1994.

6. On going through the Appeal Memorandum, I find that the Department heavily relied upon Board's Circular No. 392/25/98-CX dated 19.5.1998 and contended that since ZSM did not contain either Nitrogen or Potassium or Phosphorus as an essential element, it cannot be termed as 'other fertilizer' whereas Show Cause Notice alleged contravention of Circular No. 1022/10/2016-CX dated 6.4.2016 and there is no reference of Circular No. 392/25/98-CX dated 19.5.1998 in Show Cause Notice at all. Thus, the Department has raised a new ground in appeal memorandum, which is beyond scope of Show Cause Notice. It is settled position of law that a new ground cannot be raised at appellate stage, which is not in the Show Cause Notice. Reliance is placed on the decision rendered by the Hon'ble Gujarat High Court in the case of Reliance Ports & Terminals Ltd. reported as 2016 (334) E.L.T. 630 (Guj.), wherein the Hon'ble High Court has held that,

“9. On a conjoint reading of the show cause notice issued to the assessee and the questions proposed in this appeal, it is evident that the issues raised in the questions proposed do not find place in the show cause notice. From the averments made in the memorandum of appeal and the grounds raised therein as well as on a perusal of the impugned order passed by the Tribunal, it appears that the appellant does not dispute the validity of the order of the Tribunal on the grounds decided by the Commissioner, but on grounds, which were not subject matter of the show cause notice. In the show cause notice, the assessee was not called upon to state as to whether the services of “Consulting Engineers” and “Banking and other Financial Services” are “input services” of the respondent or as to whether the capital goods were used for providing “output services” provided by the respondent viz. “Port Services”, etc. Evidently therefore, in the present appeal, the appellant seeks to challenge the impugned order passed by the Tribunal on grounds which were never subject matter of the show cause notice. Under the circumstances, in the light of the settled legal position as emerging from the above referred decisions of the Supreme Court, that the show cause notice is the foundation of the demand under the Central Excise Act and that the order-in-original and the subsequent orders passed by the appellate authorities under the statute would be confined to the show cause notice, the question of examining the validity of the impugned






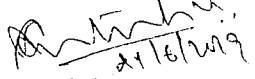
order on grounds which were not subject matter of the show cause notice would not arise.

10. In the aforesaid premises, in the absence of any infirmity in the findings recorded by the Commissioner or the Tribunal, there is no warrant for interference. The questions proposed by the appellant which were not subject matter of the show cause notice, do not arise out of the impugned order passed by the Tribunal. The appeal being devoid of any merit, is, accordingly, dismissed."

(Emphasis supplied)

7. In view of above, I reject the appeal and uphold the impugned order.
8. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
8. The appeal filed by Department is disposed off as above.

सत्यप्रति,

 विपुल शाह
 अधीक्षक (अपील्स)


 (कुमार संतोष)
 प्रधान आयुक्त (अपील्स)

By Regd. Post

To, M/s Indian Farmer Fertilizer Co- operative Ltd Finance & Accounts Administration Building Department, Old Kandla, Kandla Port, District Kutch.	सेवा में, मे. इंडियन फार्मर फर्टिलायजर को- ओपरेटिव लिमिटेड, प्रशासन विभाग, ओल्ड कांडला, कांडला पोर्ट, जिल्ला कच्छ।
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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, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अंजार-भचाउ मण्डल, गांधीधाम आयुक्तालय, गांधीधाम को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फाइल।

