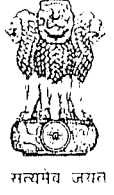




: आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क :
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,



द्वितीय तल, वी एम सी भवन / 2nd Floor, GST Bhavan
रस कोर्स रिंग रोड, Race Course Ring Road,
राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक पृ.डी.द्वारा :-

DIN-2020086-LSX00000NDA60

क.	अपील संख्या Appeal File No.	मूल आदेश सं. OIO No.	दिनांक Date
	V2/127 & 128/RAJ/2019	06 & 07/DC/KG/2019-20	17/09/2019

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

RAJ-EXCUS-000-APP-086-TO-087-2020

आदेश का दिनांक / Date of Order:	31.07.2020	जारी करने की तारीख Date of issue:	04.08.2020
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श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /
Passed by Shri Gopi Nath, Commissioner (Appeals), Rajkot

ग. अपर आयुक्त/ मध्य आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/ वस्तु एवं सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से मुक्तिव: /
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 Dev Flexipack Private Ltd, Plot No.2337, Lodhika Industrial Estate, D-Raod, Gate-II, GIDC, Metoda, Rajkot, Gujarat.

इस आदेश/आदेशों से व्यक्ति कोई व्यक्ति निम्नलिखित तरीके से उपाय प्राप्त कर सकता है।
Any person aggrieved by this Order in Appeal may file an appeal to the appropriate authority in the following way

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35(3) के अन्तर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अन्तर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35(3) of CEA, 1994 / Under Section 86 of the Finance Act, 1994 an appeal lies to

(i) विशेष बेंच मूल्यवहन से सम्बंधित सभी मामलों, सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, वस्तु एवं सेवा कर और के.ए.ए.ई. दिल्ली, का 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 (i)(a) में बूझा गए अपील के अलावा अन्य सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (मिस्ट्री) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, वस्तु एवं सेवाकर अपील न्यायाधिकरण के द्वारा कराए जाने चाहिए। /

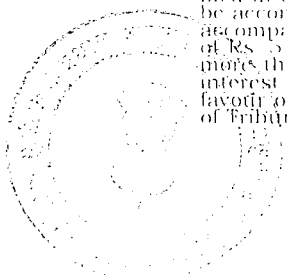
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad 380016 in case of appeals other than as mentioned in para (i) above

(iii) अपील न्यायाधिकरण के समक्ष अपील पुराने करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 5 के अन्तर्गत निम्नलिखित प्रकार से अपील (E.A. 3) का नार प्रिनटों में दर्ज किया जाना चाहिए। इसमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की प्रति अर्ज की गई है और न्याया गया जमाना, एम.ए. 5 लाख या उससे कम 5 लाख एम.ए. या 50 लाख एम.ए. तक अथवा 50 लाख एम.ए. 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 अपील न्यायाधिकरण की आस्था व सहायक रजिस्ट्रार के नाम में विधि की मार्गदर्शिका अधिनियम के तहत जारी खासित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का जमाना बैंक की इस आस्था में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की आस्था स्थित है। अथवा आदेश (ए. आ. आ.) के लिए आवेदन पत्र के साथ 500/- रुपये 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.5,000/- 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/-

(iii) अपील न्यायाधिकरण के समक्ष अपील, जिन अधिनियम, 1994 की धारा 86(1) के अन्तर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के अन्तर्गत निर्धारित प्रारूप S.T. 5 में नार प्रिनटों में की जा सकती एवं एक साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (इसमें से एक प्रति प्रमाणित होनी चाहिए) और इसमें से कम से कम एक प्रति के साथ, जहां सेवाकर की प्रति अर्ज की गई है और न्याया गया जमाना, एम.ए. 5 लाख या उससे कम 5 लाख एम.ए. या 50 लाख एम.ए. तक अथवा 50 लाख एम.ए. 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 अपील न्यायाधिकरण की आस्था व सहायक रजिस्ट्रार के नाम में विधि की मार्गदर्शिका अधिनियम के तहत जारी खासित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का जमाना बैंक की इस आस्था में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की आस्था स्थित है। अथवा आदेश (ए. आ. आ.) के लिए आवेदन पत्र के साथ 500/- रुपये 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 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/-

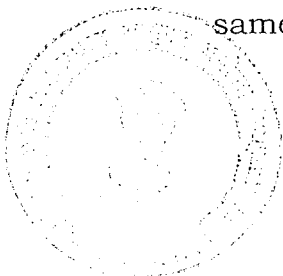


:: ORDER-IN-APPEAL ::

M/s Dev Flexipack Private Limited, Plot No. 2337, Lodhika Industrial Estate, D-Road, Gate-II, GIDC, Rajkot (*hereinafter referred to as "Appellant"*) filed Appeal Nos. V2/127 & 128/RAJ/2019 against Order-in-Original No. 6&7/DC/KG/2019-20 dated 17.09.2019 (*hereinafter referred to as 'impugned orders'*) passed by the Deputy Commissioner, Central GST & Central Excise, Division-II, Rajkot (*hereinafter referred to as the 'adjudicating authority'*).

2. The brief facts of the case are that during the course of audit, for the audit period 01.03.2016 to 31.03.2017, it was observed that the appellant was mainly engaged in manufacture of 'Multilayer Extruded Plastic Film', 'Flexible Laminated Printed Rolls' & 'Waste and Scrap of Plastic'. The appellant was classifying both the products viz. 'Multilayer Extruded Plastic Film', 'Flexible Laminated Printed Rolls' under CETH 39201092 and discharging central excise duty @ 12.5%. It was observed that the Articles of Conveyance or Packing of goods of Plastic of Polymers of ethylene were classifiable under CETH 39232100 under Chapter 39 of Section VII of Central Excise Tariff Act, 1985 and by virtue of Notification 12/2016 dated 01.03.2016, they were made chargeable to 15% of Central Excise duty. It also transpired that the "Conveyance or Packing of goods of Plastic of Polymers of ethylene" (Polyethylene pouch/bags), classifiable under CETH 39232100 was attracting 12.5% rate of Central Excise duty for clearing to Industrial Customers upto 28.02.2016 and later rate of duty was increased by 2.5% by the virtue of Notification 12/2016 dated 01.03.2016 and thus started attracting 15% rate of Central Excise duty w.e.f from March, 2016. Hence, it was observed that they were required to pay the differential amount of Central Excise duty @ 2.5 % (15%-12.5%=2.5%).

2.1 On further scrutiny of sales invoice, ER-1 returns, for the audit period, it was observed that the appellant was receiving Central Excise invoices of Cylinder (for designing of packaging materials) raised in the name of the Customers along with the work order for design of packing material. As the cost of such Cylinders was borne by the Customers, the same was not reflected in the financial records of the appellant and hence,

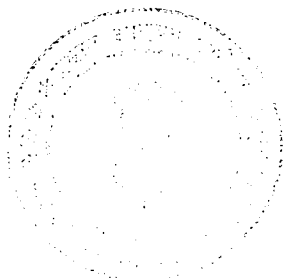


the cost was not apportioned in the dutiable clearances of the final product. Further, it was noticed that, repairing charges were incurred on these Cylinders and the cost of which was also not included in the dutiable clearance of final product. As the appellant had cleared the final product without appropriation of the Value of Service charge incurred on the same, the portion of tax suffered on the service charge was required to be recovered treating it at par with the Central Excise duty on the enhanced value of the final product. Therefore, the appellant was issued a Show Cause Notice No.: VI(a)/8-177/Circle-I/AG-04/2017-18 dated 22.06.2018 for the period from 01.03.2016 to 31.03.2017 and Statement of Demand (SOD) dated 04.12.2018 for the subsequent period i.e. 01.04.2017 to 30.6.2017, proposing to recover an amount of Rs. 4,65,670/- (Rs. 3,44,910/- + Rs.1,20,760/-) and Rs. 47,900/- (Rs. 10,911/- + Rs. 36,989/-) respectively under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as the '**Act**') along with interest and penalty under Section 11AC(1)(c) of the Central Excise Act, 1944 and Rule 27 of the Central Excise Rules, 2002 (hereinafter referred to as the said '**Rules**'). The adjudicating authority vide the impugned order confirmed the entire demand along with interest and imposed equal penalty under Section 11 AC of the Act and also imposed penalty of Rs.5000/- under Rule 27 of the Rules.

3. Being aggrieved by the impugned order, the appellant preferred the present appeal on the grounds as under:-

3.1 That the department had all the knowledge of the classification as also the process by which such products were manufactured by the appellant; that the basis of proposal to change the classification has not been clarified in the Show Cause Notice; that during the course of auditing, they submitted samples of the product being manufactured and cleared by them, which itself proves that the same cannot be classified under the proposed heading.

3.2 That the heading proposed is for the product bags and sacks where as the product being manufactured by them is pouches or rolls which can be fitted into the packing machine which can be used only for packing goods and not transporting of goods; that this basic difference in the nature of the product has not been considered by the department; that the



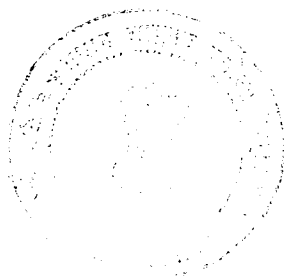
demand is barred by limitation, therefore the SCN is liable to be dropped; that as the department is aware of the activity undertaken, suppression of facts cannot be alleged and therefore penalty cannot be imposed.

3.3 That the burden to prove the classification is on the Department.

3.4 That the department has arrived at hypothetical value of the product which is illegal and without base; that the appellant is neither manufacturer of cylinder nor has charged any value of cylinder from the supplier, therefore the duty demanded is bad in law; that they relied upon the CBEC Circular No. 170/4/96 whereby it is clarified that the value of die supplied free of cost is to be apportioned in the value of final product by ascertaining the life of the said die; that the said principle is clearly applicable to the present case; that unless the value of the so called cylinder stated to have been supplied by the customer is worked out or determined with the life of such cylinder no part of value can be included and no part of duty can be recovered; that the cost of die/cylinder has to be apportioned and then only duty can be demanded; that the cylinders supplied by the customers were being used for number of years, hence the duty demanded is bad in law; that they relied upon the following decisions in support to their claim:

- Exotech Plastics Pvt. Ltd. Vs Commissioner of C.Ex., Pune-III 2018 (364) E.L.T 658 (Tri.- Mumbai)
- Tetra Pak India Pvt. Ltd. Vs Commissioner of Central Excise, Pune 2017 (354) E.L.T. 272 (Tri. -Mumbai)
- Bhavna Industrial Corporation Vs Commissioner of C.Ex., Rajkot 2009 (248) E.L.T. 660 (Tri.-Ahmd.)
- Before the Authority for Advance Ruling under GST, Karnataka, Re: Nash Industires (I) Pvt. Ltd. 2018 (19) G.S.T.L. 162 (A.A.R. – GST)
- GESTAMP Automotive India P. Ltd. Vs Commissioner of C.Ex., Pune-II 2017 (7) G.S.T.L 337 (Tri.-Mumbai)

3.5 That no part of the demand can be confirmed as the value of the cylinders is worked out on presumption and assumption.



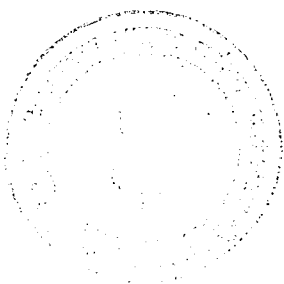
3.6 That the Department had full knowledge of the fact that the appellant is manufacturing various types of pouches with the help of cylinders being supplied and therefore the allegation of suppression of facts cannot be sustained; that they have also followed all the procedure prescribed under the law and are also submitting their return from time to time; that the department has also audited their books of accounts and have never objected the procedure followed and therefore the allegation cannot be sustained; they further submitted that they have not suppressed any fact from the department and the opinion arrived is just change of opinion, therefore the duty demanded is clearly barred by limitation. In this connection, they relied on the following judgments.

- (1) Commissioner of Central Excise, Mumbai-III Vs Essel Propack Ltd. 2015 (323) E.L.T. 248 (S.C.)
- (2) Shreeji Colourchem Industries Vs Commr. Of C,Ex., & Cus., Vadodara 2013 (294) E.L.T 615 (Tri.-Ahmd.)
- (3) SDL Auto Pvt. Ltd., Vs Commissioner of Central Excise, Delhi-IV 2013 (294) E.L.T/. 577 (tri.-Del.)
- (4) Uniworth Textiles Ltd., Vs Commissioner of Central Excise, Raipur 2013 (228) E.L.T. 161 (S.C.)

3.7 That they never had the intention to suppress any fact or evade payment of tax and therefore the allegation of suppression of fact cannot be sustained. The Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills had settled the law that if the intention of the assessee is not to evade duty then the penalty under the provisions of Section 11 AC is not imposable. The ratio laid down is clearly applicable in their case and therefore the penalty proceedings are liable to be set aside.

4. In Hearing, Shri Paresh Sheth, authorized representative of the appellant appeared on behalf of the appellant for the personal hearing. He reiterated the submissions already made and requested 10 days time to file additional submissions.

4.1 The appellant vide their additional submissions dated 19.03.2020 submitted that they are manufacturer of Flexible Laminated Printed Rolls and also Flexible Laminated Printed Pouches suitable for packing of Food articles but not for bulk packaging suitable for transportation; that the product manufactured by the appellant are not reusable and cannot carry

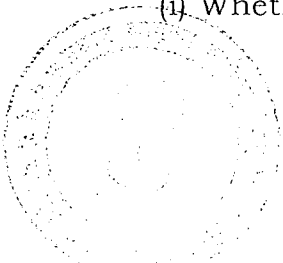


much weight and therefore cannot be compared with the Bags/sacks as confirmed in the impugned order; that the appellant are manufacturing and clearing not only in numbers but also in roll form; that they submitted a copy of a certificate issued by M/s HSM Foods International Pvt. Ltd. that they had purchased Pouches in number and in roll form from the appellant; that if their product is not classifiable under CETH No. 30921092 then it can be classified under CETH No. 39231090 or 39239090 but definitely not under 39232100 and hence the proceedings are liable to be dropped; that they submitted sample of the product to prove that the product being manufactured by them are sold in the form of pouches or in the form of Rolls; that they relied upon the decision of the Hon'ble Tribunal in the case of Sharp Industries Ltd. and Shree Chaitanya Plastics reported in 2007-216-ELT-33 and 2003-156-ELT-772 respectively whereby the Hon'ble Tribunal has held that the product 'Pouches' are classifiable under CETH No. 3926.90/3923.90 as other article.

4.2 That they are not manufacturers of cylinders and therefore no duty can be demanded on the value of the cylinder; that as per Rule 6 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000, and had clarified that the rule as such allows addition of value to the extent apportioned, that whenever the Capital goods are supplied by the customer on free of charge basis, for manufacture of Excisable Goods then the value has to be apportioned looking to the life of the said Capital goods, in other words, whenever the capital good are supplied by the customer for free then the value can be apportioned but duty cannot be demanded, therefore the duty demanded on the value of the cylinders is highly illegal; that the appellant are registered with the department since so many years and are following all the procedures prescribed under the law, therefore allegation of suppression of fact cannot be sustained and demand raised invoking extended period of limitation is liable to be set aside.

5. I have carefully gone through the facts of the case, the impugned orders, appeal memorandums and submissions made by the Appellant. I find that the issues to be decided in the present appeals are:

(i) Whether the manufactured product namely 'Packing material of plastic'



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should be classified under Chapter sub-heading no. 39232100 of Central Excise Tariff Heading instead of Central Excise Tariff Heading No. 39201092 or not.

(ii) whether the cylinders received free of cost from the customers is required to be appropriated in the final cost of the finished goods or otherwise and

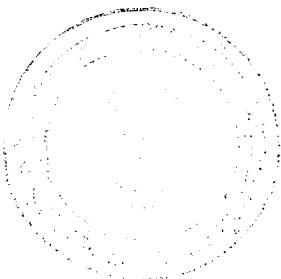
(iii) whether the cost of reworking/repairing of the cylinders (supplied free of cost by the customers) is required to be appropriated in the final cost of the finished goods or not.

6. In respect of the first issue, I find that the appellant has contended that they are classifying their final product viz. 'Multilayer Extruded Plastic Film' and 'Flexible Laminated Printed Rolls' under CETH 39201092 and discharging central excise duty @ 12.5% from the very onset and that the product should not be classified under 39232100.

6.1 I find that under the notes to Chapter 39 'Plastics and articles thereof', it has been clarified that - in headings 3920 and 3921, the expression "plates, sheets, film, foil and strip" applies only to plates, sheets, film, foil and strip (other than those of Chapter 54) and to blocks of regular geometric shape, whether or not printed or otherwise surface-worked, uncut or cut into rectangles (including squares) but not further worked (even if when so cut they become articles ready for use).

The description of the goods under the relevant chapter headings is reproduced as under:

SECTION VII		CHAPTER 39
Tariff Item	Description of goods	
(1)	(2)	
3920	OTHER PLATES, SHEETS, FILM, FOIL AND STRIP, OF PLASTICS, NON-CELLULAR AND NOT REINFORCED, LAMINATED, SUPPORTED OR SIMILARLY COMBINED WITH OTHER MATERIALS	
3920 10	Of polymers of ethylene: Sheets of polyethylene:	
3920 10 92	Flexible, plain	
3923	ARTICLES FOR THE CONVEYANCE OR PACKING OF GOODS, OF PLASTICS; STOPPERS, LIDS, CAPS AND OTHER CLOSURES, OF PLASTICS	



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6.2 Thus, I find that, "other plates, sheets, film, foil and strip, of plastics, non-cellular and not reinforced, laminated, supported or similarly combined with other materials" are covered in the description of goods under the chapter heading 3920 and "Sheets of polyethylene-Flexible, plain" fall under the CETH 39201092. "Articles for the conveyance or packing of goods, of plastics, stoppers, lids, caps and other closures of plastics" are classifiable under the CETH 3923 and "Sacks and Bags (including cones)" fall under the CETH 39232100.

6.3 On examination of the samples submitted by the appellant, I find that the Flexible Packaging Material of plastic (pouch) manufactured by them as per the choice of their customers falls under the category 'Articles for packaging of goods, of plastics.' The appellant manufactured and sold their goods as 'packaging material' of specific design and size but not as films. I find that films are not capable of packaging commodities. The products manufactured by the appellant were packing materials for their buyers which they used as pouches for packing of their products. Further, I find that the flexible laminated printed pouches (sample submitted) are suitable for packing food articles in small quantities. I further observe that the primary use of the product with motifs and pictorial representation, printed name, weight, trademark and other information of the product is primarily for packing of goods. I also find that the said pouches are not reusable and cannot carry much weight, therefore are not suitable for bulk packing. The product manufactured by the appellant are pouches or rolls which can be fitted into packing machines and used only for packing of goods but not for transportation of goods. Furthermore, I find that Sacks and bags are mainly used for packing of goods for transport, storage and sale of goods. The pouches manufactured by the appellant are not reusable and given to their customers for packing their product and sealed with the help of packing machines. I find that this basic difference in the nature of the product proves that the said product manufactured by the appellant is pouches or rolls only and merit classification under Chapter heading 3920 10 92 or 3923 10 90 and not as bags and sacks classified under CETH No. 3923 21 00 as proposed in the SCN and confirmed by the adjudicating authority. Thus, the demand of duty amounting to Rs. 3,55,821/- (Rs. 3,44,910/- + Rs. 10,911/-) is not sustainable.



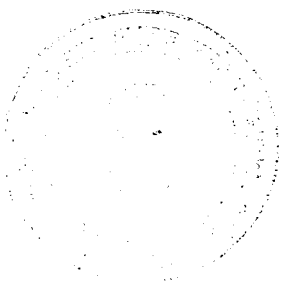
7. I find that the appellant had vehemently contended that the demand of duty amounting to Rs. 1,57,749/- (Rs. 120760/- + Rs. 36,989/-) is on the hypothetical value of the cylinders and is without considering the life of the cylinders or the apportioned value of the cylinder. I find that the appellant received Central Excise invoices of cylinders raised in the name of the customers along with the work order for design of packaging material. I also note that as the cost of the cylinders were borne by the customers, the said cost was not included in the final cost of the finished product. Further, the cost of the repairing charges incurred on these cylinders was also not included in the dutiable clearance of the final product.

7.1 In this regard, I find it pertinent to reproduce Rule 6 of the Central Excise Valuation (Determination of price of excisable of goods) Rules, 2000-

“RULE 6. - *Where the excisable goods are sold in the circumstances specified in clause (a) of sub-section (1) of Section 4 of the Act except the circumstance where the price is not the sole consideration for sale, the value of such goods shall be deemed to be the aggregate of such transaction value and the amount of money value of any additional consideration flowing directly or indirectly from the buyer to the assessee.*

Explanation 1 - For removal of doubts, it is hereby clarified that the value, apportioned as appropriate, of the following goods and services, whether supplied directly or indirectly by the buyer free of charge or at reduced cost for use in connection with the production and sale of such goods, to the extent that such value has not been included in the price actually paid or payable, shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the assessee in relation to sale of the goods being valued and aggregated accordingly, namely :-

- (i) *value of materials, components, parts and similar items relatable to such goods;*
- (ii) *value of tools, dies, moulds, drawings, blue prints, technical maps and charts and similar items used in the production of such goods;*



(iii) value of material consumed, including packaging materials, in the production of such goods;

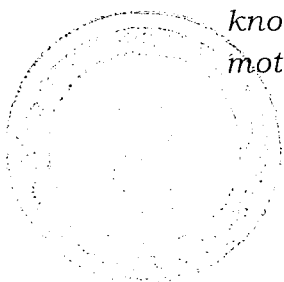
(iv) value of engineering, development, art work, design work and plans and sketches undertaken elsewhere than in the factory of production and necessary for the production of such goods.

7.2 From the above Rule, it is explicitly clear that any goods supplied directly or indirectly by the buyer free of charge for use in connection with the production and sale of such goods to the extent that such value has not been included in the price actually paid or payable shall be treated to be the amount of money value of additional consideration flowing directly or indirectly from the buyer to the appellant in relation to sale of the goods being value. As per this Rule, from 01.07.2000, the value of free supplied goods by the buyer which is used in connection with the production of the goods, to be sold to the buyer is includible in the assessable value. Therefore the landed cost of free supplied goods should be taken for inclusion in the assessable value, accordingly no deduction on account of excise duty of free supplied goods is permitted.

7.3 In this regard, I find that the **Hon'ble Tribunal, Mumbai in the case of Jemcon Industries Vs Commissioner of Central Excise, Kolhapur 2018 (17) G.S.T.L. 264 (Tri. - Mumbai) vide Final Order No. A/91016/2017-WZB, dated 30-11-2017 in Appeal No. E/585/2008-EX(DB)** had held that free of charge supplies made along with excisable goods forms a part of additional consideration in sale price thereof and accordingly value of such free supplies was includible in assessable value. The said case has been affirmed by the **Hon'ble Supreme Court in 2018 (17) G.S.T.L. J50 (S.C.)**.

7.4 Further, I place reliance in the case of **CCE, Jamshedpur Vs Tata Motors and Others [2009(237)E.L.T.147(Tr.Kolk.)]**, wherein the Hon'ble CESTAT, Kolkata vide its decision dated 16.12.2008 has categorically held that the cost of design and drawings is to be included in the assessable value. The Hon'ble Tribunal while ruling this, has cited the provisions of Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. The relevant portion of the Order is as under:

".....The brief facts of the case are that M/s. Tata Motors (earlier known as M/s. TELCO) have got various components of chassis and motor vehicles manufactured by a number of vendors who are the



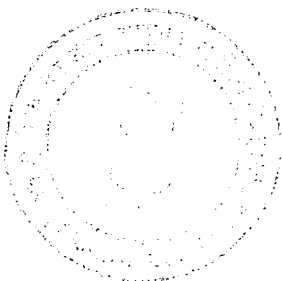
Respondents in this case. The vendors have paid the duty on the components and these have been sold to M/s. Tata Motors who have taken credit of the duty paid on the components. While placing orders for the components, technical drawings have been supplied by M/s. Tata Motors free of cost to the vendors for manufacturing the components. Admittedly, during the impugned period, no amount has been added towards the drawings and design in the value of the components. The Department's case is that the cost of such drawings and designs involved in the manufacture of the said components, should be included in the assessable value of the components manufactured by the vendors. The case of the Department rests on the provisions of Rule 6 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Explanation 1 to the said Rule 6

.....

4. It is seen from the extract of Rule 6, Explanation 1, as extracted above, that value of drawings as specified under Clause (ii) and value of engineering, development, art work, design work etc. as specified in Clause (iv) are includible in the value of excisable goods when these are supplied either free of cost or at reduced cost by the buyer to the manufacturer.

7.5 Thus, I note that the value of the free supply has to be included in the value of the final product, if it is supplied by the customer. In the facts of the present case when the cylinder that was supplied by the customer free of cost to the appellant, the amortized value of such free goods (cylinder) must be added in the assessable value of the final goods manufactured and sold by the appellant to their customer. Further, I find that manufacture of printed pouches for each customer required different kind of cylinders i.e as per the work orders for design of packaging material. The material to be printed differs from customer to customer which means that cylinders are custom-made and cylinders made for one customer cannot be used for another customer. This means that cylinders made in a particular period or year can be used to print no. of pouches and this work may be spread over several periods or years, in other words the price of cylinders received during a given period may be used for many more years. Thus, I find that the value of cylinders must be spread over goods manufactured using the cylinders. My above view has been drawn from the decision of M/s Flex Industries Ltd., Vs Commissioner of C.Ex., Meerut as reported in 1997 (91) E.L.T. 120 (Tribunal), New Delhi. The Tribunal, New Delhi has also held that:

".....This principle is seen supported by M.F. (DR) Circular No.



17/4196-CX, dated 23-1-1996, in connection with value of patterns used in foundry industry to be added to the cost of castings for arriving at the assessable value of castings. There would be difficulty as the quantity of castings to be made out of a pattern cannot be anticipated and sometimes some rectifications or **repairs** may be made in the pattern after some period of use. The Board clarified as follows :-

“The matter has been clarified and it is hereby clarified that the proportionate cost of pattern **has to be included** in the assessable value of the casting even in cases where such patterns are being supplied by the buyers of the casting or are got prepared/manufactured by the job worker at the cost of the buyer. In cases where there is difficulty in apportioning the cost of pattern, apportionment can be made depending on the expected life and capability of the pattern and the quantity of castings that can be manufactured from it and thus working the cost to be apportioned per unit. For this purpose, a certificate from a Cost Accountant may be accepted.”

(Emphasis supplied)

See page T5 of 1996 (82) E.L.T.

6. The principle underlying the Board clarification would apply to apportionment of cost of cylinder used in the manufacture of printed pouches. It may be considered that cylinder is used and consumed in the manufacture of printed pouches; but it is not used in the sense in which raw material is used in manufacture of a product; in such case, the conversion or use of raw material is done quickly and it is easy to correlate a definite quantity of raw material and its value with a definite quantity of finished product and its value. In the present case, the use of cylinders is in such a manner that it is spread over a considerable period and over a very large quantity or number of finished products. To illustrate, we assume that a set of four cylinders of the value of Rs. X can be used in manufacture of ten lakh printed pouches. Hence it is reasonable to regard that Rs. $X \div 10$ lakhs is the proportionate value of cylinder which is used in the manufacture of a single printed pouches and this fractional value has to be added to the value of printed pouches. However, during a particular period, the use of the set of cylinder may not be exhausted as only 4 lakh printed pouches are manufactured during the period. If so, it has to be regarded that Rs. $(x \div 10 \text{ Lakhs}) \times 4 \text{ Lakhs}$ is



the proportionate value of cylinder utilized in the manufacture of finished products during the period and only this value can be added to the value of printed pouches. This rational principle of proportional value addition has been approved by the Board and we are of the opinion that Board was right in doing so. This has to be arrived at after making a realistic estimate of the expected life and capability of the cylinders and determining the appropriate proportion of the value of cylinders to be added to the value of printed pouches. The conclusion arrived at by the lower authorities that entire value of the cylinders is to be added to the value of printed pouches manufactured during the relevant period without reference to the expected life and capability of the cylinders has to be set aside and the matter has to be considered afresh by the respective adjudicating authorities.....”.

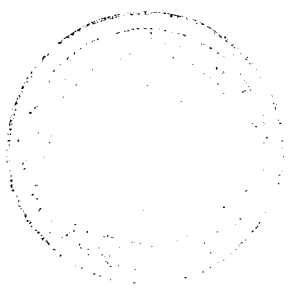
[Emphasis supplied]

7.6 In view of my discussions above, I find that the value of cylinder/repairing charges should be added/apportioned in the assessable value of the manufactured finished product as additional consideration and the question of determination of the part of value to be amortized has to be decided by the adjudicating authority.

7.7 I further note that in Mutual Industries, the Larger Bench approved the method amortization in Flex Industries Ltd. v. CCE, Meerut - 1997 (91) E.L.T. 120 referred to by the DR. In Flex Industries, a regular Bench of the Tribunal had adopted the principle contained in Board's Circular No. 170/4/96-CX, dated 23-1-96. I also note that, towards evidence of all the factors viz. life expectancy, capability etc., the Board's advice is to accept the Cost Accountant's certificate. Further, the Board's Circular is binding on the adjudicating authorities.

7.8 I note that the appellant has relied on the various case laws and the Board's Circular also on this account and agrees that the life of the cylinder has to be worked out and thereafter only the value can be apportioned and charged to duty in the respective years.

7.9 I observe that at this stage correct determination of the demand is not possible. Accordingly, I set aside the impugned order and remand the matter to the Adjudicating Authority to re-determine the quantum of demand only on the amortized cost in respect of number of pouches



manufactured and sold to their customer. The appeal is allowed by way of remand to the Adjudicating Authority in the above terms.

8. As regards suppression of facts, I find that the above facts were unearthed by the Department only during the course of audit, I do not find any bona fide or good faith in the conduct of the appellant in the present case and observe it as a clear suppression of material facts for evading duty and therefore, the case laws relied by the appellant is of no help to them.

9. In view of the above discussions, I hold that confirmation of duty of Rs. 3,55,821/- and imposition of equal penalty, with respect to the first issue is not justified. I set aside the impugned order and remand the case to the adjudicating authority as discussed at para 7.9 above with respect to points for determination no. (ii) and (iii). Appeal is accordingly, partly allowed and partly remanded, as indicated above.

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

10. The appeals filed by the Appellant are disposed off as above.

सत्यापित,



विभागाध्यक्ष

अपीलें (राजकोट)

(Handwritten signature and date)
31/7/2020

(Gopi Nath)

Commissioner (Appeals)

By Regd. Post AD

To,

M/s Dev Flexipack Private Limited,
Plot No. 2337, Lodhika Industrial Estate,
D-Road, Gate-II, GIDC, Rajkot.

Copy to:

- 1) The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone, Ahmedabad.
- 2) The Commissioner, CGST & Central Excise Commissionerate, Rajkot.
- 3) The Deputy Commissioner, CGST & Central Excise, Division-II, Rajkot.
- 4) Guard file.

