



आयुक्त (अपील) का कार्यालय, केन्द्रीय प्रत्यक्ष कर बोर्ड और उत्तरांचल राज्य
AND THE COMMISSIONER, APPELLATE, CENTRAL TAX & EXCISE,



अधिसूचना क्रमांक, सी.ए. ई. सी.ए. 1/2018 (आय. सी. टी. डिमांड)

311 कोठी रोड रोड, - Phase-1, Connaught Place, New Delhi-110008

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अधिकार प्राप्त कर के द्वारा :-

आयुक्त (अपील) का कार्यालय Appellate Office No. W-270/2007/2017	आयुक्त (अपील) का कार्यालय O.I.C. No. 16/Demand/2018-19	दिनांक Date: 25.01.2017
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आयुक्त (अपील) का कार्यालय (आयुक्त (अपील) का कार्यालय)

BITV-EXCISE-IND-APP-018-2018-19

आयुक्त (अपील) का कार्यालय Appellate Office	10.04.2018	कार्यवाही की तिथि Date of Issue:	13.04.2018
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Issued by: Shri P. S. Vyas, Commissioner, CBST & Central Excise, Mumbai/Kandhkhari;

अधिकार प्राप्त कर के द्वारा :-
आयुक्त (अपील) का कार्यालय, केन्द्रीय प्रत्यक्ष कर बोर्ड और उत्तरांचल राज्य, 311 कोठी रोड रोड, - Phase-1, Connaught Place, New Delhi-110008, फोन नंबर - 2612021, टेलीफोन नंबर - 2612024/1142, ईमेल - comptroller@cbec.gov.in।
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In pursuance of the Ministry's Instructions No. 20/2007 C.E. (ST) dated 17.02.2007 and other orders O.I.C. No. 23/2011-2012 dated 10.01.2012, Shri P. S. Vyas, Commissioner, CBST & Central Excise, Kandhkhari, Mumbai, was appointed as Appellate Authority for the purpose of assessing duties in respect of appropriate items under Section 33 of Central Excise Act, 1944 and Section 9 of the Finance Act, 1994.

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To the West regional branch of Customs, Excise & Duties Tax Appellate Tribunal, (CEAT) at, 24 Floor, Bhoodhri Bhawan, New Delhi-110002 and 283311 in case of a remote office. Unit is mentioned in para-10 above.

IN ORDER-IN-APPEAL:

Shri Pravin S. Patel, proprietor of M/s. Vaishali Auto Industries, Plot No. 017, GIDC Estate, 4th Phase, Vadliwan, CIV-382035 Dist. Surendranagar (hereinafter referred to as the appellant) have filed this appeal against Order in Original No.18/Demand/2016-17 dated 25.01.2017 (hereinafter referred to as the impugned order) passed by the Assistant Commissioner, Central Excise Division, Surendranagar (hereinafter referred to as the Adjudicating authority) confirming the demand / recovery of Central Excise duty of Rs.10,73,551/- under the provisions of Section 11A, Interest under Section 11A9 and penalty of Rs.10,73,551/- under Section 11A8 of the Central Excise Act, 1944.

2. Being aggrieved with the impugned order, the appellant filed the present appeal on the following grounds:

(i) The adjudicating authority failed in deciding the point of mutual interest between the appellant (seller) and Buyer (buyer), in the absence of mutuality of interest in the business of each other, the buyer being holder of the appellant cannot be treated to be related. It is neither the case that the buyer holds 50% shares of the manufacturing unit of the appellant nor does it have direct or indirect control over each other nor the case that the buyer has given any interest free advance/loan to the appellant, nor cash flow directly or indirectly from one to other nor having common staff for accounting, marketing and supervision, nor some tools, equipments free of cost or loan basis given to the appellant by the buyer etc. Even the units are independent without mutual interest, mutuality of interest means that both the parties / companies mutually get benefited with each other by sharing the profits and losses and further each unit should be interested in the business of the other and there should be evidence of flow back of profit from one unit to another, such evidence is not forthcoming from the impugned order. The adjudicating authority failed in deciding the case in the broad way and in totality of the relationship as did not take into consideration the provision (a) of Section 4(3)(i) of the Act.

(ii) The appellant has cleared the semi-finished goods to the buyer M/s. Shri Patel Industries, Ulhasnagar; the impugned goods were not cleared as such by the buyer some process activities such as grinding, turning, inspection, repacking, crisslabelling are done at buyer's factory; It is not possible that after processing, the description of the goods is changed; the cost of such activities, freight from appellant's factory (Surendranagar) to buyer's factory (Ulhasnagar) excise duty paid by the appellant and the profit of the buyer are to be considered while arriving at the value of the goods sold by the buyer, even there is no change in description of the impugned goods, the buyer has to bear the cost of the aforesaid expenses that makes increase the price of goods, the appellant and the buyer

cannot be said to elude as the price is not influenced by relationship, but it is influenced by the above-mentioned facts.

(ii) The adjudicating authority held that the valuation done by the appellant for the goods cleared to their related person M/s. Shree Hotel Industries, Utharkhandam, required to be rejected and the same is to be done in accordance with the provisions of Rule 3 of Valuation Rules, 2000 and accordingly the appellant is required to pay the differential duty of Rs. 10,73,551/- in terms of Section 4(1) of read with Rule 3 of Valuation Rules, 2000 is not in accordance with the CBEC Circular No. 334/2000 CX dated 01.07.2002; the appellant has sold only a part 10% of the production to Shree Hotel Industries, Utharkhandam (imported relation) and receiving 95% to the independent buyer M/s. A. Mangalad Aale Engg. Pvt. Ltd., hence Rule 3 of the Valuation Rules, 2000 as amended vide Notification No. 14/2010 Central Excise (N.T.) dated 22.11.2013 (alias w/o from 14 December 2013) not applicable in the present case.

(iii) The matter involved in this case is purely of a legal nature of the Valuation Rules and no mala fide intention on appellant's part to evade duty, therefore the imposition of penalty under Rule 25 of CER, 2002 read with Section 114A of the CGA, 1944 is unwarranted and deserves to be set aside.

(iv) The appellant has filed an earnest amount Rs. 44 per appeal memorandum.

3. Subsequently in pursuance of Director's Notification No.23/2017-C.L.E.(N.T.) dated 17.10.2017 read with Board's Order No.05/2017-57 dated 16.11.2017, the instant appeal has been taken on hold for passing Order-in-Appeal.

4. Personal hearing in this case was held on 05.02.2018 and again on 23.02.2019 as requested by the appellant, which was attended by Shri K.A. Nagar, Authorized Representative on behalf of the appellant. He reiterated grounds of appeal and further submitted that the appellant has cleared semi-finished goods to Shree Hotel Industries (buyer), the buyer has undertaken some process on semi-finished goods and cleared the same to a related person and hence the appellant is not required to pay duty on the finished goods cleared by the buyer and received to clear the case at an earlier stage.

5. Findings in case of instant appeal, the impugned order was reversed by the appellant on 17.02.2017 and date of filing of appeal is 22.03.2017. Hence, the appeal has been filed within the stipulated time period and there is no delay in filing the appeal. The condition of earnest deposit also satisfied.

11. At the material time that gives rise to the issue under consideration is short payment of duty existing in sales transaction between appellant and buyer namely M/s. Shree Palehreshish, Uttaranchal, which are allegedly related persons as per Section 4 of the Central Excise Act, 1944. Revenue's contention that the price charged by appellants is not on principal to principal basis and not sole consideration for the goods sold to above named buyer and accordingly the assessment of duty of excise is incorrect. Hence, the issue is to be decided in light of Section 4 of the Central Excise Act, 1944 read with Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

12.1 From 21.07.2000 onwards the concept of transaction value has been introduced for the purpose of charging duty of excise to all sales made by principal to principal where the buyer and seller are not related and hence in the sales made where in other words, the transaction made between the seller and buyers have bearing on financial flow and there should be no mutuality of interest between them in business of each other. For assessment of duty of excise, the following essential requirements have to be satisfied:

- a. The goods are sold by an assessee for delivery at the time of assessment.
- b. The value of such transaction has been determined solely to meet a liability of a wide nature.
- c. The assessee and the buyer are not related.
- d. The price is based on market price for the goods.

12.2 If any of the above requirements is not satisfied, then the transaction value shall not be the assessable value and the value in such case has to be assessed under the Valuation Rules.

12.3 In event a price such transaction between the appellant manufacturer and the buyer is given as related buyer and such transaction was not at arm's length, the essential requirement is first to determine whether the appellant manufacturer and the buyer are falling within the ambit of term "related" as defined under Section 4(1)(b) of the Central Excise Act, 1944 or otherwise.

12.4 The term related person is defined under Section 4(1)(b) of the Central Excise Act, 1944. It is necessary to reproduce the same in the context of issue which arises as under:

- (i) Persons who are deemed to be related.
- (ii) They are not subjected under this.
- (iii) Goods are sold.
- (iv) Arranged from the buyer's records and a list price of the assessee is a
- (v) Transaction value of goods.

12.4 They are associated [as they have interest directly or indirectly in the business of each other]

Definition of relative:-

(1) The connected undertakings, shall have the meaning assigned to it in clause (a) of section 2 of the Companies Act, 1956 (hereinafter referred to as "the Act") and

(2) "Relative" shall have the meaning assigned to it in clause (b) of section 2 of the Companies Act, 1956 (hereinafter referred to as "the Act").

12.5 It would be pertinent to note that as per clause (b) of section 2 of the Companies Act, 1956, "relative" shall have the same meaning assigned in clause 41 of section 2 of the Companies Act, 1956, which is reproduced as under:-

"Relative" means, with reference to any person, anyone who is related to that person in any of the ways specified in section 6 and the others;

12.6 Section 6 reads as under:-

6. Meaning of relative:- A person shall be deemed to be a relative of another if, and only if -

- (a) they are members of a Hindu Undivided Family; or
- (b) they are husband and wife, or
- (c) The one is related to the other in the manner indicated in Schedule 1A. Schedule 1A reads as under:-

List of Relatives:-

- 1. Father 2. Mother (including step-mother) 3. Son (including step-son) 4. Son's wife 5. Daughter (including step-daughter) 6. Father's father 7. Father's mother 8. Mother's mother 9. Mother's father 10. Son's son 11. Son's Son's wife 12. Son's daughter 13. Son's Daughter's husband 14. Daughter's husband 15. Daughter's son 16. Daughter's Son's wife 17. Daughter's Daughter 18. Daughter's Daughter's husband 19. Brother (including step-brother) 20. Brother's wife 21. Sister (including step-sister) 22. Sister's husband.

12.7 In view of foregoing, I find that as per definition clause of relative given under Schedule 1A of the Companies Act 1956 as shown above both the firms i.e. M/s. Nitro Fuel Industries, Uttaranchal and the appellant are established as relative persons under Section 4(3)(b) of the Central Excise Act, 1944 and therefore their sales transaction between them cannot be considered as sale consideration and principal to principal for the purpose of charging duty of excise.

12.8 Section 4 of the Central Excise Act, 1944 provides for valuation of excisable goods for the purpose of charging of duty of excise. In case of goods sold where transaction between assessee and unexcised buyers are principal to principal basis and as such length the duty or excise is being charged on the price charged by assessee to

such buyers and such price should be accepted as the transaction value under Section 4 for the purpose of assessment of duty or excise. For the sake of easy reference, relevant provision of Section 4 are under:

Section 4: Valuation of excisable goods in the process of clearing of duty or excise

(1) Where under this Act, the duty or excise is chargeable on any excisable goods with reference to their being taken, or kept, in bond of the goods, such goods shall

(a) in the case where the goods are sold by the assessee for delivery at the time such goods are cleared, the assessed value of the goods are not reduced and the value of the goods is calculated under this Act, on the transaction value;

(b) in any other case, including the case where the goods are not sold, the value determined in such manner as may be prescribed.

Explanation: For the removal of doubts, it is hereby declared that the price or duty of the excisable goods sold by the assessee shall be the price actually paid for, in the circumstances, and the normal value of the excisable goods, being directly or indirectly in the hands of the assessee in connection with the sale of such goods, and such price normally including sales tax and other taxes, duty, royalty, etc., shall be deemed to include the duty payable on such goods.

12.9 However, in any other case including the case where the goods are not sold, the clause (b) of sub-section (1) of Section 4 of the Central Excise Act, 1944 should be applicable and in such cases transaction value is to be determined as per Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2001. Also Rule 3 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2001 provides that the value of any excisable goods sold for the purpose of Clause (b) of sub-section (1) of Section 4 of the Central Excise Act, 1944, be determined in accordance with Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2001.

12.10 Rule 3 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2001 provides that when the assessee so arranges that the excisable goods are not sold by an assessee except to or through a person who is related in manner specified in either of sub-section (9), (10) or (11) of Clause (b) of sub-section (1) of Section 4 of the Act, the value of goods shall be the normal transaction value at which these are sold to the related person at the time concerned, to buyers (not being related person) at others such goods are not sold to such buyers, to buyers (being related person), who sells such goods to related.

12.11 I find that the appellant has made such arrangement to sell their goods to the person who is related person in the manner as specified in Clause (b) of sub-section (1) of Section 4 of the Central Excise Act, 1944. Thus, it is evident that Mrs. Sures Patel (the wife of Mr. Anand) and the appellant's company were mutually interested in each other's business transaction and the principle of mutuality of interest is also played or taken into account in the present case. Hence, the appellant is required to pay the duty of excise on the basis of normal transaction value and at the price the goods were usually sold by

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M/s. Shree Prati Industries, Udaipur and at the time of removal of the similar goods to their unrelated buyers in total. I further hold from the facts of the case that the appellant have adopted such mode operation with deliberate discretion to undervalue their goods by selling their partial quantity (15%) of goods manufactured by them to their related firm and remaining quantity (85%) of goods sold to other unrelated customers. Thus, the appellant has attempted their sales to the related person, which is in larger quantity and availed the benefit by paying less Central Excise Duty thereon. In the Business transactions, the appellant has highlighted their major of quantity sales with unrelated buyers, however, on comparison of the valuation of such transactions with unrelated buyers & related buyers, it is evident that the appellant has sold the goods to their related person by taking less sale price than the goods sold to their unrelated person. The sales transaction value adopted by the appellant for their unrelated buyers should be the sale transaction value for their related person. At such time appellant was well aware of the law and pay less duty of excise appellant resorted such a method with ultimate aim to evade the duty of excise and therefore, I am of the considered opinion that the lower adjudicating authority has correctly confirmed the duty of central excise vide the impugned order viz. Order No.Original No.13/Demand/21.10.17 dated 25.01.2017 and I also hold that the appellant is a person connected with the liability of interest.

My second view also bolstered by the decision of Hon'ble Supreme Court of India passed in case of COMMISSIONER OF CENTRAL EXCISE, MUMBAI V Varusali -COURTATION reported at 2015 (374) E.L.T. 472 (S.C.), wherein the demand of central of related person has been upheld. The said case is akin to the present case and therefore the ratio of the decision of Hon'ble Supreme Court of India, supra cited applicable to the present case and accordingly, I hold that the lower adjudicating authority has correctly confirmed the duty of central excise vide the impugned order viz. Order No.Original No.13/Demand/2016-17 dated 25.01.2017 and hereby affirm the same.

12.12 I find that the appellant on his own interpretation deliberately failed to disclose and pay correct duty of excise. Hence, I find that this is a fit case for imposition of Section 11AC (iii) for imposition of penalty on them and the reasons therefor as the department has made a strong case against appellant. It is well settled that ignorance of law and bona fide impression is not an excuse for order to remain non-consequent a penalty for wrong act in unlawful manner. It is clearly established in the facts and circumstances of the case that appellant have wilfully suppressed at the material facts deliberately and intentionally to evade payment of excise and thus render them liable for penalty under Section 11AC (iii).

12.15 The ingredients mentioned in Section 11AC are completely satisfied. It is well settled that once the duty is concerned under section, the adjudicating authority has to



discretion or option available either to quantify the duty or to reduce the penalty sought. In short, in such case the adjudicating authority have no discretionary power to impose lesser amount of penalty in light of the Apex Court decision of *Shimulachar Textile Processing & Office* [2008 (231) F.T.R. 363] and *Rajasthan Spinning & Weaving Mills* [2009 (239) E.T.R. 3 (SC)] and the mandatory penalty equivalent amount of duty determined under Section 10(b) to be imposed.

12.14 If a case (case 1) of appellant have deliberately entered with a undervalued invoice, which proves their mala-fide intention and this intention clearly manifested that the intention was wrong and fraudulent in order to evade the payment of duty. Has the department not found such wrong act as discussed above the same would have been treated as undisclosed from the department. It proves that all such facts are deliberately suppressed by appellant from the department.

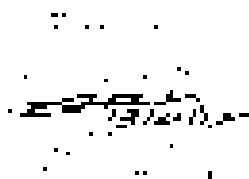
12.15 With the introduction of self assessment procedure under the liberalized policy, a higher responsibility has been cast upon every tax payers by the Legislature to comply with all the necessary requirements prescribed under the fiscal statute. Therefore, it cannot be said that the amnesty undertaken by the appellants cannot be raised within the knowledge of the department as the department from all corners can not and not the guilty of each tax payers.

12.16 There are no statutory mandate / declaration prescribed by the legislature required to be submitted under the liberalized policy with respect to self assessment of duty and payment of CENVAT credit duty and the manufacturer or producer is not required to disclose / declare the information like manufacturing process, consumption of raw materials, marketing patterns etc. and submission of sales invoice and purchase invoice to the department as it was earlier required when the assessment of duty was done by the Central Excise Officers. In all cases of self assessment, the duty credit can be reduced unless this is to be verified by the department during a special inspection gathered and during self. Hence, it would amount to willful suppression of facts and mis-statement. Hence, to this case the practice of concealment / knowledge for the taxpayer can not be accepted as held in the case of *IGT, Cauvery Vs Steel Industries Kerala Ltd* reported in 2006 (200) E.T.R. 33 (tribunal Bangalore) and *Coalco Chemicals & Fertilizers Co. Vs Union of India* reported in 2003 (155) F.T.R. 407 (SC). In the case of *Commissioner of Customs Vs Central Enterprises* [2001 (130) E.T.R. 404 (SC)], the Apex Court observed that Section 17 of the Limitation Act, 1963 has embodied cardinal principle that fraud vitiates everything. The fraudulent act cannot give rise to recovery and held that the adjustment is not time barred.

12.7 Appellant is a registered manufacturer and fully aware about provisions of the Central Excise Act, 1944 and duly bound to follow the mandatory and regulatory requirements prescribed under the Central Excise Act, 1944 and it has made thereunder. Appellant have resorted such modus operandi with intent to avoid the payment of tax as elaborately discussed hereunder. In view of above facts the extended period is correctly available in this case for recovery of short payment of duty as per first proviso to Section 11A(1) of the Central Excise Act, 1944 alongwith Interest at appropriate rate under Section 11A(3) of Central Excise Act, 1944.

13. In view of above discussion and findings I reject the appeal filed the appellant on merits and uphold the above impugned order dated 29.11.2017.

14. The appeal filed by the appellant stands dismissed in above terms.



(P. A. Vasave)
Commissioner (Appeals)
Commissioner
CGST & Central Excise,
Kutch (Gandhinagar)

F. No. V.27013VR/2017

Date: 10/01/2018

By Regd. Post A.D. / Speed Post

To,

Shri Pravin S. Pale,
Proprietor of M/s. Vaishali Auto Industries
Plot No 1917, GIDC Estate, Gandhinagar,
Wadhwan City 393025 Dist. Surendranagar

Copy to

1. The Chief Commissioner, CGST & C.Ex., Ahmedabad Zone, Ahmedabad.
2. The Commissioner CGST & C.Ex., Gandhinagar.
3. The Additional Commissioner, CGST & C.Ex.(System), Gandhinagar.
4. The Assistant Commissioner, CGST & C.Ex. (Taxation), Surendranagar.
5. Copy file.