



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



द्वितीय तल, जी एम टी भवन / 2<sup>nd</sup> Floor, GST Bhavan  
रेस कोर्स रिंग रोड / Race Course Ring Road  
राजकोट / Rajkot - 360 001

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सत्यमेव जयते

**DIN-20200964SX00000GBED2**

रजिस्टर्ड डाक ए.डी.द्वारा :-

क अपील / फाइल संख्या /  
Appeal / File No.

V/3 & 4/EA2/BVR/2018-19

मूल आदेश में /  
O.I.O. No.

11/Excise/Demand/2018-19

दिनांक /

Date:

29/06/2018

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

**BHV-EXCUS-000-APP-045-TO-046-2020**

आदेश का दिनांक /  
Date of Order:

24.09.2020

जारी करने की तारीख /  
Date of issue:

24.09.2020

श्री गोपी नाथ, आयुक्त (अपील्स), राजकोट द्वारा पारित /

Passed by Shri Gopi Nath, Principal Commissioner (Appeals), Rajkot

ग अपर आयुक्त / संयुक्त आयुक्त / उपायुक्त / सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क / सेवाकर / वस्तु एवं सेवाकर,  
राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से मृजित: /

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. 1. Yash Gases Pvt Ltd Survey No. 325, Plot No. 2, Near Garibsha pir, Bhavnagar-Rajkot Road, Sihor,  
Bhavnagar District

2. Shri Chetan Bipinchandra Shah, Director of Yash Gases Pvt Ltd Survey No. 325, Plot No. 2, Near  
Garibsha pir, Bhavnagar-Rajkot Road, Sihor, Bhavnagar District

इन आदेश (अपील) में व्यथित काई व्यक्ति तन्नालोखित तराक में उपयुक्त प्राधिकार / प्राधिकरण के समक्ष अपील दायर कर सकता है। /  
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत तन्नालिखित 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 में सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद 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 (सिस्टम) 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, 2<sup>nd</sup> 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 जमाना, रुपा 5 लाख या उससे कम, 5 लाख रुपा या 50 लाख रुपा तक अथवा 50 लाख रुपा 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 में किमी भी मार्बजितक क्षेत्र के बैंक द्वारा जारी रखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपा का निर्धारित शुल्क जमा करना होगा। /

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty/demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमावली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकती एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उत्तम में 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 जमाना, रुपा 5 लाख या उससे कम, 5 लाख रुपा या 50 लाख रुपा तक अथवा 50 लाख रुपा 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 में किमी भी मार्बजितक क्षेत्र के बैंक द्वारा जारी रखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपा 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) विन अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी 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 माथ 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 (सेस्टैट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एए के अंतर्गत, जो की विनियम अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करने समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, यद्यपि कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दम कंगेड रूप में अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनबेट जमा की ली गई गलत राशि
- (iii) सेनबेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

यद्यपि यह कि इस धारा के प्रावधान विनियम (नं० 2) अधिनियम 2014 के आरंभ से पूर्व किमी अपीलीय प्राधिकारी के समक्ष विचारार्थ स्थापित अर्जी 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 मामला में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपत्रक के अंतर्गत अर्ज मन्त्रि, भारत सरकार, पुनरीक्षण आवेदन इकाई, विन संचालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किमी नुकसान के मामले में, जहां नुकसान किमी माल को किमी कारखाने में अंडार गृह के पारगमन के दौरान या किमी अन्य कारखाने या फिर किमी एक अंडार गृह में दूसरे अंडार गृह, पारगमन के दौरान, या किमी अंडार गृह में या अंडारण में माल के प्रसंस्करण के दौरान, किमी कारखाने या किमी अंडार 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 किमी गठ या अंश को निर्यात कर रू माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के कूट (रिवेट) के मामले में, जो भारत के बाहर किमी गठ या अंश 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) मन्त्रिधन उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विन अधिनियम (नं० 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि 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 [A-8] में, जो की केन्द्रीय उत्पाद 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 या केन्द्रीय सरकार को एक आवेदन किया जाना है। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

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

(vii) यदि इस आदेश में कोई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त हंग में किया जाना चाहिए। इस वृथ के होने हंग भी की निष्ठा पट्टी कार्य में वचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाना 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 Appellate 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. 1000/- for each.

यथास्थिति 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-I in terms of the Court Fee Act, 1975, as amended.

सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्बन्धित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाना 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.

उच्च अपीलीय प्राधिकारी को अपील दायित्व करने में संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विचारार्थ वेबसाइट [www.bec.gov.in](http://www.bec.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.bec.gov.in](http://www.bec.gov.in)



**:: ORDER-IN-APPEAL ::**

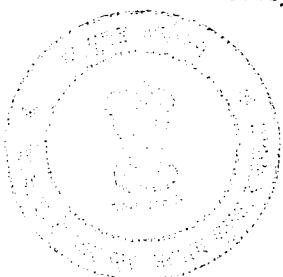
The Asst. Commissioner, CGST Division-I, Bhavnagar has filed appeal Nos. V2/3&4/EA2/BVR/2018-19 on behalf of the Commissioner, Central GST & Central Excise, Bhavnagar (hereinafter referred to as "Appellant Department") in pursuance of the direction and authorization issued under sub-section(2) of Section 35E of the Central Excise Act,1944 (hereinafter referred to as 'Act') against Order-in-Original No. 11/Excise/Demand/ 2018-19 dated 29.6.2018 (hereinafter referred to as 'impugned orders') passed by the Asst. Commissioner, CGST Division-I, Bhavnagar (*hereinafter referred to as 'adjudicating authority'*) in the case of M/s Yash Gases Pvt Ltd, Bhavnagar and Shri Chetan Shah, Director of M/s Yash Gases Pvt Ltd, Bhavnagar (*hereinafter referred to as 'Respondent No.1'* and '*Respondent No. 2'* respectively)

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

2. The brief facts of the case, which are relevant for the purpose of present proceedings, are that Respondent No. 1 was engaged in the manufacture of Oxygen Gas and Nitrogen Gas falling under Chapter 28 of the Central Excise Tariff Act, 1985 and was registered with Central Excise. Investigation carried out against the Respondent No. 1 revealed that there was variation in assessable value of their finished goods recorded in invoices, sales registers, ER-3 Returns and Annual Reports; that they had suppressed correct assessable value of their finished goods in ER-3 Returns for the period from \*\* to evade payment of Central Excise duty.

2.1 The Show Cause Notice No. V/30-5/AE/2017-18 dated 4.10.2017 was issued to Respondent No. 1 calling them to show cause, inter alia, as to why Central Excise duty of Rs. 7,85,289/- should not be demanded and recovered from them under sub-section (4) of Section 11A of the Act, along with interest under Section 11AA of the Act and proposed imposition of penalty under Rule 25(1) of the Central Excise Rules, 2002 read with Section 11AC(1)(c) of the Act. The Respondent No. 2 was also called upon to show cause as to why penalty under Rule 26 of the Central Excise Rules, 2002 should not be imposed upon them.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority who, inter alia, confirmed Central Excise duty of Rs. 17,558/-



under Section 11A of the Act along with interest under Section 11AA ibid but dropped demand of Rs. 7,67,740/- and did not impose penalty upon Respondent No. 2.

3. The above order was reviewed by the Appellant Department and appeal has been filed on the grounds that,

(i) The adjudicating authority erred in dropping the demand of Rs. 7,67,740/- vide the impugned order.

(ii) That the Show Cause Notice alleged short-payment of Central Excise duty on the basis of details of value of clearances of excisable goods available in Invoices / Sales Register / ER-3 Returns / Balance-Sheet and highest of such value in respective years were taken up for arriving at Assessable Value for the purpose of demanding Central Excise Duty; that the the Adjudicating Authority considered Central Excise duty paid as per Audited Balance-sheet in respect of F.Y. 2012-13 & 2014-15.

(iii) That payment of Central Excise duty can be effected by two ways viz. (i) by debiting Cenvat Credit, or (ii) by Cash or both; that the respondent had made payment of Central Excise duty by utilizing Cenvat Credit in almost all years and rest of the payment were made in cash. In case of payment of Central Excise duty by way of debiting Cenvat Credit, the balance of Cenvat Credit gets reduced. Similarly, in case of payment of Central Excise duty in cash, the details of challan is sufficient to verify payment. Thus, in this case, had Central Excise duty was paid in cash, then the authenticity of such duty payment ought to have been verified with the respective challans under which such payment was made. Alternatively, if duty was paid through Cenvat Credit, then verification of Cenvat credit account or figures declared in ER-3 should have been made and amount of Cenvat Credit balance should have been reduced to the extent payment made through Cenvat Credit. This is because, in absence of such verification, the Cenvat Credit balance would not get reduced and the Cenvat Credit to that extent would be available there in Cenvat Credit balance for subsequent utilization. It was proved during the course of investigation that the respondent did not maintain Cenvat Credit details and relevant records. The respondent was also enjoying SSI Exemption as per Notification No. 08/2003-CE date 01.03.2003, which also restricts availment / utilization of Cenvat Credit till the threshold of Rs. 1.50 Crores is crossed by the manufacturer.

(iv) In this facts & circumstances of this case, the Adjudicating Authority



erred in relying upon the submission of the respondent that there might be some clerical error in filing ER-3 Returns as the work of Account and filing of return were being looked after by two different employees and that the Audited Balance Sheet submitted to the Income Tax Department is a valid document; that when the allegation in the subject case is short-payment of Central Excise duty by way of suppression of value of clearances of excisable goods only, to rely on data contained in Audited Balance-sheet is not tenable inasmuch as statutory provision provided specific mechanism to account for the payment of Central Excise duty; that the Adjudicating Authority adopted such rational only in respect of Financial Years where short-payment was noticed and not for the rest of Financial Years; that in this backdrop, the impugned order is bad in law to the extent dropping of demand of Central Excise Duty of Rs. 7,67,740/- and therefore, requires to be set-aside and matter may be remanded back for verification of correctness of payment and consequently re-determination of Central Excise duty payable and penal liabilities.

(v) That the Adjudicating Authority erred in not imposing penalty on Respondent No.2, Director of the Respondent No. 1 under Rule 26(1) of the Central Excise Rules, 2002, as proposed in Show Cause Notice; that Respondent No.2 was looking after the entire affairs of the respondent firm and masterminded the modus operandi for evasion of duty by way of suppression of actual assessable value of finished goods, clearance thereof from the factory of the respondent without payment of Central Excise duty and removal of capital goods without reversing proportionate Cenvat credit. Thus, impugned order is liable to be set-aside on this count too.

4. Hearing in the matter was scheduled on 30.9.2019. Shri Sarju Mehta, C.A. appeared on behalf of both the Respondents and sought 15 days' time to submit written submission. Shri Sarju Mehta vide letter dated 14.10.2019 informed that their clients intend to avail Sabka Vishwas (Legacy Dispute Resolution ) Scheme, 2019 in respect of both the appeals and also mailed copy of declaration in form SVLDRS-1 dated 1.11.2019 filed by the Respondents. Since no further communication was received, CGST, Bhavnagar was requested to inform the status of the declarations filed by the Respondents. The CGST, Bhavnagar vide email dated 8.7.2019 informed that Respondent No. 1 has failed to discharged duty liability and hence, discharge certificates - SVLDRS-4 have not been issued to the Respondents. Hence, the matter was listed for hearing in virtual mode on 6.8.2020 and 26.8.2020. The Respondents vide letters dated 5.8.2020 and 26.8.2020 requested for adjournment of hearing, which was granted.



4.1 Hearing was conducted in virtual mode through video conferencing with prior consent of the Respondents. Shri Sarju Mehta, C.A. appeared on behalf of the Respondents and stated that the impugned order is legal and fair and therefore appeals of the Appellant Department may be rejected. He sought 4 days' time to file written submission. No one appeared on behalf of the Appellant Department.

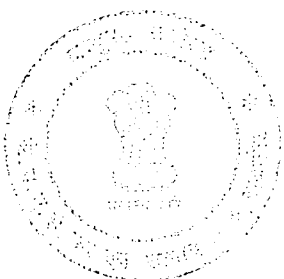
5. Respondent No.1 filed cross objection vide letter dated 18.9.2020, inter alia, contending that,

(i) The adjudicating authority has considered the assessable value and central excise duty payment as per Balance sheet for the F.Y. 2012-13 and 2014-15, which is correct and as per established principle of law; that the amount of central excise duty paid through cash and reflected in audited Balance sheet has been verified with respective duty paying challans by their Chartered Accountant who signed the audited annual accounts and hence, the authenticity of such cash payments of C. Ex. Duty is not under dispute; that the adjudicating authority has rightly relied on their submission and issued the impugned order after verifying all the reports and records.

(ii) That the plea of the Department that the data contained in audited Balance sheet is not tenable is a frivolous plea, which is not sustainable as the Department has not mentioned any statutory provision of Central Excise Law in support of their argument, under which it is provided that the data contained in audited Balance sheet should not be considered.

(iii) that the Assistant Commissioner has correctly passed the impugned order after verification of records available with them; that they could not produce copies of duty paying challans as the same are lying with the divisional office.

5.1 Respondent No.2 filed cross objection vide letter dated 18.9.2020, inter alia, contending that he was Director of Respondent No. 1 and has not acted with any personal motive or benefit and thereby the question of any personal penalty upon him is not proper; that penalty could be imposed on a person who acquired possession of, or otherwise physically dealt with, any excisable goods which, according to his belief or knowledge, was liable to confiscation; that the department has no case that the Respondent No. 2 had a belief or knowledge that the goods were liable to confiscation. Hence, Rule 26 of the Central Excise Rules, 2002 was not invocable against him; that it is settled law that personal



penalty on Director in addition to the Company is not imposable and relied upon following case laws:

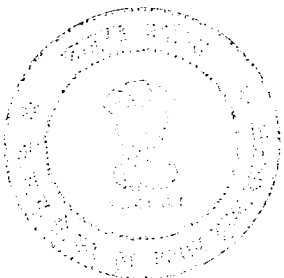
- (a) Kamdeep Marketing Pvt. Ltd. - 2004 (165) E.L.T. 206 (Tri-Del.)
- (b) Shri Selvakumar Textiles - 2005 (188) E.L.T. 334 (Tri-Chennai)

6. I have carefully gone through the facts of the case, the impugned orders, appeal memoranda as well as oral and written submission of the Respondents. The issues to be decided in the present appeals is, whether the impugned order dropping demand of Rs. 7,67,740/- is correct, legal and proper and whether Respondent No. 2 is liable to penalty under Rule 26 of the Central Excise Rules, 2002 or not.

7. On going through the records, I find that investigation carried out against Respondent No. 1, inter alia, revealed that Respondent No. 1 had allegedly evaded Central Excise duty of Rs. 7,85,289/- by way suppressing their assessable value in their ER-3 Returns. The Show Cause Notice alleged that there was discrepancy in assessable value of finished goods as recorded in invoice/ sales register/ ER-3 Returns/ audited final accounts in the year 2012-13 and 2014-15. The adjudicating authority dropped demand of Rs. 7,67,740/- by holding that the audited balance sheet of Respondent No. 1 for the relevant years reflected duty payment made by Respondent No. 1; that audited balance sheet submitted to Income Tax Department is a valid documents and there might be clerical error in filing ER-3 Returns.

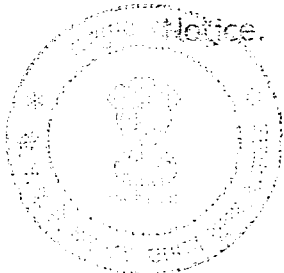
7.1 The Appellant Department has contended that when the allegation in the subject case was short-payment of Central Excise duty by way of suppression of value of clearances of excisable goods in ER-3 Returns, the adjudicating authority ought to have verified authenticity of such duty payment with the respective challans under which payment was made instead of relying upon documents submitted by Respondent No. 1; that matter may be remanded to adjudicating authority for verification of correctness of payment. On the other hand, Respondent No. 1 has pleaded that Central Excise duty paid through cash and reflected in audited Balance sheet was verified with respective duty paying challans by their Chartered Accountant who signed the audited annual accounts and hence, authenticity of such duty payment is not under dispute; that the adjudicating authority has correctly relied on their submission and issued the impugned order.

8. I find that the limited issue before me is whether Respondent No. 1 has correctly discharged duty liability in respect of clearances made by them during



F.Y. 2012-13 and 2014-15. The whole issue came to light during investigation on comparing assessable value recorded in ER-3 Returns for the said years with sale value recorded in invoices/sales register/ Audited final accounts. It is not under dispute that assessable value recorded in ER-3 returns for the said years was less than the actual assessable value. I find that the adjudicating authority concurred with the submission of Respondent No. 1 that said lapse occurred due to clerical error while filing ER-3 Returns. I find that the adjudicating authority verified duty figures mentioned in the audited balance sheet and came to conclusion that there was no short payment. I am not in agreement with the verification process adopted by the adjudicating authority. When the allegation against Respondent No. 1 was that they had suppressed assessable value in ER-3 Returns to evade payment of duty, the adjudicating authority should have verified duty paying challans, as rightly contended by the Appellant Department. Duty paying challans are the primary evidence to prove duty payment. It is also not a case that duty paying challans were not available for verification, which compelled the adjudicating authority to rely on audited balance sheet of the Respondent No. 1. It is pertinent to mention that there are many cases in public domain that show that even accounts audited by Chartered Accountant contain many irregularities. After careful examination of the facts of the case, I am of the opinion that duty paying documents are required to be verified to ascertain whether Respondent No. 1 has properly discharged duty liability or not. The Appeal memorandum does not contain duty paying documents nor Respondent No. 1 has produced the same before me for verification. Hence, I am not in a position to verify and decide the case. It has been submitted by Respondent No. 1 that all records are lying with adjudicating authority, including duty paying challans. I, therefore, have no other option but to remand the case to the adjudicating authority with a direction to ascertain whether Respondent No. 1 has correctly discharged duty liability in the years 2012-13 and 2014-15 by conducting verification of duty paying challans. Respondent No. 1 is also directed to produce all information / documents as called upon by the adjudicating authority. Needless to mention that speaking order should be passed by adhering to the principles of natural justice.

9. Regarding appeal filed in respect of Respondent No. 2, I find that Show Cause Notice proposed imposition of penalty upon Respondent No. 2 under Rule 26 of the Central Excise Rules, 2002. The adjudicating authority held the proceedings as concluded on the ground that Respondent No. 1 has paid Central Excise duty, interest and 15% penalty within 30 days from date of Show Cause Notice. I find that whether Respondent No. 1 has correctly discharged duty or





not will depend upon the outcome of document verification by the adjudicating authority in remand proceedings. Hence, conclusion of proceedings is not determined yet and therefore, issue regarding imposition of penalty upon Respondent No. 2 under Rule 26 cannot be decided at this stage. Since, appeal in respect of Respondent No. 1 is remanded to adjudicating authority, the issue regarding imposition of penalty upon Respondent No. 2 is also to be decided by the adjudicating authority on the basis of outcome of remand proceedings.

10. In view of above, I set aside the impugned order to the extent of dropping of demand of Rs. 7,67,740/- and non imposition of penalty upon Respondent No. 2 under Rule 26 of the Central Excise Rules, 2002 and allow both the appeals filed by the Appellant Department by way of remand.

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

11. The appeals filed by the Appellant are disposed off accordingly.

(GOPI NATH)

Principal Commissioner(Appeals)

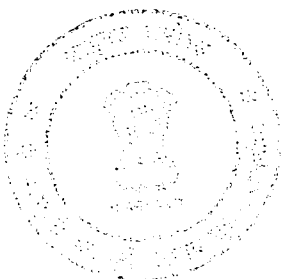
Attested

(V.T.SHAH)

Superintendent(Appeals)

By RPAD

<p>To, 1. M/s. Yash Gases Pvt Ltd Survey No. 325, Plot No. 2, Near Garibsha Pir, Bhavnagar- Rajkot Road, Sihor, Bhavnagar District.</p>	<p>सेवा में, मैसर्स यश गेसिस प्राइवेट लिमिटेड, सर्वे न. 325, प्लॉट न. 2, गरीबशा पीर के पास, भावनगर-राजकोट रोड, सीहोर, भावनगर.</p>
<p>2. Shri Chetan Bipinichandra Shah, Director of M/s. Yash Gases Pvt Ltd Survey No. 325, Plot No. 2, Near Garibsha Pir, Bhavnagar- Rajkot Road, Sihor, Bhavnagar District.</p>	<p>श्री चेतन बिपिचन्द्र शाह, डाइरेक्टर, मैसर्स यश गेसिस प्राइवेट लिमिटेड, सर्वे न. 325, प्लॉट न. 2, गरीबशा पीर के पास, भावनगर-राजकोट रोड, सीहोर, भावनगर.</p>



प्रतिलिपि :-

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

