



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

द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: commrappl3-cexamd@nic.in



सत्यमेव जयते

रजिस्टर्ड डाक ए.डी. द्वारा :-

DIN-20210664SX0000000DCC

क	अपील / फाइल नम्बर/ Appeal/File No.	मूलआदेश / OIONo.	दिनांक/ Date.
	V2/75/RAJ/2020	16/D/AC/2020-21	27-07-2020

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

RAJ-EXCUS-000-APP-024-2021

आदेश का दिनांक / Date of Order:	08.06.2021	जारी करने की तारीख / Date of issue:	09.06.2021
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**श्री अखिलेश कुमार, आयुक्त (अपील), राजकोट द्वारा पारित/
Passed by Shri Akhilesh Kumar, 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 सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST, Rajkot / Jamnagar / Gandhidham :

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

M/s. Rototon Polypack Pvt Ltd, Sakhiyanagar Industry, Opp Dharamajivan Industrial Area, Behind S T Workshop, Swami Narayan Gurukul, Rajkot, Gujarat

इस आदेश (अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) बर्गीकरण मूल्यांकन से 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 बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 380016 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमबली, 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, व्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

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

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमबली, 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 (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, व्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा। /

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fee of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is upto 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-



- (i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उनके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेन्स्टैट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ 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 करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" 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
- बशर्ते यह कि इस धारा के प्रावधान विनियम (सं- 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन 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 कोपुनरीक्षण आवेदन :
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
(i) यदि मान के किसी नुकसान के मामले में, जहाँ नुकसान किसी माल को किसी कारखाने में भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। / In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। / In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.
(iv) मुनिष्ठित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो क्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं- 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए 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 प्रतियाँ प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील)नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संश्लेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियाँ संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साथ के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-in-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो 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.
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.
(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-1 in terms of the Court Fee Act, 1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbcc.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.cbcc.gov.in



:: ORDER-IN-APPEAL ::

M/s Rototon Polypack Pvt. Ltd, Rajkot (hereinafter referred to as "appellant") has filed Appeal No. 75/Raj/2020 against Order-In-Original No. 03/D/AC/2019-20 dated 30.04.2019/ 10.05.2019 (hereinafter referred to as "impugned order") passed by the Joint Commissioner (in situ), Central GST Division, Rajkot-I (hereinafter referred to as "adjudicating authority").

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of 'Flexible Packaging Material' falling under Chapter 39 of the Central Excise Tariff Act, 1985 and was registered with Central Excise Department having Registration No. AABCR0096FXM001. During the course of audit of the records of the Appellant undertaken by the Departmental officers, it was observed that the Appellant was engaged in manufacture of 'Flexible Packaging Material' classifying the same under CETH 39201092 and discharging Central Excise duty @ 12.5%. The principal raw materials were Polyester film, CPP Film, Polythene Film, BOPP film, printing inks, adhesives, additives and various chemicals. It was observed that the articles of conveyance or packing of goods of plastic of Polymers of ethylene were classifiable under CETH 39232100 of the Central Excise Tariff Act, 1985 and by virtue of Notification No. 12/2016 dated 01.03.2016, it was chargeable to Central Excise duty @15%. It appeared to the Audit Officers that the Appellant had short paid Central Excise Duty @2.5% during the period from 1.3.2016 to 31.3.2017. Based on Audit observations, Show Cause Notice No. VI(a)/8-390/Circle-I/AG-07/2017-18 dated 18.4.2018 was issued to the Appellant demanding Central Excise duty of Rs. 11,28,678/- for the said period.

2.1 Since the Appellant continued classifying their product under CETH 39201092, a Statement of Demand bearing No. V. 84(4)13/MP/D/ 2019-20 dated 29.4.2019 was issued to the Appellant for the period from 1.4.2017 to 30.6.2017 calling them to show cause as to why Central Excise duty of Rs. 2,54,058/- should not be demanded and recovered under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as 'Act'), along with interest under Section 11AA of the Act and proposed imposition of penalty under Section 11AC of the Act.

2.2 The above Show Cause Notice was adjudicated by the adjudicating authority vide the impugned order who confirmed the demand of Rs. 2,54,058/- under Section 11A(4) of the Act, along with interest under Section 11AA and imposed penalty of Rs. 2,54,058/- under Section 11AC(1)(c) ibid.



Handwritten signature/initials

3. Being aggrieved, the Appellant preferred the present appeal, *inter-alia*, on the various grounds as under:
- (i) The adjudicating authority has erred in confirming demand ignoring the fact that the product being manufactured by the appellant was being classified and approved by the Department from so many years and while proposing change in classification, no documentary evidence is either produced by the Department or Audit party. Hence, the impugned order is liable to be set aside; that adjudicating authority has erred in confirming the demand ignoring the fact that the statutory record of the appellant were audited by various audit party prior to the audit by concerned party and none of the officers had ever raised any objection on the classification.
- (ii) That during the course of personal hearing of earlier show cause notice, samples of the product being manufactured and cleared by them were submitted which proved beyond doubt that the same cannot be classified under the heading as proposed by the Department; that unless the basis of change in classification is clarified by the department proper submission cannot be made and hence it is prayed that the very basis of the modification may please be clarified.
- (iii) That the heading proposed by the Department is for the product bags and sacks whereas the product being manufactured by them is nothing but the pouches which can be used only for packing of goods but not for transportation of the goods. The adjudicating authority has erred in overlooking the samples produced as also the fact that the product being manufactured cannot be classified as bags or sacks and hence Notification referred is not applicable. The basic difference in the nature of the product does not seem to have been considered by the department while proposing the modification in classification of the product.
- (iv) That it is a settled proposition of law that the burden to prove classification is on the person who alleges such classification; that unless the burden lying on the department is discharged the classification as proposed cannot be modified and accordingly the proceedings are liable to be dropped. In any case there is no suppression of fact and hence the proceedings initiated under Section 11AC cannot be sustained as also the demand cannot be confirmed.
- (v) That the adjudicating authority has erred in confirming duty by invoking extended period of limitation ignoring the fact that their statutory



record/documents were scrutinized by the Department time to time and Department had full knowledge of the fact of the case, hence allegation of suppression of fact with intention to evade payment of duty cannot be sustained and consequently demand beyond the period of normal limitation is bad in law and liable to be set aside.

(vi) That they are holding registration with the department since long and the Departmental officers have visited their premises many times for the official reasons and were aware of the activity being carried out and hence the allegation of Mis-declaration of fact cannot be alleged and consequently the proceedings on such ground cannot be sustained or the penalty on such ground cannot be imposed.

4. Personal hearing was conducted in virtual mode through video conferencing on 12.2.2021. Shri Paresh Sheth, Advocate, appeared on behalf of the appellant and reiterated the submissions made in appeal memorandum and stated that demand for earlier period has been decided in their favour by the then Commissioner (Appeals), Rajkot.

5. I have carefully gone through the facts of the case, impugned order, grounds raised in appeal memorandum and oral submission made at time of hearing. The issue to be decided in the present appeal is whether 'Flexible Packaging Material' manufactured by the Appellant is classifiable under CETH No. 39232100 or not ?

6. I find that the Appellant was engaged in manufacturing of 'Flexible Packaging material' which was manufactured out of Polyester film, CPP Film, Polythene Film, BOPP film, printing inks, adhesives and additives and various chemicals. The Appellant was classifying the said product under CETH No. 39201092 and was paying Central Excise duty @12.5%. The team of officers during the course of Departmental audit found that the articles of conveyance or packing of goods of plastic of Polymers of ethylene were classifiable under CETH No. 39232100, which attracted duty @15% under Notification No. 12/2016 dated 01.03.2016. It was also contended that the product manufactured by the Appellant was classifiable under CETH No. 39232100 and not under CETH No. 39201092 used by the Appellant. The adjudicating authority confirmed Central Excise duty demand of Rs. 2,54,058/- under Section 11A of the Act which was allegedly short paid by the Appellant by wrongly classifying their product.



6.1 The Appellant has contended that the heading proposed by the Department is for the product bags and sacks whereas the product being manufactured by them is nothing but the pouches which can be used only for packing of goods but not for transportation of goods. That it is a settled proposition of law that the burden to prove classification is on the person who alleges such classification and unless the burden lying on the department is discharged, the classification cannot be modified. The Appellant further contended that the statutory record of the appellant were audited by various audit party in the past but none of the officers had ever raised any objection on the classification of their goods.

7. Since classification of 'Flexible Packaging material' is under dispute, it is pertinent to examine the relevant tariff entries under which said product is classified by both the Appellant as well as the Department as under:

- Classification by the Appellant

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

- Classification by the Department :

3923	ARTICLES FOR THE CONVEYANCE OR PACKING OF GOODS, OF PLASTICS; STOPPERS, LIDS, CAPS AND OTHER CLOSURES, OF PLASTICS
3923 21 00	- Sacks and bags (including cones) : -- Of polymers of ethylene

8. The Appellant has not produced product sample before me and hence, it is not possible for me to examine product vis a vis relevant tariff entries. I find that the Appellant had produced product samples before the adjudicating authority, who has recorded following findings, after examination of samples, as under:



“16. On examination of the samples submitted by the Noticee, I find that the Flexible Packaging Material of plastic (pouch) manufactured by the Noticee as per the choice of their customers falls under the category of ‘Articles for packaging of goods, of plastics’ They manufactured and sold their goods as ‘packaging material’ of specific design and size but not as films. Films are not capable of packaging commodities. The products manufactured by the Noticee were packing materials for their buyers which they used as pouches for packing of the other products. Hence, they cannot be classified as ‘other plates, sheets, film, foil and strip, of plastics’ under 39201092. Therefore, I find that the product namely ‘Flexible Packing Material of Plastic (pouch)’ used for conveyance or packing of goods made of plastics are rightly classifiable under the CETH 39232100 and the same attracts 15% Central Excise duty as per entry no. 148AA of the Notification No. 12/2016-CE dated 01.03.2016.”

8.1 On going through the above findings, it appears that the Appellant manufactured flexible packing material in pouch form having specific design and size and such pouches were used for packing of other products. Now it has to be decided whether flexible packing material in pouch form would fall under CETH No. 39232100 as held by the adjudicating authority or not.

9. I find that against CETH No. 39232100 reproduced *supra*, description of goods is mentioned as “-- Of polymers of ethylene”. Further, entry immediately preceding said tariff item is “- Sacks and bags (including cones)”. The use of single dash (-), double dashes (--), and triple dashes (---) prefixing entries in the tariff and how to read them is explained in the General Explanatory Notes as under :

“(1) Where in column(2) of this Schedule the description of an article or group of articles under a heading is preceded by “-”, the said article or group of articles shall be taken to be a sub-classification of the article or group of articles covered by the said heading. Where, however, the description of an article or group of articles is preceded by “--”, the said article or group of articles shall be taken to be a sub-classification of the immediately preceding descriptions of article or group of articles which has “-”. Where the description of an article of group of articles is preceded by “---” or “----”, the said article or group of articles shall be taken to be a sub-classification of the immediately preceding description of the article of group of article which has “-” or “--”

9.1 In view of above explanation, CETH No. 39232100 having description “-- Of polymers of ethylene’ is sub-classification of “- Sacks and bags (including



cones)". Thus, it is apparent that CETH No. 39232100 will cover sacks and bags (including cones) of polymers of ethylene. In the present case, the Appellant manufactured flexible packaging material in pouch form. The pouches cannot be equated with sacks or bags. Even though, the pouches so manufactured by them were meant for packing of goods as observed by the adjudicating authority and 'articles of packing of goods' is covered by Tariff Item No. 3923, then also the pouches cannot be considered as sacks or bags so as to get them classified under CETH No. 39232100.

10. It is pertinent to mention that the adjudicating authority has given more stress on how the impugned product would not fall under CETH No. 39231092 claimed by the Appellant. It is irrelevant for the purpose of present proceedings whether the items manufactured by the Appellant would fall under CETH No. 39201092 or not. The adjudicating authority was required to show that product being manufactured by the Appellant would fall under CETH No. 39232100 to demand differential duty @2.5% in terms of Entry No. 148AA of the Notification No. 12/2016-CE dated 01.03.2016. However, the adjudicating authority has failed to discharge the onus that the product manufactured by the Appellant would fall under CETH No. 39232100. It is settled position of law that when the Department is disputing assessee's claim for classification of goods under a particular heading, responsibility lies on the Department to prove their claim. I rely on the judgement rendered by the Hon'ble Supreme Court in the case of H.P.L. Chemicals Ltd. reported as 2006 (197) E.L.T. 324 (S.C.), wherein it has been held that,

"29. This apart, classification of goods is a matter relating to chargeability and the burden of proof is squarely upon the Revenue. If the Department intends to classify the goods under a particular heading or sub-heading different from that claimed by the assessee, the Department has to adduce proper evidence and discharge the burden of proof. In the present case the said burden has not been discharged at all by the Revenue."

11. I also observe that appeal of the Appellant for previous period was decided by the then Commissioner (Appeals), Rajkot in Appellant's favour vide Order-in-Appeal No. RAJ-EXCUS-000-APP-088-2020 dated 5.8.2020. The present demand is for subsequent period. There is no change in the legal provisions emerging from the case records.

12. In view of above discussion, I hold that the adjudicating authority has failed to prove that the product manufactured by the Appellant would fall under



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CETH No. 39232100. Consequently, the confirmation of demand of Rs. 2,54,058/- is not sustainable and is required to be set aside and I order accordingly. When demand of duty is set aside, recovery of interest and imposition of penalty under Section 11AC are also set aside.

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

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

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

स. नि. व. /
✓
सि. नि. व. /
स. नि. व. /

Akhil Kumar
(AKHILESH KUMAR)
Commissioner (Appeals)
26 June, 2021

By Regd. Post AD

To, M/s Rototon Polypack Pvt. Ltd., Sakhiyanagar Industries, Opp. Dharmajivan Ind. Area, B/h S.T. Workshop, Swami Narayan Gurukul, Rajkot.	सेवा में, मै. रोटोटोन पोलिपैक प्राइवेट लिमिटेड, सखियानगर इंडस्ट्रीज़, धर्मजीवन इंडस्ट्रियल एरिया के सामने, एस टी वर्कशॉप के पीछे, राजकोट.
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प्रतिलिपि :-

- 1) 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, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
- 3) उप आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट-1 मण्डल, को आवश्यक कार्यवाही हेतु।
- 4) गार्ड फ़ाइल।

