



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

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



सत्यमेव जयते

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रजिस्टर्ड डाक ए.डी.द्वारा

DIN-20211164SX000000A8C7

क	अपील / फाइल नं./ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/52/RAJ/2021	18/JC(RSS)/2020-21	29-01-2021

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

**RAJ-EXCUS-000-APP-046-2021**

आदेश का दिनांक / Date of Order:	15.11.2021	जारी करने की तारीख / Date of issue:	15.11.2021
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श्री अखिलेश कुमार, आयुक्त (अपील्स), 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 / गांधीधामा 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. Kelvin Industries (Prop. Arvindbhai Babubhai Patel), 150 feet ring road, Nandanvan-1, Block No.C-3, Rajkot, . .

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) सामान्य शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थी न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 का 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) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामलों में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलार्थी 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 ब्रताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलार्थी न्यायाधिकरण (मिस्ट्रेट) 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) अपीलार्थी न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलार्थी 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 अपीलार्थी न्यायाधिकरण की शाखा स्थित है। स्वयं 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) अपीलार्थी न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसमें साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलार्थी 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 अपीलार्थी न्यायाधिकरण की शाखा स्थित है। स्वयं 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 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 नियमवानी, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके 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 Form ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेन्ट्रल) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जर्माना विवादित है, या जर्माना, जब केवल जर्माना विवादित है, का भुगतान किया जाए, वरतें कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपये 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) सेनवेट जमा की ली गई गलत राशि
  - (iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- वरतें यह कि इस धारा के प्रावधान वित्तीय (सं- 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थान अर्थात् अपील को लागू नहीं होगा। /

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

- (i) amount determined under Section 11 D;
- (ii) amount of erroneous Cenvat Credit taken;
- (iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :  
**Revision application to Government of India:**  
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन 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 माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /  
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /  
In case of rebate of duty of excise on goods exported to any country or territory outside India of an excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /  
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और रोसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं- 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं। /  
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय 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 आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के माध्यम 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 O.I.O and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।  
जहां संलग्न रकम एक लाख 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 चाहिये। इस तथ्य के होते हुए भी की निम्नलिखित 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 umbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is 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 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.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में बर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /  
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को देख सकते हैं। /  
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website [www.cbec.gov.in](http://www.cbec.gov.in).



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

M/s Kelvin Industries, Rajkot has filed Appeal No. V2/52/RAJ/2021 (*hereinafter referred to as "Appellant"*) against Order-in-Original No. 18/JC(RSS)/ 2020-21 dated 2.2.2021 (*hereinafter referred to as 'impugned order'*) passed by the Joint Commissioner, Central GST & Central Excise, Rajkot (*hereinafter referred to as 'adjudicating authority'*).

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of Submersible Pumps and Openwell Pumps falling under CETH 8413 of the Central Excise Tariff Act, 1985 and was registered with Central Excise Department having registration No. AACCC6670KXM001. A search was carried out by the officers of the Anti Evasion wing of erstwhile Central Excise, Rajkot Commissionerate at factory premises of the Appellant on 1.7.2010 and incriminating documents i.e. chits, pendrive were recovered indicating clandestine removal of goods without payment of Central Excise duty and without cover of invoices. Shri Arvind Patel, Proprietor of the Appellant in his statements recorded on 1.7.2010, 2.7,2010 and 9.4.2011 under Section 14 of the Central Excise Act,1944 (*hereinafter referred to as "Act"*) admitted that the Appellant had sold goods without issuing bills and without payment of Central Excise duty during the period 2008-09 to 2010-11. The investigation was extended to buyers of finished goods and suppliers of raw materials. The buyers of goods in their statements recorded under Section 14 of the Act admitted to have purchased finished goods from the Appellant without cover of bills and payment was made to the Appellant in cash. The suppliers of goods in their statements recorded under Section 14 of the Act admitted to have supplied goods to the Appellant without cover of bills for which payment was received by them in cash from the Appellant.

2.1 Show Cause Notice No. V.84/AR-V-RJT/ADJ/265/2011 dated 30.11.2011 was issued, *inter alia*, to the Appellant calling them to show cause as to why Central Excise duty amount of Rs. 18,74,628/- should not be demanded and recovered from them under proviso to Section 11A(1) of the Act along with interest under Section 11AA and also proposing imposition of penalty under Section 11AC read with Rule 25 of the Central Excise Rules, 2002 (*hereinafter referred to as 'Rules'*).

2.2 The above Show Cause Notice was adjudicated vide Order-in-Original No. 80/ADC/2012 dated 8.8.2012 which, *inter alia*, confirmed Central Excise duty of Rs. 11,22,927/- under proviso to Section 11A(1) of the Act along with interest under Section 11AA *ibid* and penalty of Rs. 11,22,927/- was imposed



under Section 11AC of the Act upon the Appellant. Being aggrieved with the impugned order, the Appellant preferred appeal before the then Commissioner (Appeals), Rajkot who vide Order-in-Appeal No. 215 to 224/2013(RAJ)CE/AK/Commr(A)/Ahd dated 8.5.2013 upheld the impugned order but remanded the matter to the lower adjudicating authority for the limited purpose of verifying the claim of the Appellant regarding reduction of duty demanded on opening balance as on 1.4.2008/1.12.2008 and directed to grant benefit, if the plea of the Appellant is substantiated on the basis of documents submitted by them.

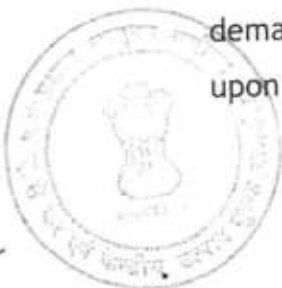
2.3 In *de novo* adjudication, the lower adjudicating authority, after examining the submission of the Appellant as well as evidences, held that duty liability was arrived at on the basis of data of illicit removal of goods recovered from the pen drive of the Appellant which was admitted by the proprietor and that their claim to exclude the opening balance amount from total clearance is an after thought and manipulated to escape Central Excise duty liability. The lower adjudicating authority vide the impugned order confirmed Central Excise duty of Rs. 11,22,927/- under proviso to Section 11A(1) of the Act, along with interest under Section 11AA and imposed penalty of Rs. 11,22,927/- under Section 11AC of the Act.

2.4 Being aggrieved, the Appellant preferred appeal before the then Commissioner (Appeals), Rajkot who vide Order-in-Appeal No. RAJ-EXCUS-000-APP-187-2018-19 dated 17.10.2018 again remanded the matter to the adjudicating authority for the limited purpose of verifying the claim of the Appellant regarding reduction of duty demanded on opening balance as on 1.4.2008/1.12.2008. The Appellant challenged the said Order-in-Appeal by filing appeal before the Hon'ble CESTAT, Ahmedabad who decided the appeal vide Order No. A/11294/2020 dated 5.11.2020 holding that that the remand made by the Commissioner(Appeals), Rajkot to adjudicating authority be considered as open remand.

2.5 In *de novo* adjudication, the adjudicating authority vide the impugned order confirmed Central Excise duty of Rs. 11,22,927/- under proviso to Section 11A(1) of the Act along with interest under Section 11AA *ibid* and penalty of Rs. 11,22,927/- was imposed under Section 11AC of the Act.

3. Being aggrieved with the impugned order, the Appellant has preferred appeal on various grounds, *inter alia*, as under :-

- (i) The adjudicating authority has erred in confirming the duty demand of Rs. 11,22,927/- and further imposing equal amount of penalty upon them.



(ii) That the adjudicating authority erred in denying to follow the mandate of Section 9D of the Act. He erred in not appreciating that duty demand proposed in the show cause notice was worked out based on the statements recorded under section 14 of the Act of the deponents mentioned in the Show Cause Notice. There was discrepancy in the investigation which makes the statements of the deponents highly doubtful and is a strong ground to follow the mandate of section 9D of the Act. In the circumstances, adjudicating authority was duty bound to follow the mandate of section 9D of the Act. Denial of cross examination on the ground that the appellant never requested to give cross examination in first round of litigation or that deponents have not retracted the statements are not the exceptions provided under section 9D of the Act.

(iii) That the adjudicating authority erred in not appreciating that heavy reliance in the present case is placed on statements of persons who have not been examined as witnesses by the Department in adjudication as required by Section 9D of the Act and hence the statements are not admissible in evidence. Essentially, the entire case of the department is based on the statements of the appellant, some of the buyers of the final products and some of the supplier of raw materials. None of these persons have been examined as witness by the department as required by Section 9D of the Act and relied upon the case laws of Basudev Garg - 2013 (294) ELT 353 (Del.) and G-Tech Industries - 2016 (339) ELT 209 (P & H). Once the said statements are excluded from consideration, there is no evidence to show that the contents of the pendrive pertain to removal of the goods clandestinely by the appellant. The statements of alleged sales derived from the pendrive themselves do not show that the said pertain to the goods which were removed by the appellant clandestinely in absence of person in possession of whom the said pendrive is found and the person who has entered the said data in the pendrive having been identified nor has been examined in the investigations and in adjudication.

(iv) That the adjudicating authority erred in not appreciating that Computer print outs have no evidentiary value as the mandatory conditions in this behalf stipulated in Section 36B of the Act have not been followed. In the present case data contained in the pen drive was not stored in the computer. Print outs from the pen drive was taken after 40 days of its seizure allegedly from their factory premises and no prints were taken at the time its seizure The officers have not identified or



*du*

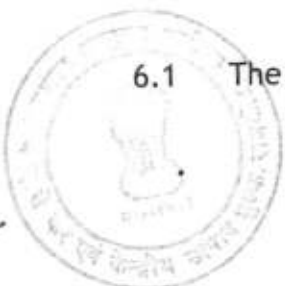
recorded the statement of the person who operated the pen drive or the computer in their factory nor certificate of the person who operated the pen drive or computer in terms of Section 36B(4) of the Act was obtained by the officers of the Department. There was absolutely nothing to show that the data obtained from the pen drive were regularly fed into the pen drive or in the computer in the ordinary course of business. The said data therefore would not constitute an evidence much less a reliable evidence to substantiate the allegation of clandestine removal of the goods and relied upon the case laws of *Ambica Organics - 2016 (334) ELT 97 (Tri. Ahd)* and *Modern Laboratories - 2017 (358) ELT 1179 (Tri. Del.)*.

4. Hearing in the matter was scheduled in virtual mode through video conferencing on 21.10.2021. Shri Rahul Gajera, Advocate, appeared on behalf of the Appellant. He reiterated the submissions made in appeal memorandum.

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and written as well as oral submissions made by the Appellant. The issue to be decided in the present case is whether the impugned order confirming demand of Rs. 11,22,927/- and imposing penalty of Rs. 11,22,927/- on the Appellant is correct, legal and proper or not.

6. On perusal of the records, I find that an offence case was booked against the Appellant for clandestine removal of goods. During search carried out at the factory premises of the Appellant, chits and pendrive were recovered containing details of goods removed without payment of Central Excise duty and without issuance of invoices. The proprietor of the Appellant admitted about clandestine removal of goods. Further, the buyers /suppliers also admitted about purchase/supply of goods from/to the Appellant without cover of Central Excise invoices. The adjudicating authority confirmed the demand for the period from 2008-09 to 2010-11. At appellate stage, the Appellant contended that duty was wrongly demanded on 'opening balance as on 1.4.2008 /1.12.2008' appearing in incriminating documents recovered during search. The then Commissioner(Appeals), Rajkot remanded the matter to the adjudicating authority to pass fresh orders on that issue. During *de novo* proceedings, the Appellant sought cross examination of the deponents whose statements were relied upon. The adjudicating authority vide the impugned order denied the request of cross examination and confirmed the demand of Rs. 11,22,927/- under proviso to Section 11A(1) of the Act along with interest under Section 11AA *ibid* and imposed penalty of Rs. 11,22,927/- under Section 11AC of the Act.

6.1 The Appellant has contended that entire case of the Department is based

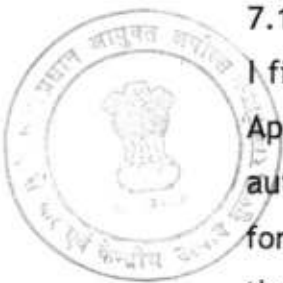


on the statements of the appellant, some of the buyers of the final products and some of the supplier of raw materials but none of these persons were examined as witness by the Department as required by Section 9D of the Act. The Appellant further contended that once the said statements are excluded from consideration, there is no evidence to show that the contents of the pendrive pertain to removal of the goods clandestinely by the appellant and relied upon case law of Basudev Garg reported as 2013 (294) ELT 353 (Del.).

7. I find that the adjudicating authority rejected the request of the Appellant for cross examination by giving findings at para 17 of the impugned order, which is reproduced as under:

“I find that the Noticee has requested for cross examination of the deponents mentioned at Sr. No.3 to 13 of the Show Cause Notice whose statements had been relied upon against the Noticee. I find from the records available that this is for the first time the Noticee has requested for cross-examination of the said deponents. I find that during the course of investigation, the Noticee did not request for cross-examination of the said deponents. Further, I find that at time of adjudication of the Show Cause Notice, they did not request for cross-examination of the said deponents. I find that at the time preferring Appeal before the Commissioner (Appeals) against the Order-in-Original dated 31.07.2012/08.08.2012, the Noticee did not request for cross-examination of the said deponents. Again, at the time of de novo adjudication vide Order-In-Original dated 26.05.2017, the Noticee did not request for cross-examination of the sad deponents. I also find that they did not request for cross examination at the time of preferring Appeal before the Commissioner (Appeal) against the said Order-In-Original dated 26.05.2017. Now, when the Noticee sought time frame to pass a de novo order and the Hon’ble Tribunal has ordered to pass the de novo order within a period of 3 months, the request for cross-examination of the said deponents is a delay technique only and cannot be accepted. Further, it is pertinent to take note that neither Noticee nor any of the said co-Noticees have retracted their statements till date, which confirmed that all of admitted what they had stated in their respective statements.”

7.1 In backdrop of the above findings and on examining the facts of the case, I find that offence case was booked against the Appellant in the year 2010. The Appellant did not seek cross objection of the deponents before the adjudicating authority or Commissioner (Appeals) during the first two round of litigation. It is for the first time, the Appellant sought cross examination of the deponents when the matter was remanded by the Tribunal to the adjudicating authority. The



*Handwritten signature*

Appellant has not given any reason/ justification as to why cross examination was not sought earlier or why cross examination is requested after delay of more than 10 years. Further, the most crucial fact here is that none of the deponents have retracted their statement, as recorded by the adjudicating authority in the impugned order. In any case, it is prerogative of the adjudicating authority to grant or decline the opportunity of cross-objection, depending upon the exigencies of the facts and circumstance of the case. Therefore, I do not find any infirmity in the decision of the adjudicating authority in denying the cross examination to the appellant, especially when no specific reason for seeking cross examination has been set out by the appellant. I rely on the decision rendered by the Hon'ble Bombay High Court in the case of Patel Engineering Ltd reported as 2014 (307) E.L.T. 862 (Bom.), wherein it has been held that,

“23. Therefore, we are of the opinion that it will not be correct to hold that irrespective of the facts and circumstances and in all inquiries, the right of cross examination can be asserted. Further, as held above which rule or principle of natural justice must be applied and followed depends upon several factors and as enumerated above. Even if there is denial of the request to cross examine the witnesses in an inquiry, without anything more, by such denial alone, it will not be enough to conclude that principles of natural justice have been violated. Therefore, the judgments relied upon by Shri Kantawala must be seen in the factual backdrop and peculiar circumstances of the assessee's case before this Court.”

7.2 I have examined the relied upon case law of Basudev Garg reported as 2013 (294) ELT 353 (Del.). In the said case, the Appellant had imported Ball Bearings of Chinese origin but showed by them as having been imported from Sri Lanka in order to evade anti-dumping duty. Show cause notice was issued to the Appellant which contained reference to various statements. The Appellant made requests to summon the persons who made the statement including the Customs Officers for cross examination before the adjudicating authority, Commissioner(Appeals) and Tribunal but the same were not considered. Further, the adjudicating authority relied upon subsequent inquiry report which was conducted after issuance of Show Cause Notice and was also not supplied to the Appellant. That is how, the allegation was made that principles of natural justice have been violated. In that backdrop the Hon'ble Court has passed the said decision. However, facts involved in the present case are totally on different footing. The Appellant herein had not made any request for cross examination of deponents before the adjudicating authority or Commissioner (Appeals) during the first two round of litigation. It is for the first time, the Appellant sought cross examination of the deponents before the adjudicating





authority after delay of more than 10 years as narrated in para supra. So, there was no violation of principles of natural justice as held by me supra.

8. The Appellant has contended that the adjudicating authority erred in not appreciating that Computer printouts have no evidential value as the mandatory conditions stipulated in Section 36B of the Act have not been followed. The data contained in pendrive would, therefore, not constitute an evidence to substantiate the allegation of clandestine removal of the goods and relied upon the case laws of *Ambica Organics - 2016 (334) ELT 97 (Tri. Ahd.)* and *Modern Laboratories - 2017 (358) ELT 1179 (Tri. Del.)*.

8.1 I find that during search carried out at the factory premises of Appellant, certain incriminating documents in the form of chits and pendrive were recovered. The seized pendrive was accessed under Panchnama proceedings and printout of content stored in the said pendrive was taken in presence of Proprietor of the Appellant, as narrated in the impugned order and not disputed by the Appellant. Investigation was extended to buyers/suppliers who admitted to have purchased /supplied goods from/ to the Appellant without bills. Thus, details of clandestine removal of goods contained in the seized pendrive was duly corroborated during investigation. I also find that proprietor of the Appellant has not retracted his Statement nor any of the buyers/suppliers have retracted their Statements during investigation or at any point of time thereafter. After examining the facts of the case, I find that there are evidences indicating clandestine removal of goods and veracity of such evidences cannot be ignored merely because provisions contained in Section 36B of the Act were not followed. I rely on the Order passed by the Hon'ble CESTAT, Chennai in the case of *Shri Ulaganayagi Ammal Steels* reported as 2008 (231) E.L.T. 434 (Tri. - Chennai), wherein it has been held that,

"16. We find that the printouts relied upon are not from the CPU belonging to the assessee. The precautions sought to be ensured through Section 36B(2) of the Act would appear to apply to printouts of data taken from a CPU. It cannot apply to a printout of a file in the presence of the person who had maintained the same and with the key (password) supplied by him. Such data is beyond suspicion of having been tampered by the investigating agency. These printouts are also corroborated by other evidence. In the consolidated submissions of SASAI dated 3-1-08, SASAI submitted that in the instant case the provisions of Section 36B would come into operation only when the computer printouts were sought to be relied upon without any corroborative evidence. We find that the printouts from floppies are admissible evidence and do not require corroboration. However the Commissioner found reliable evidence outside the printouts to find evasion. Since the authenticity of the seizure of the floppies has come under cloud, only such files opened after seizure for the first time in the presence of Shri S.P.M. Anandan with the password he gave are reliable. The files, from floppies seized from Ms.



Ponnalagu's residence which on opening in her presence showed the last they were modified to be prior to 24-6-04, i.e., the date of seizure, are also reliable.

17. We find that the Commissioner relied on diverse transactions that corroborated clandestine clearances of iron bars and rods by SASAI, namely, raw material purchases, power consumption, transporters' records, weighing slips, receipts of consideration for goods clandestinely cleared, payment for unaccounted ingots received, by way of meeting the ingot supplier's dues for scrap it had received from scrap dealers, records of buyers of clandestinely cleared goods etc. These manipulations were easier for the concerned owing to the fact that the persons involved belong to the same extended family. We have no doubt that the printouts contained true details of transactions. In serving the purpose of evidence, printouts were only more organized but other evidence are equally useful and reliable. In their submissions dated 3-1-08, the appellants have not contested the averments by the revenue on file retrieval from seized floppies.

... ..

- 25. Departmental adjudication is governed by the preponderance of probability and not proof beyond reasonable doubt. Commissioner had a plethora of evidentiary material including computer printouts to establish evasion. ... .."

8.2 I have examined the relied upon case law of Ambica Organics reported as 2016 (334) ELT 97 (Tri. Ahd). In the said case, the central Excise officers carried out search at the factory of the appellant and recovered a USB drive containing details of certain sales on which no duty was allegedly paid. During investigation, statements of buyers of goods were recorded corroborating the details recovered in USB drive. The appellant disowned the contents of said details and alleged that it was manipulated and filed affidavit to that effect immediately after the raid. At appellate stage, the Commissioner (Appeals) found that some of the statements given by the buyers were not voluntary and held that the said statements has no strong evidentiary value. In that peculiar facts of the case, the Hon'ble Tribunal passed the order. The facts involved in the present case are entirely different. The seized pendrive was accessed under Panchnama proceedings in presence of the proprietor of the Appellant. Further, none of the buyers/suppliers of the Appellant have retracted their statements. Thus, said case law is not applicable to the facts of the present case.

8.3 I have examined the relied upon case law of Modern Laboratories reported as 2017 (358) ELT 1179 (Tri. Del.). In the said case, a search was carried out at the factory premises of the Appellant and certain documents and CD were seized. On culmination of investigation, duty was demanded, *inter alia*, on the details of clearance retrieved from CD. The Hon'ble Tribunal observed that the data retrieved from the CD was never confronted with the appellant and the appellant came to know about retrieval of the data from the CD at the time



issuance of show cause notice and that no investigation was conducted at the end of the buyer/transporters or the person whose name was mentioned in the data retrieved from the CD. The Hon'ble Tribunal held that in the absence of any corroborative evidence on the basis of the data retrieved from the CD, the demand is not sustainable. The facts of the present case are different. In the present case, the data was accessed from the seized pen drive in presence of the Appellant. Further, data contained in the seized pendrive was corroborated by the statements of buyers and suppliers of goods. The said case law is, thus, not applicable to the facts of the present case.

9. I find that the impugned order was passed pursuant to remand directions issued by the then Commissioner(Appeals), Rajkot to examine the correctness of duty demanded on opening balance amount. I find that the adjudicating authority has given detailed findings at paras 20 to 20.3 of the impugned order and came to conclusion that amount mentioned against opening balance pertained to clandestine removal of goods. I find that the Appellant has not contested the said findings of the adjudicating authority. Hence, I have no other option but to uphold the confirmation of duty demand on that issue.

10. In view of above, I uphold the impugned order and reject the appeal.

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

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

सत्यापित,

*VS*

विपुल शाह

अधीक्षक (अपील)

*Akhil*  
15<sup>th</sup> November  
2021  
(AKHILESH KUMAR)  
Commissioner (Appeals)

By R.P.A.D.

To, M/s Kelvin Industries, 150 Feet Ring Road, Nandanvan-1, Block No. C-3, Rajkot.	सेवा में, मेसर्स केल्विन इंडस्ट्रीज, 150 फीट रिंग रोड, नंदनवन-1, ब्लॉक नंबर सी-3, राजकोट।
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प्रतिलिपि:-

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



