::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔरकेन्द्रीय 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 – 2477952/2441142Email: commrappl3-cexamd@nic.in

रजिस्टर्डडाकए.डी.द्वारा:-DIN-20211064SX0000000A73

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date
	V2/ /114/RAJ/2011	110 to 121/2010-11 dated 01.02.2011	01.02.2011
	V2/20/EA2/RAJ/2011	110 to 121/2010-11 dated 01.02.2011	01.02.2011

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

KCH-EXCUS-000-APP-256 to 257-2021

आदेश का दिनांक / Date of Order:	29.10.2021	जारी करने की तारीख / Date of issue:	15.11.2021

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 एवंसेवाकर,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. Plastene India Limited., Survey no. 316A/317,
N.H.8A, Nani Chirai, Taluka- Bachau, Dist- Kutch-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 सवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क आधीनयम ,1944 की धारा 35B के अतगत 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 मामले सीमा शुल्क, केन्द्रीय उत्पादन 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 अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 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) वित्त अधिनियम,1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 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 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 (सेस्टेट) 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 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) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होंगे।/

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 मामलो में, केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर 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 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) मुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो छूटी 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 समयावधि पर या बाद में पारित किए गए है।/
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 उत्पादन 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 साक्ष्य 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 रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो 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 लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय 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 filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I 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-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 वर्णित एवं अन्य संबन्धित 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 को देख सकते है । /
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.

:: ORDER-IN-APPEAL ::

M/s. Plastene India Limited (formerly known as M/s. Oswal Agloimpex Ltd) (hereinafter referred to as "Appellant") has filed Appeal No. V2/114/RAJ/2011 against Refund Order Nos. 110 to 121//2010-11 dated 01.02.2011 (hereinafter referred to as "impugned order") passed by the Deputy Commissioner, erstwhile Central Excise Division, Gandhidham (hereinafter referred to as "adjudicating authority"). Further, the Deputy Commissioner, erstwhile Central Excise Division, Gandhidham has also filed appeal against the impugned order on the basis of direction and authorization issued under Section 35 E (2) of the Central Excise Act, 1994 issued by the Commissioner, erstwhile Customs & Central Excise, Rajkot (herein after referred to as "the department").

2. The facts of the case, in brief, are that the Appellant was engaged in the manufacture of excisable goods namely, PP/HDPE Woven Sacks/Bags, PP/HDPE Fabrics, PP/HDPE Laminated/un-laminated bags, Tarpaulin, LDPE Co-Extruded Films/Sheet & HDPE / PP reprocessed granules falling under Chapter 39 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AAACO3087CXM001. The Appellant was availing benefit of exemption under Notification No. 39/2001-CE dated 31.07.2001, as amended (hereinafter referred to as 'said notification'). As per scheme of the said Notification, exemption was granted by way of refund of Central Excise duty paid in cash through PLA as per prescribed rates and refund was subject to condition that the manufacturer has to first utilize all Cenvat credit available to them on the last day of month under consideration for payment of duty on goods cleared during such month and pay only the balance amount in cash. The said notification was subsequently amended vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008, which altered the method of calculation of refund by taking into consideration the duty payable on value addition undertaken in the manufacturing process, by fixing percentage of refund ranging from 15% to 75% depending upon the commodity.

2.1. The appellant had filed following refund claims towards amount of Central Excise Duty, Education Cess and Secondary and Higher Education Cess paid from PLA in terms of notification *supra* on clearance of finished goods manufactured by them:

Sl. No.	Period	Date of filing of claim	Amount (Rs.)
01	10/2007	07.12.2007	69,27,428
02	11/2007	18.01.2008	32,64,914
03	12/2007	06.02.2008	4,87,754
04	01/2008	03.03.2008	18,17,109
05	02/2008	24.03.2008	7,56,510
06	03/2008	10.04.2008	39,14,763
07	02/2009	06.03.2009	7,22,158
08	06/2009	07.07.2009	20,66,246
09	12/2009	07.01.2010	14,65,318

10	02/2020	05.03.2010	23,48,609
11	03/2010	07.04.2010	33,42,855
12	04/2010(07.04.2010)	07.05.2010	12,18,498
Total			2,83,32,162

2.2. On scrutiny of refund applications, it was observed by the adjudicating authority that,

(i) The appellant has installed new Tape Plant No.5 along with 67 looms after the cut-off date i.e., 31.12.2005, but had not availed benefit of the said notification in respect of this plant and maintained separate records;

(ii) The appellant had installed 48 looms (40 Circular Looms and 8 Needle Looms) after the cut-off date in Tape Plant No. 1 to 4, which were installed before the cut-off date; that capacity of plastic plant depends upon the capacity of Tape Plants; that installed capacity was 12,96,000 kgs per month as certified by the Chartered Engineer; that none of the available records suggest that the appellant had ever crossed the installed capacity of these four Tap Plants; that Looms cannot enhance the capacity of plant; that the Chartered Engineer vide his certificate dated 31.08.2010 has also certified that there was no increase in production capacity of the plant as there was no increase in the capacity of extrusion; that there is nothing on records to suggest anything contrary to the Chartered Engineer's contentions; that installations of looms, irrespective of their period of installations, had not got any bearing on enhancement of installed capacity as their functions are ancillary; that legally their claims cannot be denied on this ground;

(ii) The appellant had installed a plastic recycling plant for manufacturing recycled granules on 10.11.2007 i.e., after the cut-off date; that they had one such machinery installed prior to 31.12.2005, however, after installation of new recycling machine they have not maintained separate records of production and clearance of recycled granules produced from old machinery and from new machinery up to November-2008, thus, recycled granules manufactured during the period November-2007 to November-2008 was not eligible for the benefit of the said notification ;

(iii) As per Jurisdictional Range Superintendent's (JRS) verification report, the Appellant had maintained separate records of production recycled granules from December-2008 and as per the said notification refund of such recycled granules manufactured from the machinery installed after cut-off date was not eligible, however, the appellant had claimed benefit of such refund which was required to be rejected.

(iv) During the month May-08 to July-08, the appellant cleared recycled granules and discharged their whole duty liability from cenvat credit which resulted in more duty payment of PLA in subsequent month and thus availed undue benefit of the said area-based notification in subsequent month by way of paying more duty from PLA and claiming more refund/re-credit to that effect; that cenvat credit utilized towards payment of duty on recycled granules during these months is liable for deduction from the claim;

(v) The JRS further reported that the appellant had manufactured and cleared Filler from the machinery installed before and after 31.12.2005 and have not maintained separate

records; that the appellant had manufactured PP Thread from the machinery installed after cut off date hence these products were not eligible for benefit under the said notification and hence, not considered to determine the eligible amount of refund/re-credit;

(vi) As per the said notification where duty payable on value addition exceeds the duty paid by the manufacturer on the said excisable goods, other than the amount paid by utilization of Cenvat credit during the month, the duty payable on value addition, shall be deemed to be equal to the duty so paid other than by Cenvat credit; that JRS had verified the correctness and eligibility of re-credit of excise duty paid by the appellant through PLA for clearance of dutiable goods.

(vii) During the month of July-07, the appellant had manufactured and cleared Filler and claimed refund of Rs. 9,559/-, which was sanctioned erroneously vide refund order no. 309/2007-08 dated 11.03.2008; as discussed above said product was not eligible for benefit of the said notification hence the said amount along with interest was liable for deduction;

(viii) exemption under the said notification was available only to Central Excise Duty and the said notification did not cover Education Cess and Secondary & Higher Education Cess and hence, the appellant was not entitled for refund of Education Cess and S.H.E. Cess.

2.3 The adjudicating authority, in view of above observation made in the impugned order, sanctioned refund amount of Rs. 2,47,71,297/- to the appellant out of total refund claim of Rs. 2,83,32,162/- and rejected the balance amount.

3. Being aggrieved with the impugned order, the appellant has preferred the present appeals, *inter-alia,* on the grounds that,

(i) The adjudicating authority had curtailed the refund amount of Rs. 35,60,865/- purely on the basis of range superintendent report; that as per the said notification, the Assistant Commissioner or the Deputy Commissioner is the proper officer for sanction of refund claim; that sanction of refund is a quasi-judicial act and while of the same such authority should not be biased; that rejection of refund based on JRS's report without independent application of mind on the part of the Deputy Commissioner is devoid of merits and liable to be quashed;

(ii) The adjudicating authority while rejecting the refund has not followed the principal of natural justice; that he has not issued any show cause notice before rejection of refund claim; that he has also failed to offer an opportunity of personal hearing;

(iii) The adjudicating authority has erred in rejecting refund of Education Cess and SHE Cess; that as per Section 93(3) of the Finance Act, 2004 and Section 138 of the Finance Act, 2007, Education Cess is nothing but Excise duty all provisions of Central Excise Act, including those relating to refund, exemption will also apply to Education Cess and SHE Cess. Thus, it is clear that exemption provisions of Notification No. 39/2001-CE dated 31.7.2001 is also applicable to Education Cess and SHE Cess. The impugned order rejecting re-credit of Education Cess and SHE Cess is not legal and sustainable and liable to be set aside and relied upon case laws of Vipor Chemicals Pvt. Ltd (2009(233)ELT

44(Guj.), Bharat Box Factory Ltd - 2007(214) ELT 534 (Tri. Delhi), Cyrus Surfactants Pvt Ltd (2007(215)ELT 55(Tri.Del), Sun Pharmaceuticals Ltd – 2007 (207) ELT 673 and Pan Parag India Ltd (2009(247)ELT 927(Commr. Appl.) .

(iv) The refund of Rs. 7,88,332/- was curtailed on the ground that one more plastic recycling plant was installed after cut-off date and no separate records for the period from Nov-2007 to Nove-2008 was maintained; that the Appellant never claimed such refund as the amounts were paid from Cenvat credit account; that when the Appellant had not claimed any refund for the goods manufactured with the help of plant and machinery installed after cut-off date i.e., 31.12.2005, and paid duty from Cenvat credit account, the refund claim was not required to be curtailed, especially when not claimed at all.

(v) The adjudicating authority has wrongly curtailed refund of Rs. 40,920/- as the Appellant has neither paid duty of Rs. 40,920/- from PLA nor has claimed refund of the same; that when the Appellant had not claimed any refund for the goods manufactured with the help of plant and machinery installed after the cut-off date and cleared on payment of duty from Cenvat credit account.

(vi) The adjudicating authority had curtailed refund in respect of recycled granules amounting to Rs. 7,21,674/- for the period from May-2008 to July-2008 on the ground that entire duty was paid from Cenvat credit account which resulted in more duty payment from PLA in subsequent months and more refund under the said notification; that when law itself stipulates that the assessee should first utilize entire amount of cenvat credit in balance there is no reason to arrive at a conclusion that it resulted into more duty payment of PLA in subsequent months and undue refund;

(vii) The adjudicating authority had curtailed refund of Rs. 1,77,034/- paid on Filler and PP thread manufactured and cleared with the aid of plant and machinery installed after the cut-off date; that they have not claimed any refund for the goods manufactured with the help of plant and machinery installed after the cut-off date and cleared the same on payment of duty of excise from Cenvat credit account; that refund claim was not required to be curtailed by that much amount especially when not claimed.

(viii) The adjudicating authority curtailed refund of Rs. 9,559/- erroneously sanctioned earlier as the product Filler was not eligible for benefit of the said notification; that the adjudicating authority had suo-moto reduced the refund amount in gross violation of principle of natural justice; that the Appellant had submitted required documents / details with the refund claim at the material time and after its due verification only the refund was sanctioned.

(ix) The Hon'ble Gujarat High Court vide Order dated 18.3.2010 in SCA No. 6299/2008 filed by M/s SAL Steel Ltd has ruled out the amendment made in Notification No. 39/2001-CE dated 31.7.2001 vide Notification No. 16/2008-CE dated 27.3.2008, by which the refund was restricted to the extent of value addition, as bad in law. Hence, the Appellant is eligible for refund of full amount of duty which they had paid in PLA. Similar view taken by Hon'ble High Court of Gauhati in the case of Herbo Foundations Pvt Ltd (2010(261)ELT98(Gau.). The ratio of above decision squarely applicable to the present case too; That entire amount of BED paid from PLA may allowed without limiting the

same to 26% value addition

4. Being aggrieved with the impugned order, the department has also filed appeal against the impugned order, inter- alia, contending that

(i) The increase in number of looms have increased the installation capacity; that to manufacture woven sacks, two sets of machinery is required (i) tape Plant which manufacture Tapes out of HDPE / PP Granules and (ii) Looms which weaves the tapes and manufactures fabrics; that tape plants having huge production capacity but very limited number of looms which are not in a position to consume whole production of tapes for manufacture fabrics for woven sacks; that to calculate production capacity of plant and machinery of fabrics, production capacity of looms is required to be taken into consideration and not the Tape plants of the unit

(ii) The assessee has installed 48 looms after the cut off date which has increased production capacity of woven sacks hence, the refund is not admissible on the additional production from the new additional machinery (48 looms)

5. The Appeals were transferred to callbook in view of pendency of appeals filed by the Department against the orders of Hon'ble High Court of Gujarat in the case of VVF Ltd & others in similar matters before the Hon'ble Supreme Court. The said appeals were retrieved from callbook in view of the judgement dated 22.4.2020 passed by the Hon'ble Supreme Court and have been taken up for disposal.

6. Hearing in the matter was scheduled in virtual mode on 08.10.2021. Shri P.D. Rachchh, Advocate, appeared on behalf of the Appellant. He reiterated submission made in appeal memorandum and written submission as part of personal hearing.

6.1. Hearing in the department's appeal was held on 20.10.2021. It was attended by Shri P.D. Rachchh, Advocate, on behalf of the Respondent. He re-iterated submission made in the cross objection dated 18.10.2021 and submitted copy of same during hearing.

6.2. The Respondent in written submission dated 18.10.2021 has, inter-alia, contended that

(i) The appeal filed by the department is purely on the basis of imagination and assumption, presumption; that department failed to appreciate that sufficient looms were installed before the cutoff date 31.12.2005 exactly matching the production capacity of 01 to 04 Tape Plants installed before cut-off date; that the adjudicating authority found that total installed capacity of 4 Tape Plants were 12,96,000 kgs per month and 113 looms installed capacity was 12,90,000 kgs per month; that the adjudicating authority had found that the respondent was not producing even that much quantity of the fabrics; that there was no need to install additional looms.

(ii) If the looms installed capacity were lesser than installed capacity of tape plants prior to 31.12.2005 and addition of 48 looms had increased weaving capacity equal to installed capacity of 4 Tape plants then department would have case; that department failed to

substantiate its claim with month wise fact and figures that due to increase in looms had resulted in to increase in production capacity of woven sack; that there was no increase in production of tapes and weaving of fabrics from installed capacity of 12, 96,000 kgs per month even after installation of additional 48 looms

(iii) The addition of 48 looms installed capacity was only 424500 kgs per month which were installed to cater to the need of the various buyers;

(iv) The adjudicating authority found that installation of looms has not got any bearing on enhancement of installed capacity as their functions are ancillary;

(v) The department failed to submit the exact quantification of excess refund amount sanctioned and paid if any due to installation of 48 additional looms after cut-off date 31.12.2005;

(vi) They had received refund of Rs. 10,83,46,363/- for the period from March-2006 to September-2007 and department had not challenged these refund orders; that department cannot change its stand at later date for subsequent period refund orders;

(vii) Since the issue is very old and due to fire on 14.05.2017 and 15.10.2019 as well as change in dealing concern persons they are not in a position to produce certain above referred documents in addition other documents; that in the interest of justice it is prayed that before passing any adverse order in the matter original case records of all the refund claims from March-2006 to April-2010 of the division office as well as review files of head quarter office for all the refund orders including impugned order may be called for and copy thereof may also be made available to them as well as advocate on records; that respondent on the receipt of the same wishes to make further submission in the matter.

7. First of all, I proceed to decide the appeal filed by the Appellant. I have carefully gone through the facts of the case, impugned order and submissions made by the appellant in appeal memoranda. The questions to be decided in the present appeals is whether the refund amounts curtailed by the adjudicating authority vide impugned order on various counts is legally correct or otherwise?

7.1. I find that the adjudicating authority vide impugned order had sanctioned refund of Central Excise duty under Notification No. 39/2001-CE dated 31.7.2001, as amended, but had not sanctioned refund of Education Cess and Secondary & Higher Education Cess on the ground that exemption under the said notification was available only to Central Excise Duty and the said notification did not cover Education Cess and Secondary & Higher Education Cess. Hence, the appellant was not entitled for refund/re-credit of Education Cess and S.H.E Cess. On the other hand, the Appellant pleaded that as per Section 93(3) of the Finance Act, 2004 and Section 138 of the Finance Act, 2007, all provisions of Central Excise Act, including those relating to refund, exemption will also apply to Education Cess and SHE Cess. The impugned order rejecting refund/re-credit of Education Cess and SHE Cess is not legal and is liable to be set aside.

7.2. I find that issue regarding refund of Education Cess and Secondary and Higher Education Cess is no longer *res integra* and stand decided by the Hon'ble Supreme Court in the case of

Unicorn Industries reported at 2019 (370) ELT 3 (SC), wherein it has been held that,

> *"40. Notification dated 9-9-2003 issued in the present case makes it clear that exemption was granted under Section 5A of the Act of 1944, concerning additional duties under the Act of 1957 and additional duties of excise under the Act of 1978. It was questioned on the ground that it provided for limited exemption only under the Acts referred to therein. There is no reference to the Finance Act, 2001 by which NCCD was imposed, and the Finance Acts of 2004 and 2007 were not in vogue. The notification was questioned on the ground that it should have included other duties also. The notification could not have contemplated the inclusion of education cess and secondary and higher education cess imposed by the Finance Acts of 2004 and 2007 in the nature of the duty of excise. The duty on NCCD, education cess and secondary and higher education cess are in the nature of additional excise duty and it would not mean that exemption notification dated 9-9-2003 covers them particularly when there is no reference to the notification issued under the Finance Act, 2001. There was no question of granting exemption related to cess was not in vogue at the relevant time imposed later on vide Section 91 of the Act of 2004 and Section 126 of the Act of 2007. The provisions of Act of 1944 and the Rules made thereunder shall be applicable to refund, and the exemption is only a reference to the source of power to exempt the NCCD, education cess, secondary and higher education cess. A notification has to be issued for providing exemption under the said source of power. In the absence of a notification containing an exemption to such additional duties in the nature of education cess and secondary and higher education cess, they cannot be said to have been exempted. The High Court was right in relying upon the decision of three-Judge Bench of this Court in Modi Rubber Limited (supra), which has been followed by another three-Judge Bench of this Court in Rita Textiles Private Limited (supra). "*

7.3. Respectfully following the judicial pronouncement of the Hon'ble Supreme Court, I hold that the appellant is not eligible for refund of Education Cess and Secondary & Higher Education Cess under the said notification. The impugned order is upheld to that extent and appeal filed by the appellant is rejected.

8. It is further observed that the adjudicating authority has curtailed the refund claim amount of Rs. 7,88,372/-, Rs. 40,920/- and Rs. 7,21,674/- on account of recycled granules manufactured and cleared from the Plant and Machinery installed after the cut-off date. As the contentions of the Appellant in respect of above curtailments are more or less similar, I take up the legality of above curtailment simultaneously.

8.1. I find that the adjudicating authority has curtailed an amount of Rs. 7,88,372/- & Rs. 7,21,674/- mainly on the ground that the Appellant had installed a plastic recycling plant for manufacturing of recycled granules on 10.11.2007, i.e., after the cut-off date; that they had one such machinery already installed prior to 31.12.2005, that after installation of new machine they had not maintained separate records up to November-2008. I find that the Appellant has not disputed the above factual position in their submission. I also find that Hon'ble Tribunal in an identical matter in the case of M/s. Ratnamani Metals and Tubes Limited 2012 (276) E.L.T. 230 (Tri. -Ahmd.) has held that benefit of the said notification is not available to the products manufactured from the Machinery installed after the cut-off date of 31.12.2005. Hence, there remains no dispute about the fact that the benefit of the said notification is not available to the recycled granules manufactured from the Machinery installed after the cut-off date. In this regard,

Board has also issued clarification vide Circular No. 110/11/2006/CX.3, dated 10-7-08. The relevant part of said circular is as under:-

> *"Point No. 1: Whether the benefit of exemption would be available to goods/products that the units starts manufacturing after the cut-off date for the commencement of commercial production i.e. 31-12-2005.*
>
> *Comments: There would be two situations. First is that where a unit introduces a new product by installing fresh plant, machinery or capital goods after the cut off date in such a situation, exemption would not be available to this new product. The said new product would be cleared on payment of duty, as applicable, and separate records would be required to be maintained to distinguish production of these products from the products which are eligible for exemption.*

As clarified above, the exemption under the said notification is not available to the product manufactured from the machinery installed after the cut-off date and separate records would be required to be maintained for such products. Undisputedly, the Appellant had not maintained separate records of production and clearance of recycled granules manufactured from machinery installed before and after the cut-off date up to November-2008. Hence, refund claimed, if any, in respect of this ineligible product, directly or indirectly is required to be curtailed. However, I find that the adjudicating authority while curtailing the refund has not discussed as to how this non-maintenance of separate records has impacted the refund under the said notification and accordingly necessitated such curtailment. Hence, in my opinion this portion of the impugned order requires to be remanded to the adjudicating authority for recording detailed findings in this regard with proper justification.

8.2. I find that the adjudicating authority had curtailed an amount of Rs. 40,920/- on the ground that though the Appellant maintained separate records in respect of recycled granules with effect from December-2008, still they claimed refund of ineligible granules. I find that impugned order is non-speaking as to how despite maintaining separate records and not paying duty from PLA, the appellant claimed above refund. I find that this aspect requires fresh consideration by the adjudicating authority.

9. It is further observed that the adjudicating authority had deducted an amount of Rs. 1,77,304/- on the ground that the appellant had manufactured Filler from the machinery installed after the cut-off date and have not maintained separate records. In this regard, as discussed at para 8.1, I find that such product is not eligible for benefit under the said notification. However, I find that in respect of above said curtailments also the adjudicating authority has not discussed as to how this non-maintenance of separate records has impacted the refund under the said notification. Hence, in my opinion this portion of the impugned order also requires to be remanded to the adjudicating authority for recording detailed findings in this regard with proper justification.

10. I find that in respect of all the above curtailments, the Appellant's main argument is that though they have not maintained separate records, since they had paid duty from cenvat credit account and not claimed any refund under the said notification, deduction made from their eligible

refund amount are unjust and illegal. In this regard, I find that it is an undisputed fact that the Appellant had not maintained separate records for recycled granules (up to November-2008) and Filler which were manufactured from the machinery installed after 31.12.2005 and these products were not eligible for refund under the said notification. But as discussed in para supra, the adjudicating authority has not discussed as to how such non-maintenance of separate records have ultimately affected the refund amount under the said notification, the matter requires fresh consideration as per the findings recorded at paras supra.

11. As regards restriction of refund amount in terms of the Notification No. 39/2001-CE dated 31.7.2001, amended vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008 (duty payable on value addition), I find that the Appellant in written submission filed at the time of personal hearing has stated that they do not wish to press the issue as the same is decided against them by the Hon'ble Supreme Court of India in the case of Union of India Vs. VVF Ltd & Others as reported in 2020 (372) E.L.T. 495 (S.C.).

11.1 Accordingly, respectfully following the above judgement passed by the Hon'ble Supreme Court in the case of Union of India Vs VVF Ltd & others, I hold that the Appellant is eligible for refund of duty only at the rates prescribed under Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008 and following the terms prescribed therein. I, therefore, uphold the impugned order to that extent.

12. I also find that the adjudicating authority had deducted an amount of Rs. 9,559/- on the ground that the Appellant had manufactured and cleared Filler and claimed refund of the said amount during the month of July-07. In this regard, as already held at para-9 above, benefit of the said notification is not available to the product Filler manufactured by the Appellant from the machinery installed after the cut-off date and this fact has not been disputed by the Appellant also. Accordingly, I find that the adjudicating authority has not caused any injustice to the Appellant by deducting this amount of erroneous refund sanctioned earlier from the eligible refund amount for the subsequent period.

13. As regards the appeal filed by the department, I find that department's main contention is that increase in number of looms have increased the production capacity of woven sacks manufactured by the Appellant and hence, refund is not admissible in respect of additional production obtained from the new machinery (48 looms). It has been contended that if the unit has tape plants having huge production capacity but has very limited number of looms which are not in a position to consume whole production of tapes manufactured for manufacture of fabrics and woven sacks, then though the production capacity of tape plant for manufacture tapes may remain higher but the ultimate production of woven sacks out of weaving machinery i.e., looms will remain low. It was further contended that for production capacity of woven fabrics is concerned, production capacity of looms is required to be taken into consideration.

13.1. I find that there is some merit in the department's above contentions, which cannot be

brushed aside as mere assumption, presumption as argued by the Advocate as respondent in case of department's appeal. It is undisputed fact that the respondent firm was engaged in the manufacture of excisable goods namely, PP/HDPE Woven Sacks/Bags, PP/HDPE Fabrics, PP/HDPE Laminated/un-laminated bags, Tarpaulin, LDPE Co-Extruded Films/Sheet & HDPE / PP reprocessed granules falling under Chapter 39 of the Central Excise Tariff Act, 1985. Further, as explained in the department's appeal, to manufacture woven sacks, two sets of different types of machinery are required (1) Tape Plant, which manufactures tapes out HDPE / PP Granule, and (ii) Looms- which weaves the tapes and manufactures fabrics. Thus, it is quite logical that ultimate production of woven fabrics and woven sacks would depend upon the production capacity of weaving machinery which includes looms. As mentioned in the impugned order, before the cut-off date 31.12.2005, the capacity of 113 looms already installed by the Appellant was 12,90,000 kgs/month whereas capacity of 48 looms installed after 31.12.2005 was 4,24,500 kgs/month. Hence, it appears that production capacity of looms had increased to 17,14,500 (1290000+424500) kgs/month after the cut-off date. Hence, I am not in agreement with the findings of the adjudicating authority that the installation of looms was ancillary. In my opinion, the adjudicating authority ought to have verified the quantity of goods produced with the help of additional 48 looms installed and restricted the refund amount accordingly. In this regard, reliance is also placed upon the Hon'ble Tribunal's judgment in the case of M/s. Ratnamani Metals and Tubes Limited 2012 (276) E.L.T. 230 (Tri. - Ahmd.) as discussed at para 8.1 above.

13.1 As regards, plea of the Appellant that since the department had not filed appeal against earlier orders hence, cannot take different stand, I rely upon Hon'ble Supreme Court's judgment in the case of C.K. GANGADHARAN Vs. COMMISSIONER OF INCOME TAX, COCHIN 2008 (228) E.L.T. 497 (S.C.), wherein the Hon'ble Apex Court has held that

> *"In answering the reference, we hold that merely because in some cases the revenue has not preferred appeal that does not operate as a bar for the revenue to prefer an appeal in another case where there is just cause for doing so or it is in public interest to do so or for a pronouncement by the higher Court when divergent views are expressed by the Tribunals or the High Courts."*

Applying the ratio of Hon'ble Supreme Court's judgment supra I find that non-filling of appeals against earlier refund orders cannot prevent the department from taking different stand and filing appeal against subsequent refund orders.

13.2 In view of above, I allow the appeal filed by the department and I remand the matter back to the adjudicating authority to calculate and recover the refund amount attributable to the goods manufactured with the help of 48 looms installed after the cut-off date.

14. In view of above findings, I pass orders as per details given below:

(1) I uphold the impugned order to the extent of:-

(i) non-sanctioning of refund of Education Cess and Higher Education Cess as discussed at para 7.1 to 7.3 above;

(ii) calculation of refund in terms of notification No.39/2001- dated 31.7.2001

amended vide Notification No. 16/2008-CE dated 27.03.2008 and Notification No. 33/2008-CE dated 10.06.2008(duty payable on value addition);

(iii) curtailment of refund of Rs.9,559/- in respect of Filler as discussed at para -12 above;

(2) I set aside the impugned order so far as same relates to curtailment of refund of Rs. 7,88,372/-, Rs. 721674/- , Rs. 40,920/- & Rs. 1,77,304/- and remand the matter back to the adjudicating authority to pass a speaking order as per the direction given at para 8.1, 8.2 and 9 respectively;

(3) I set aside the impugned order and direct the adjudicating authority to calculate and recover refund as discussed at para- 13.1 & 13.2 above;

15. अपीलकर्ता द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

15. The appeals filed by the Appellants are disposed off as above.

Attested

(KETAN DAVE)
Superintendent
Central GST (Appeals)
Rajkot

29 October, 2021

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To,
M/s Plastene India Limited (formerly known as
Oswal Agloimpex Limited)
Survey No. 316A/317, N.H.8A,
Nani Chirai , Taluka Bhachau
District – Kutch(Gujarat)

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,गांधीधाम आयुक्तालय,गांधीधाम को आवश्यक कार्यवाही हेतु।
3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अंजार-भचाऊ मण्डल, गांधीधाम को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।