OFFICE OF THE COMISSIONER OF CENTRAL EXCISE AND SERVICE TAX,
PLOT NO 6776 B-1, "SIDDHI SADAN" BUILDING,
NARAYAN UPADHYAY MARG,
BHAVNAGAR 364 001.

F. No. V/15-55/DEM/HQ/2011-12

Date of order : 27.12.2012
Date of issue : 11.01.2013

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No.33/ADC/BVR/2012-13

Any person(s) deeming himself aggrieved by this order may appeal against this order to the Commissioner, Central Excise (Appeals), Central Excise Bhavan, Race Course road, Rajkot 364 001 within three months from the date of receipt of the decision or order of adjudicating authority. The appeal should bear a Court Fee stamp of Rs. 2.50 paise only.

The appeal should be filed in Form EA-1 in duplicate as per the provisions of Section 35(1) of the Central Excise Act, 1944 read with Rule 3 of the Central Excise (Appeals) Rules, 2002. It should be signed by the Appellants in accordance with the provisions of sub-rule (2) of the Central Excise (Appeals) Rules, 2002.

It should be accompanied with the following: -

1. Copy of appeal in duplicate.
2. Copies of the order in duplicate, one of which shall be certified copy of the order must bear a Court Fee stamp of Rs. 2.50 paise as per Schedule I to the Article of the Court Fee Stamp Act, 1870.
3. Proof of payment of Service Tax, penalty, interest etc.

Sub: - Show Cause Notice No. V/15-55/DEM/HQ/2011-12 dated 27.03.2012.

Brief facts: -

1. M/s Rushil Decor Ltd, Surendranagar Dhrangadhra Road, Navalgadh, Dhrangadhra, (hereinafter referred to as "Noticee") are engaged in the manufacturing of wood based Particle Boards and Cotton Stalk Particle Boards falling under Chapter Heading 4410 of the First Schedule to the Central Excise Tariff Act, 1985 and are holding Central Excise Registration No. AABCR3005NXM004. The Noticee are availing the benefit of Notification No. 06/2011-CE dated 01.03.2011 and the Cenvat credit scheme as envisaged under the Cenvat Credit Rules, 2004 and are also maintaining records to this effect.

2. During the course of audit of the records maintained by Noticee, the Audit officers of the Department noticed that the Noticee are availing benefit of exemption from payment of Central Excise Duty under Notification No. 06/2011-CE dated 01.03.2011 w. e f. 1.3.2011. The said Notification amending the main Notification No 06/2006-CE dated 1.3.2006 provides for exemption from duty on "Cotton Stalk Particle Board". From the scrutiny of the ER-1 for the month of February, 2011, it was noticed that the Noticee mentioned their product as "Agro waste based Particle Board" falling under Chapter Heading 4410 11 10 of CETSH and shown the closing balance as 36,850 Nos. It was further noticed from ER-1 for the month of March, 2011 that there was an opening balance as under :

(i) 24,304 nos. of Cotton Waste Particle Board (CETSH No. 4410 11 90).
(ii) 12,546 nos. of Wood based Particle Board (CETSH No. 4410 11 10).

Whereas there was no such items in closing balance in ER-1 Return for the month of February, 2011 filed on 9.3.2011. The bifurcation appears to have been done after 28.2.2011 to avail the benefit of exemption. It was confirmed by the Noticee that they have not intimated the jurisdictional Central Excise authority about the said bifurcation at the material time i. e. 1.3.2011 and accordingly, no verification etc was done by the Range Officers. The Noticee have mentioned the said bifurcation in ER-1 Return for March, 2011.

3. The Noticee could not explain the opening balance of 24,304 nos. of Cotton Waste Particle Boards for March, 2011 without mentioning the same in the closing balance of February, 2011. However, they submitted a letter dated 30.11.2011 intimating that they had started maintaining separate accounts of these two commodities w. e. f. 01.03.2011 only and claimed that they were manufacturing both the commodities. The Noticee also informed that they have used only one Cenvatable input viz. Resin in the manufacturing of said 24,304 nos. of Boards and the proportionate Cenvat credit attributable to said quantity was worked out as Rs 1,58,863/- and that they paid the amount with interest Rs 21,447/- vide Challan dated 30.11.2011 for total amount of Rs 1,80,310/-.

4. The contention of the Noticee in respect of exemption claimed for 24,304 Nos. of Particle Boards was not acceptable for the following reasons :

(i) The Noticee have not intimated to jurisdictional Central Excise authority about the said bifurcation at the material period on 01.03.2011 and no verification was ever done by the Range Officers ;

(ii) They have failed to prove that the said 24,304 Nos. of Particle Boards were "Cotton Stalk Particle Boards" as claimed by them ;

The benefit of exemption as contained in Notification No. 06/2011-CE dated 01.03.2011 w.e f. 01.03.2011 was not available to the Noticee and the duty at full rate i.e. 10.3 % was required to be paid on the said 24,304 Nos.of Boards and by following the FIFO method, the assessable value of Boards cleared during the month of March and April, 2011 worked out to be Rs 1,14,57,083/- and the duty @ 10.3% was required to be recovered along with interest after adjusting the amount of Rs. 1,80,310/- (Duty Rs 1,58,863/- + Interest Rs 21,447/-).

5. Therefore, Joint Commissioner, Central Excise Commissionerate, Bhavnagar issued a show cause notice No. V/15-55/DEM/HQ/2011-12 dated 27.03.2012 to the Noticee proposing the following actions:

(i) Recovery of Central Excise duty amounting to Rs 11,80,080/- (Rupees eleven lacs, eighty thousand and eighty only) under Section 11A of Central Excise Act, 1944 and appropriation of amount of Rs 1,58,863/- paid towards duty ;

(ii) Recovery of interest under Section 11AB/11AA of the Central Excise Act, 1944 and appropriation of amount of Rs 21,447/- paid towards interest ;

(iii) Imposition of penalty under Rule 25 of the Central Excise Rules, 2002.

6. Defence reply and personal hearing: -

6.1 The Noticee filed a written reply dated nil received on 05.06.2012 mainly contending as under: -

At the outset, Noticee vehemently objected to the proposal of demand of Central Excise duty (wrongly stated to be Service Tax by the Noticee) and interest as stated in the Show Cause Notice and stated that the Noticee has not wrongly availed benefit of exemption from payment of Central Excise Duty under Notification No. 06/2011-CE dated 01.03.2011 in the month of March, 2011 and duty is not required to be paid or interest is not payable on it and the penalty cannot be imposed as they have not violated any of the provisions of the Act or the rules made there under. The SCN is based on presumptions and assumptions and is issued in sheer disregard of facts on record, legal provisions, decided case laws and departmental instructions.

6.2 Noticee submitted that the SCN is issued in sheer disregard of facts on record which clearly show that demand of duty on the ground that the Noticee has wrongly availed benefit of exemption from payment of Central Excise Duty under Notification No.06/2011-CE dated 01.03.2011 in the month of March, 2011 without going to the basic definition, circular and clarification of the Board and by any stretch of imagination the demand under the SCN is not sustainable on merit. Further, there is no fraud or collusion or wilful misstatement or suppression of facts or contravention of any of the provisions of the Act, or the rules made there under with intent to evade payment of Service Tax on its part and hence the demand is not sustainable on the ground of limitation also as the SCN is issued after a limitation period of one year from the relevant date. SCN

is issued to it on 13.03.2012 covering period March, 2011 after 6 months which clearly shows that the same is issued beyond a period of one year from the relevant date.

6.3 The SCN is vague in its contents as it straight away alleges and states in para 5 that the Noticee has wrongly availed benefit of exemption from payment of Central Excise Duty under Notification No. 06/2011-CE dated 01.03.2011 in the month of March, 2011 and not paid duty amounting to Rs 11,80,080/- in contravention of provisions of Central Excise Act, 1944; that it was observed that the said Noticee has never informed the department about their bifurcation of cotton based Particle Boards and wood based Ply Board and these facts were found out by the department only during the course of Audit of records maintained by the said Noticee; that they have availed the said exemption notification and suppressed these facts from the department with an intention to evade payment of Central Excise Duty.

6.3.1 They are engaged in the manufacturing of wood based particle boards and cotton stalk particle boards falling under Chapter Heading No. 4410 of the First Schedule to The Central Excise Tariff Act, 1985 and are holding Central Excise Registration No.AABCR3005NXN4004. The Noticee are availing the benefit of Notification No. 06/2011-CE dated 01.03.2011 and the Cenvat Credit Scheme as envisaged under the Cenvat Credit Rules, 2004 and also maintaining records to that effect.

6.5 Despite these facts in the knowledge of Department since 2006 and onwards, saddling with the SCN issued in the year 2012 alleging suppression of the fact is itself a ground on which the SCN is illegal, unfair and uncalled for. Confirmation of having knowledge about the practice of the assessee since March 2011 and onwards and issuing SCN on the same issue in 2012 alleging suppression proves clear contradiction of the stand taken in the SCN and thus the SCN is capricious. In the light of above, they requested to drop the proceedings under SCN on the ground of being vague and capricious.

6.6 The Noticee drew attention towards the fact of the case as under :

The Noticee are engaged in the manufacturing of wood based particle boards and cotton stalk particle boards falling under Chapter Heading No. 4410 of the First Schedule to The Central Excise Tariff Act, 1985 and are holding Central Excise Registration No.AABCR3005NXN4004. The Noticee are availing the benefit of Notification No. 06/2011-CE dated 01.03.2011 and the Cenvat Credit Scheme as envisaged under the Cenvat Credit Rules, 2004 and are also maintaining records to that effect.

6.7 During the course of audit of the records maintained by the said Noticee, the Audit Officers of the department noticed that the said Noticee are availing benefit of exemption from payment of Central Excise Duty under Notification No.06/2011-CE dated 01.03.2011 w. e. f. 01.03.2011. The said Notification, amending the Notification No.06/2006-CE dated 01.03.2006, provides for exemption from duty on "Cotton Stalk Particle Board". From the scrutiny of ER-1 for the month of February 2011, it was noticed that the said Noticee had mentioned their product as "Agro waste based Particle Board" falling under chapter heading 4410 11 10 of Cl: FSI-i and had shown the closing balance as 36,850 nos. It was further noticed from E.R.1 for March 2011 that there was an opening balance of :

(i) 24,304 no. of Cotton waste Particle Board (CETSH No. 44101190)
(ii) 12,546 no. of Wood based Particle Board (CETSH No. 44101110).

There were no such items in closing balance in ER-1 return of February 2011 filed on 09.03.2011. The bifurcation appears to have been done after 28.02.2011 just to avail of the benefit of exemption. It was confirmed by the Noticee that they have not intimated the jurisdictional Central Excise authorities separately about the said bifurcation at the material time i.e. 01.03.2011 and accordingly no verification etc. was ever done by the Range Officers. They have only mentioned the said bifurcation in the ER-1 return for March 2011 which was submitted to Range Office on 09.04.2011.

6.8 The Noticee could not explain the opening balance of 24,304 no. of Cotton waste Particle Boards of March 2011 without mentioning the same in closing balance of February 2011. They vide letter dated 30.11.2011 submitted that they have started maintaining separate accounts of these two commodities w. e. f. 01.03.2011 only and not prior to that but claimed that they were manufacturing both the commodities. The Noticee informed that they have used only one Cenvatable input viz.

Resin in the manufacture of said 24,304 no. of Boards and the proportionate CENVAT credit attributable to 24,304 nos. was worked out as Rs 1,58,863/- and they have paid the amount along with interest of Rs 21,447/- vide Challan dated 30.11.2011 for Rs 1,80,310/-.

6.9 The Audit did not accept the contention of the Noticee in respect of exemption claimed on 24,304 nos. of Particle boards for the following reasons:

(i) They have not intimated the Jurisdictional Central Excise authorities separately about the said bifurcation at the material time i.e. 01.03.2011 and accordingly, no verification etc. was ever done by the Range Officers;
(ii) They have failed to prove that the said 24,304 nos. of Particle Boards were "Cotton Stalk Particle Board" as claimed by them.

Therefore, the benefit of exemption Notification No.06/2011-CE dated 01.03.2011 w.e. f. 1.3.2011 was not available to the Noticee and duty @ full rate i.e. 10.3% was required to be paid on the said 24,304 nos. of Boards. By following the FIFO method, the assessable value of said 24,304 nos. of Boards (cleared during March 2011 and April 2011) was worked out at Rs 1,14,57,083 and duty @ 10.3% was calculated as Rs 11,80,080/- and the same was required to be recovered along with interest under Section 11A and 11AB (now 11AA) respectively of the Central Excise Act, 1944, after adjusting the already paid amount of Rs 1,80,310/- (duty Rs 1,58,863/- and interest Rs 21,447/-).

6.10 On the basis of the audit objection the present show cause notice has been issued to the Noticee proposing to deny the benefit of provision of exclusion clause, circular and notification issued from time to time by the Board and Govt.

6.11 The Noticee denied all the allegations/observations raised in the show cause notice and stated that the show cause notice is not sustainable on the basis of the submissions made below which are independent and without prejudice to each other.

They submitted salient issues to be addressed as under: -

(i) Noticee have maintained separate records for the taxable and exempted goods, even though demand of duty and to deny the benefit of exemption notification was sustainable or not.
(ii) Whether Noticee has reversed Cenvat credit of common inputs, then after demand for the duty on the full value was sustainable or not.
(iii) Whether extended period can be invoked or not.
(iv) Whether penalty may be imposed or not.

6.12 **Regarding whether Noticee has maintained separate records for the taxable and exempted goods, even though to demand duty and to deny benefit of exemption notification is sustainable or not.**

It is undisputed fact that they are availing benefit of exemption from payment of Central Excise Duty under Notification No.06/2011-CE dated 01.03.2011 w. e. f. 01.03.2011. The said Notification, amending the Notification No.06/2006-CE dated 01.03.2006, provides for exemption from duty on "Cotton Stalk Particle Board". From the scrutiny of ER-1 for the month of February 2011, it was noticed that the said they had mentioned their product as "Agro waste based Particle Board" falling under Chapter Heading 4410 11 10 of CETSH and shown closing balance as 36,850 nos. It was further noticed from E.R.1 for the March 2011 that there was an opening balance of

(i) 24,304 no. of Cotton waste particle board (CETSH No. 44101190);
(ii) 12,546 no. of wood based particle board (CETSH No. 44101110).

On the basis of above they have separated the stock details of "Cotton Stalk Particle Board" and mentioned in the RG-1 register separately. Noticee have also reversed Cenvat credit pertaining to the stock held as on 01.03.2011 suo moto and was duly intimated to the Range office as on the March 2011 before staring clearance of the goods which further also reflected in the said bifurcation in the ER-1 return for March 2011 and was submitted to Range Office on 09.04.2011. So they had followed proper procedure and maintained separate records for the taxable and exempted goods as per CCR, 2004.

They have not breached any Rule and compliance of the relevant provision. They requesed to drop the proceeding and demand for the duty on the exempted product in the interest of justice.

6.13 **Regarding whether they have reversed Cenvat credit of common inputs and demand for the duty on the full value is sustainable or not.**

They had submitted the opening balance of 24,304 No. of Cotton waste Particle Boards of March 2011 without mentioning the same in closing balance of February 2011 with the corroborative accounting entries of purchase of raw material and production of goods. They vide letter dated 30.11.2011 have submitted that they have started maintaining separate accounts of these two commodities w. e. f. 01.03.2011 only and not prior to that due to no requisition but it is undisputed fact that they were manufacturing both the commodities. They have used only one Cenvatable input viz. Resin in the manufacture of said 24,304 no. of Boards and the proportionate CENVAT credit attributable to 24,304 nos. is worked out as Rs 1,58,863/- and they have paid the amount along with interest of Rs 21,447/- vide Challan dated 30.11.2011 for Rs 1,80,310/-. They believed that in respect of exemption claimed on 24,304 nos. of Particle Boards is acceptable for the following reasons:

(i) they have intimated the Jurisdictional Central Excise authorities separately about the said bifurcation at the material time i.e. 01.03.2011 and provided details in monthly ER-1 return regularly;
(ii) they have established during the audit that the said 24,304 nos. of Particle Boards were "Cotton Stalk Particle Board" as claimed by them.

Therefore, the benefit of exemption Notification No.06/2011-CE dated 01.03.2011 w.e. f. 01.03.2011 is available to them and duty @ full rate i.e. 10.3% is not required to be paid on the said 24,304 no. of Boards. So demand of duty @ 10.3% for Rs 11,80,080/- for recovery along with interest under Section 11A and 11AB (Now 11AA) respectively of the Central Excise Act, 1944 has to be dropped after adjusting the already paid Cenvat amount of Rs 1,80,310/- (duty Rs 1,58,863/- and interest Rs 21,447/-).

They drew attention towards Finance Act, 2010 amending the CCR 2004.

"Amendment No. 72 of Rule 6 of CENVAT Credit Rules, 2004. — (1) In the CENVAT Credit Rules, 2002, made by the Central Government in exercise of the powers conferred by Section 37 of the Central Excise Act and published in the Official Gazette *vide* notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 144(E), dated the 1st March, 2002, rule 6 shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column (3) of the Seventh Schedule, on and from and up to the corresponding date specified in column (4) of that Schedule against the rule specified in column (2) of that Schedule.

Where a person opts to pay the amount in accordance with (2) the provisions as amended by sub-section (1), he shall pay the amount along with interest specified there under and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President.

The Commissioner of Central Excise shall, on receipt of an (3) application under sub-section (2), verify the correctness of the amount paid within a period of two months from the date of receipt of the application and in case the amount so paid is found to be less than the amount payable, he shall call upon the applicant to pay the differential amount along with interest, which shall be paid within a period of ten days from the date of receipt of the communication from the Commissioner in this regard.

Notwithstanding anything contained in any judgment, decree (4) or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done at any time during the period commencing on and from the 1st day of March, 2002 and ending with the 9th day of September 2004 relating to the provisions as amended by sub-section (1), shall be deemed to be and deemed always to have been, for all purposes as validly and effectively taken or done as if the amendment made by sub-section (1) had been in force at all material times.

Notwithstanding the supersession of the CENVAT Credit (5) Rules, 2002, for the purposes of sub-section (1), the Central Government shall have and shall be deemed to have the power to make rules with retrospective effect as if the Central Government had the power to make rules under section 37 of the Central Excise Act, retrospectively, at all material times.

Explanation. — For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this section not come into force.

Amendment No 73 to Rule 6 of CENVAT Credit Rules, 2004. — (1) In the CENVAT Credit Rules, 2004, made by the Central Government in exercise of the powers conferred by section 37 of the Central Excise Act, as published in the Official Gazette *vide* notification of the Government of India in the Ministry of Finance (Department of Revenue) number G.S.R. 600(E), dated the 10th September, 2004, rule 6 shall stand amended and shall be deemed to have been amended retrospectively, in the manner specified in column (3) of the Eighth Schedule, on and from and up to the corresponding date specified in column (4) of that Schedule against the rule specified in column (2) of that Schedule.

Where a person opts to pay the amount in accordance with (2) the provisions as amended by sub-section (1), he shall pay the amount along with interest specified there under and make an application to the Commissioner of Central Excise along with documentary evidence and a certificate from a Chartered Accountant or a Cost Accountant, certifying the amount of input credit attributable to the inputs used in or in relation to the manufacture of exempted goods, within a period of six months from the date on which the Finance Bill, 2010 receives the assent of the President.

The Commissioner of Central Excise shall, on receipt of an (3) application under sub-section (2), verify the correctness of the amount paid within a period of two months from the date of receipt of the application and in case the amount so paid is found to be less than the amount payable, he shall call upon the applicant to pay the differential amount along with interest, which shall be paid within a period of ten days from the date of receipt of the communication from the Commissioner in this regard.

Notwithstanding anything contained in any judgment, decree (4) or order of any court, tribunal or other authority, any action taken or anything done or purported to have been taken or done, at any time during the period commencing on and from the 10th day of September, 2004 and ending with the 31st day of March, 2008, relating to the provisions as amended by sub-section (1), shall be deemed to be and deemed always to have been, for all purposes, as validly and effectively taken or done as if the amendment made by sub-section (1) had been in force at all material times.

For the purposes of sub-section (1), the Central (5) Government shall have and shall be deemed to have the power to make rules with retrospective effect as if the Central Government had the power to make rules under section 37 of the Central Excise Act, retrospectively, at all material times.

Explanation. — For the removal of doubts, it is hereby declared that no act or omission on the part of any person shall be punishable as an offence which would not have been so punishable had this section not come into force.

They relied on the following citations in support of their contention.

(i) 2011 (274) E.L.T. 413 (Tri. - Chennai) IN THE CESTAT, SOUTH ZONAL BENCH, CHENNAI Ms. Jyoti Balasundaram, Vice-President and Dr. Chittaranjan Satapathy, Member (T) GLOBAL PHARMATECH PVT. LTD. Versus COMMISSIONER OF C. EX., CHENNAI Final Order No. 79/2011, dated 13-1-2011 in Appeal No. E/546/2009
Demand - Cenvat credit - Reversal - Non-maintenance of separate account for inputs used for dutiable goods and exempted goods - Subsequent reversal of availed credit in accordance with Rule 6(3A) of Cenvat Credit Rules, 2004 - Demand for period upto 31-3-2008 not sustainable as prior to 1.4.2008, assessee covered under amended Section 73(1) of Finance Act, 1994 - For the period after 31-3-2008, as assessee reversed credit under Rule 6(3A) of Cenvat Credit Rules, 2004 it is deemed that credit not been availed - Demand set aside - Section 11A of Central Excise Act, 1944. *[para 2]*
Appeal allowed.

(ii) 2011 (274) E.L.T. 401 (Tri. - Mumbai) IN THE CESTAT, WEST ZONAL BENCH, MUMBAI [COURT NO. IV] Shri P.R. Chandrasekharan, Member (T) CHOKSI ENTERPRISES Versus COMMISSIONER OF CENTRAL EXCISE, MUMBAI-II Final Order No. A/351/2011-WZB/C-IV(SMB), dated 22-9-2011 in Appeal No. E/1478/2009-Mum.

Demand - Cenvat/Modvat on inputs - Final product became exempt from duty subsequently - When credit was taken and utilized, final product was chargeable to duty, therefore, credit was rightly taken and rightly utilized - Seeking reversal of credit when subsequently final product became exempt from duty, not sustainable in law - Demand not sustainable - Rule 57C of erstwhile Central Excise Rules, 1944 - Section 11A of Central Excise Act, 1944. *[paras 5, 6]*

Cenvat/Modvat on inputs - Final product became exempt from duty subsequently - Credit was taken when final product was chargeable to duty - Goods became exempt at later point of time - Credit lying unutilised in books when final product became exempt, to lapse - Rule 57C of erstwhile Central Excise Rules, 1944 - Rule 6 of Cenvat Credit Rules, 2004 *[paras 5, 6].* Appeal disposed off.

(iii) 2010 (251) E.L.T. 373 (H.P.) IN THE HIGH COURT OF HIMACHAL PRADESH AT SHIMLA Deepak Gupta and V.K. Ahuja, JJ. COMMISSIONER OF C.EX. CHANDIGARH Versus UNITED VANASPATI LTD. C.E.A. No. 1 of 2006, decided on 8-12-2009.

Cenvat/Modvat - Reversal of - Credit on inputs or inputs in process or contained in finished goods whether liable for reversal when exemption granted to final product - Similar issue considered by Supreme Court in 1999 (112) E.L.T. 353 (S.C.) and such ratio followed by High Court in 2001 (130) E.L.T. 417 (Ker.) answering the question in favour of assessee - Language in rules involved in present case and the one considered by Supreme Court being identical, interpretation of Supreme Court applicable - Assessee cannot be asked to reverse credit already taken when final product became exempt - Rule 57C of erstwhile Central Excise Rules, 1944 - Rule 6 of Cenvat Credit Rules, 2004. *[paras 1,2, 7, 10, 11, 12, 13, 14]* Appeal dismissed

(iv) 1999 (112) E.L.T. 353 (S.C.) IN THE SUPREME COURT OF INDIA S.P. Bharucha, R.C. Lahoti and N. Santosh Hegde, JJ. COLLECTOR OF CENTRAL EXCISE, PUNE Versus DAI ICHI KARKARIA LTD. Civil Appeal Nos. 10176 of 1996 with C.A. Nos. 10377/96, 6448/97, 981-984/98, 4768-69/97, 2053-2054/97, 7331-7333/97, 1094/98, 795/98, 1087-1091/98, 159/99, 299/99, 330/99, 432/99, 433-435/99, 464/99, 766/99, 774/99, 903/99, 1274/99, 1511/99, 1928-29/99, 1580/99, 1535/99, 2098/99, 2087/99, 2059-2060/99, 5406-5407/98 and 2544/99 decided on 11-8-1999.

Valuation (Central Excise) - Cost of production - Excise duty paid on raw material, if Modvatted, not to be included in determining the cost of production of excisable product - 'Cost' when not defined in the statute, should be interpreted as it would be reckoned by a man of commerce - If he paid the purchase price of Rs. 100/- for the input (exclusive of freight, insurance and the like) and got back Rs. 10/- by way of Modvat credit allowed thereon, he would reckon the input cost as Rs. 90/- - This, in real terms, is the cost of the raw material (exclusive of freight, insurance and the like) - This is also borne out by the Guidance Note of the Indian Institute of Chartered Accountants - Revenue's appeals dismissed - Section 4(1)(b) of Central Excise Act, 1944 - Rule 6(b)(ii) of Central Excise (Valuation) Rules, 1975.[paras 2, 15, 24, 25, 26, 27]

Precedent - Interpretation of statute - Judgments relating to Income-tax or other statutes have no relevance while considering a provision in an Excise statute but judgments relating to Income-tax and interpreting a word not defined in that Act is relevant when that word is to be given a meaning as put by man of business and for that purpose established practice is considered. [para 21]

Modvat scheme - An Over-view - Rules 57A and 57J of Central Excise Rules, 1944.

- It is clear from the Modvat Rules, that a manufacturer obtains credit for the excise duty paid on raw material to be used by him in the production of an excisable product

immediately it makes the requisite declaration and obtains an acknowledgement thereof. It is entitled to use the credit at any time thereafter when making payment of excise duty on the excisable product. There is no provision in the Rules which provides for a reversal of the credit by the excise authorities except where it has been illegally or irregularly taken, in which event it stands cancelled or, if utilized, has to be paid for. The credit is, therefore, indefeasible. It should also be noted that there is no co-relation of the raw material and the final product; that is to say, it is not as if credit can be taken only on a final product that is manufactured out of the particular raw material to which the credit is related. The credit may be taken against the excise duty on a final product manufactured on the very day that it becomes available. It is, therefore, that in the case of Eicher Motors Ltd. v. Union of India [1999 (106) E.L.T. 3] Supreme Court said that a credit under the Modvat scheme was "as good as tax paid."[paras 17, 18]

Modvat - Reversal of credit by Excise authorities permissible only when Modvat taken illegally or irregularly - Effect and manner of reversal - Rules 57A to 57J of Central Excise Rules, 1944.

- There is no provision in the Modvat Credit Rules which provides for a reversal of the credit by the Excise authorities where it has been illegally or irregularly taken in which event it stands, cancelled, or if utilized has to be paid for. [para 17]

Valuation (Central Excise) - Analysis of Section 4 of the Central Excise Act, 1944 and Central Excise (Valuation) Rules, 1975.

- Section 4 deals with the valuation of excisable goods which are chargeable to excise duty with reference to their value. The valuation is to be based ordinarily on the price thereof, that is to say, the price at which the excisable goods are ordinarily sold by the manufacturer to a buyer. It is only when the valuation cannot be so made that the closest equivalent thereof has to be determined, in the manner prescribed under the Valuation Rules. "Value" for the purposes of the Valuation Rules means the value under Section 4 of the Act. It is to be determined, ordinarily, under Rules 4 and 5. Rule 6 comes into play when the valuation of the excisable goods under assessment cannot be so determined. When the excisable goods are not sold by the assessee but are used or consumed by him in the manufacture of other products, as here, the value is to be based upon the value of comparable goods manufactured by the manufacturer, and, if that cannot be done, on the "cost of production or manufacture including profits, if any, which the assessee would have normally earned on the sale of such goods". When sub-section (4) of Section 4 defines certain words "for the purposes of this section". It defines "'Value' in relation to any excisable goods". It says, so far is relevant here, that the value of excisable goods does not include the amount of the duty of excise payable on such goods. The Explanation thereto says that, for the purposes of the sub-clause, the amount of excise duty payable on excisable goods is the sum total of the effective excise duty payable thereon under the Act plus the aggregate of the effective excise duties payable thereon under other Central Excise statutes. By reason of Clause (i) of the Explanation, where there is an exemption "notification or order" giving an exemption in respect of the excisable goods it shall be given effect to and the excise duty leviable under the concerned Central Excise statute shall be reduced to the extent of such exemption, provided such notification or order is not one "for giving credit with respect to, or reduction of duty of excise under such Act on such goods equal to any duty of excise under such Act, or the additional duty under Section 3 of the Customs Tariff Act, 1975, already paid on the raw material or component parts used in the production or manufacture of such goods." It is, therefore, only a notification or order relating to the excisable goods that gives an exemption equal to the excise duty already paid on raw material used therein that is not to be taken into account for the purposes of computing the effective duty on the excisable product. [paras 9, 10]

CASES CITED

(v) 2011 (271) E.L.T. 172 (Kar.) IN THE HIGH COURT OF KARNATAKA AT BANGALORE N. Kumar and Ravi Malimath, JJ. COMMISSIONER OF C. EX., MANGALORE Versus KUDREMUKH IRON & STEEL CO. LTD. C.E.A. No. 22 of 2010, decided on 1.4.2011

Cenvat/Modvat - Inputs - Common in dutiable and exempted products - Credit attributable to exempted product reversed - In such case, assessee is not required to reverse 8% of sale value of exempted products - It was more so as amendment to Rule 6 of Cenvat

Credit Rules, 2004 by Finance Act, 2010 permitting such course, had retrospective effect. *[para 4]*Appeal dismissed .CASE CITED

Demand of duty, interest and penalty may be dropped on the basis of submissions supra.

6.14 **Whether demand is time barred.**

They submitted that show cause notice covers the period of March 2011. The show cause notice has been issued on 27.03.2012. Thus, the show cause notice has invoked the extended period of limitation. The show cause has baldly alleged that the Noticee have suppressed the information from the department.

6.15 They submitted that the extended period of limitation cannot be invoked in the present case since there is no suppression, wilful misstatement on the part of the Noticee. The show cause notice is liable to be dropped on this ground also.

6.16 They submitted that the demand of duty for the period March 2011 made in the SCN under Section 11A (wrongly written as Section 11AC) of the Central Excise Act, 1944 (wrongly written as Finance Act, 1944) for extended cannot be made.

They submitted that the Supreme Court has dealt the meaning of 'suppression of facts' in the case of Pushpam Pharmaceutical Company Vs Collector of Central Excise, Bombay [1995 Supp (3) SCC 462]. While dealing with the meaning of the expression "suppression of facts" in proviso to Section 11A of the Act it was held that the term must be construed strictly, it does not mean any omission and the act must be deliberate and wilful to evade payment of duty. The Court has further held that:-

"In taxation ('Suppression of facts') can have only one meaning that the correct information was not disclosed deliberately to escape payment of duty where facts are known both the parties the omission by one to do what he might have done and not that he must have done, does not render it suppression".

In the above decision, the Hon'ble Court has further stated that "we find that suppression of facts can have only one meaning that the correct information was not disclosed deliberately to evade payment of duty when facts were known to both the parties. The settled law states that mere failure to declare does not amount to wilful suppression. There must be some positive act from the side of the assessee to find wilful suppression. They submitted in view of above fact that there was no deliberate intention on the part of the assessee, regarding not to disclose the correct information or to evade payment of duty.

6.18 Regarding imposition of Penalty under Rule 25 of the Central Excise Rules, 2002

(i) Penalty under Section 11AC is not to be imposed when there is interpretation difference of notification for calculating aggregating value of clearance for home consumption. It is submitted that when the issue involves interpretation of exemption notification, allegation of intent to evade payment of duty, imposition of extended period of limitation or penalty under Section 11AC is not justified. They relied on the following judgements :

(a) 2007 (210) E.L.T. 84 (Tri-Ahd) - White Silco Pvt. Ltd. v. CCE
(b) 2007 (207) E.L.T. 241 (Tri-Bom) - Ircon Intl. Ltd. v. CCE
(c) 2005 (187) E.L.T.119 (Tribunal) = 2005 (71) RLT 325 (CESTAT-Del) - Anand Metal Industries v. CCE.

(ii) They submitted that it would be seen that there was no deliberate intention to de-finance or not complying the provision of said Act. They have taken immediate steps to fulfil the compliance of rule and requested to take a lenient view and demand and penalty proceeding may be dropped on the basis of above reason.

(iii) They submitted that proceeding for imposing penalty is a proceeding which is quasi-criminal in nature. The question of imposition of penalty in ordinary course came for scrutiny before Hon'ble Supreme Court in the case of Hindustan Steel Vs State of Orissa reported in AIR 1970 SC 253. The Hon'ble Supreme Court observed that penalty should not be imposed in

ordinary course unless the party acted in deliberately in defiance of law. Penalty will not also be imposed merely because it is lawful to do so. Applying the ratio of the above decision in the present case, it would be seen there is no allegation of deliberate defiance on us and as such no penalty may be imposed and the proceeding initiated vide the subject notice may be dropped.

A personal hearing was fixed on 06.08.2012 wherein Shri Vipul Khandar, a Chartered Accountant of M/s Khandhar & Associates, Ahmedabad on behalf of the Noticee appeared before the adjudicating authority and submitted as under :

i) He reiterated the written submission already submitted. He also produced the documents no. 1 to 6 in support of his contentions.

7. Discussion and findings :

7.1 I have carefully gone through the facts of the case, defence reply filed by the Noticee and the relevant documents placed in the file. On going through the facts of the case, I find that the Noticee are engaged in the manufacture of excisable goods viz. Wood based Particle Boards falling under Chapter Heading No. 4410 of the First Schedule to the Central Excise Tariff Act, 1985 and are holding Central Excise Registration No. AABCR3005NXM004. The Noticee are also availing the benefit of Notification No.06/2006-CE dated 01.03.2006 as amended by Notification No. 06/2011-CE dated 01.03.2011 which provides exemption from duty on "Cotton Stalk Particle Boards".

During the course of Audit of the records maintained by the Noticee and scrutiny of ER-1 for the month of February 2011, it was observed that the Noticee had mentioned their product as "Agro Waste based Particle Boards" falling under Chapter Heading 4410 11 10 of CETSH and had shown closing balance as 36,850 no. and it was noticed from ER-1 for the month of March 2011 there was an opening balance of following items :

i) 24,304 no. of Cotton Waste Particle Boards (CETSH No. 4410 11 90);
ii) 12,546 no. of Wood based Particle Boards (CETSH No. 4410 11 10).

and there was no such items in the closing balance in ER-1 for the month of February 2011, therefore it was observed by the Audit that the bifurcation appeared to have been done after 28.02.2011 to avail the benefit of exemption as contained in Notification No. 06/2011-CE dated 01.03.2011. It is the charge in the show cause notice that the Noticee have not intimated the jurisdictional Central Excise authorities about the above bifurcation of excisable goods at the material time and in the result, no verification was done by the Range Officers, therefore, the benefit of exemption Notification No.06/2011-CE dated 01.03.2011 was not available to the Noticee and the duty at full rate i.e. 10.3% was liable to be paid on the said goods under Section 11A of the Central Excise Act, 1994 along with interest under Section11AB/11AA and a penalty was also liable to be imposed on them under Rule 25 of the Central Excise Rules, 2002.

7.2 I find that the Noticee have manufactured Agro waste-based Particle Boards falling under CETH 4410 and have been clearing the same on payment of Central Excise duty. The ER-1 for the month of February 2011 indicated closing balance to be 36,850 no. however, the opening balance of quantity of the goods as indicated in the ER-1 for the month of March 2011 was as detailed above. This bifurcation of quantity of two varieties of goods is apparently done in order to avail the exemption as contained in Notification No 06/2011-CE dated 01.03.2011. The said Notification grants exemption to the "Cotton Waste Particle Boards" w. e. f. 01.03.2011 from the payment of Central Excise duty. It is also observed that the Noticee have not maintained separate stock accounts in respect of these two commodities for the period earlier to 28.02.2011. I find that the Noticee have bifurcated above quantity into two commodities on 01.03.2011 and have reflected as an opening balance as 24,304 no. of Cotton Waste Particle Boards. Similarly, the Noticee could not justify the bifurcation of above two varieties of commodities and its quantity as an opening balance in ER-1 for the month of March 2011 which is in order to avail the exemption as contained in Notification No. 06/2011-CE dated 01.03.2011. This Notification grants exemption to Cotton Stalk Particle Boards from payment of central excise duty w. e. f. 01.03.2011. I find that the Noticee have never informed the Department about the bifurcation of above two commodities and this fact was found out by the Department during the course of Audit of records maintained by the Noticee. I find that the Noticee in their letter dated 30.11.2011 have informed Department that they have started maintaining separate

accounts of these two commodities w. e. f. 01.03.2011, I therefore, hold that the Noticee have suppressed this material fact in order to avail the exemption as contained in Notification No.06/2011-CE dated 01.03.2011. The Noticee have contended that the show cause notice for demand of duty is issued on 27.03.2012 for the clearance of excisable goods for the period of March and April 2011 and hence it is time-barred under Section 11A of the Central Excise Act, 1944, I find that the closing balance of excisable goods as contained in ER-1 for the month of February 2011 did not tally with the opening balance of the said goods in the ER-1 for the month of March 2011, however, a bifurcation into two varieties of commodities was attempted and was shown as an opening balance in ER-1 of March 2011 and no verification of said stock was done by the Range officers. This act of commission on the part of the Noticee is suppression of fact, therefore, Department has rightly invoked extended period under Section 11A of the Central Excise Act, 1944. I, therefore hold that the Central Excise duty is liable to be recovered on 24,304 no. of Cotton Waste Particle Boards under the provisions of Section 11A of the Central Excise Act, 1944 along with interest under Section 11AB upto 07.04.2011 and under Section 11AA from 08.04.2011 of the Central Excise Act, 1944. The case laws cited by the Noticee are not helpful in this case.

7.3 I also find that the Noticee have availed Cenvat credit on input side both on inputs and input services upto 28.02.2011, therefore, in terms of provisions of Rule of the Cenvat Credit Rules, 2004, the Noticee are required to pay 5% of the sale value of exempted goods of 'Cotton stalk Particle Boards' as central excise duty. According to FIFO method, the value of 24,304 no. of Cotton Stalk Particle Boards cleared during the month of March 2011 and April 2011 is arrived at Rs 1,14,57,083/- and Central excise duty is liable to be paid thereon.

7.4 I find that the Noticee have informed that they have used only one Cenvatable item i.e. Resin in the manufacture of the said 24,304 no. of Cotton Stalk Particle Boards and the proportionate Cenvat credit attributable to quantity of Cotton Stalk Particle Boards worked out to Rs 1,58,863/- which they have paid along with an amount of interest of Rs 21,447/- (Total Rs 1,80,310/-) vide Challan dated 30.11.2011.

7.5 The show cause notice has proposed penal action under the provision of Rule 25 of the Central Excise Rules, 2002. The Rule 25 of the said Rules states that a penalty is imposable on the manufacturer who removes any excisable goods in contravention of any of the provisions of Central Excise Rules, 2002 or the notifications issued under the said rules or a manufacturer does not account for any excisable goods manufactured by him. I find that the Noticee, in spite of holder of Central Excise Registration and a manufacturer of excisable goods have failed to maintain separate stock account in respect of above said two varieties of Particle Boards upto 28.02.2011 and have suppressed the fact from the Department. The Noticee have started keeping stock account of these two varieties w. e. f. 01.03.2011 in order to avail the exemption under Notification No. 06/2011-CE dated 01.03.2011 thereby they have failed to account for excisable goods as required under Rule 25 of the Central Excise Rules, 2002. Further, there was no corroboration between the varieties of excisable goods in the closing balance of ER-1 of February 2011 and opening balance of ER-1 of March 2011. It was the Departmental Audit which has pointed out this discrepancy. This act of omission and commission on the part of the Noticee is liable for imposition of penalty under the provision of Rule 25 of the Central Excise Rules, 2002. I, therefore, find that the charge of imposition of penalty in the show cause notice is sustainable. The case laws cited by the Noticee are not helpful.

In view of the facts, evidence, discussion and findings I pass the following order.

ORDER

1. I confirm Central Excise duty of Rs 11,80,080/- (Rupees eleven lacs, eighty thousand and eighty only) under the provisions of Section 11A of the Central Excise Act, 1944 on M/s Rushil Decor Limited, Navalgadh. I appropriate an amount of Rs 1,58,863/- (Rupees one lac, fifty eight thousand, eight hundred and sixty three only) towards Central Excise duty which was paid vide Challan dated 30.11.2011.

2. I confirm the interest on the above amount of Central Excise duty under the provisions of Section 11AB upto 07.04.2011 and under Section 11AA from 08.04.2011 of the Central Excise Act, 1944. I also appropriate an amount of Rs 21,447/- towards interest which was paid vide Challan dated 30.11.2011.

3. I impose penalty of Rs 11,80,080/- (Rupees eleven lac, eighty thousand and eighty only) under the provisions of Rule 25 of the Central Excise Rules, 2002 on M/s Rushil Decor Limited, Navalgadh.

Sd/-

(HARCHARAN SINGH)
ADDL. COMMISSIONER

By Registered Post A.D.

To,
M/s Rushil Decor Limited,
Survey No 270, Navalgadh,
Dhrangadhra,
District: Surendranagar
Gujarat.

Copy to:-
(1) Commissioner, Central Excise & Service Tax, Bhavnagar.
(2) Deputy Commissioner, Central Excise (Audit), Bhavnagar.
(3) Assistant Commissioner, Central Excise Division, Surendranagar.
(4) Superintendent, Central Excise, AR-Dhangadhra.
(5) Guard File.

11/1/2013
ADDL. COMMISSIONER