

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

F. No. V/15-70/DEM/HQ/2010-11

Date of order : 09.01.2013

Date of issue : 11.01.2013

Passed by Shri Harcharan Singh, Additional Commissioner.

Order-in-Original No. 35 /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 Central Excise Act, 1944 read with Rule 3 of Central Excise (Appeals) Rules, 2002. It should be signed by the Appellants in accordance with the of sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2002.

1. It should be accompanied with the following :
2. Copy of appeal in duplicate.
3. 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.
4. Proof of payment of Service Tax, penalty, interest etc.

Sub: - Show Cause Notice No.V/15-70/DEM/HQ/2010-11 dated 13.1.2010.

**Brief facts :**

1. M/s Patel Salt and Marine Chemicals Private Limited, Near Railway Crossing, Kumbharwada, Bhavnagar (hereinafter referred to as the Noticee") are engaged in the manufacture of excisable goods viz. Salt and Magnesium Carbonate classifiable under sub heading 2501 00 90 and 2836 99 20 of the First Schedule to the Central Excise Tariff Act, 1985. The Industrial Salt manufactured by the Noticee attracted NIL rate of duty and Magnesium Carbonate is dutiable goods but the Noticee are availing SSI exemption under Notification No 08/2003 - CE dated 01.03.2003 in respect of Magnesium Carbonate.

2. On 03.06.2010, the officers of the Anti-Evasion Branch of the Central Excise Commissionerate, Bhavnagar searched the office premises of the Noticee in presence of two independent witnesses and Shri Bipin Dhirajlal Patel, Director of the Noticee , certain incriminating documents were seized under Panchnama dated 03.06.2010. On scrutiny of the documents revealed that the aggregate value of clearances of all excisable goods was more than Rs 400 lac during the Financial years 2008-09 and 2009-10 , therefore the Noticee were not entitled to exemption under the said notification during the succeeding financial years.

3. During the course of investigation, a statement of Shri Bipin Dhirajlal Patel, Director of the Noticee was recorded under Section 14 of the Central Excise Act, 1944 before the Superintendent (A.E.) Central Excise Commissionerate, Bhavnagar on 03.06.2010 wherein he inter alia stated that they are manufacturing exempted excisable goods viz. Salt and dutiable goods Magnesium Carbonate; that the value of clearances of all excisable goods manufactured in their factory during the year 2008-09 was more than Rs 400 lac; that they were not aware of the provisions of Notification No 08/2003; that the value of all excisable goods are to be taken into account for the purpose of calculating the eligibility limit of Rs 400 lac; therefore they had not paid any duty on clearance of Magnesium Carbonate and that they undertake to pay the duty not levied and not paid.

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4. Further statement of Shri Bipinbhai Dhirajlal Patel, director of the Noticee was recorded on 12.07.2010 wherein he stated that the manufacturing process of Salt involves extraction of brine which is evaporated in number of ponds and thereafter on saturation it is transferred into pans and after few days salt is deposited in pans wherefrom it is harvested manually and transferred to stock yard, crushed, washed and dried; that the dried salt is then packed in pouches bearing their brand name; that manufacturing process of Magnesium Carbonate involves reaction of bittern (residual liquor) with Sodium Carbonate which is then heated upto 60 degrees, thereafter it is dewatered in filter press and filtered cake is dried and pulverised to get final product i.e. Magnesium Carbonate. He furnished the aggregate value of Salt and Magnesium Carbonate.

5. On reasonable belief that the said goods were manufactured without obtaining registration as required under the Central Excise Act, 1944 therefore, 60 kgs of Magnesium Carbonate was seized on 21.07.2010 under a Panchnama dated 21.7.2010 and the same was handed over to the Noticee for safe custody under Supratnama dated 21.7.2010.

6. The aggregate value of clearance of all excisable goods manufactured by the Noticee is as under: -

Year	Clearance Value of Salt. (in Rs.)	Clearance Value of Magnesium Carbonate (in Rs)	Total Clearance value of all excisable goods. (in Rs.)
2005-06	2,33,65,058/-	47,46,820/-	2,81,11,878/-
2006-07	2,76,57,514/-	54,12,800/-	3,30,70,314/-
2007-08	2,42,36,726/-	87,60,480/-	3,29,97,206/-
2008-09	3,36,72,765/-	64,58,000/-	4,01,30,765/-
2009-10	3,41,94,863/-	78,55,475/-	4,20,50,338/-
2010-11 (Upto May 2010)	43,73,420/-	12,88,340/-	56,61,760/-

Exemption Notification no 08/2003-CE dated 01.3.2003 grants exemption to various excisable goods based on the value of clearances during a financial year subject to conditions. The relevant portion of Notification is reproduced below:

2. The exemption contained in this Notification shall apply subject to the following condition, namely: -

(vii) The aggregate value of clearance of all excisable goods for home consumption by a manufacturer from one or more factories, or from a factory by one or more manufacturers, does not exceed four hundred lakhs in the preceding financial year.

It appeared that the value of clearances of all excisable goods manufactured by the Noticee exceeded Rs 400 lac during the financial years 2008-09 and 2009-10, therefore, the Noticee were not entitled to avail exemption under the said exemption Notification in the financial years 2009-10 and 2010-11 in the result, the duty not levied was recoverable under the provisions of Section 11A of the Central Excise Act, 1944

7. Further Rule 9 of the Central Excise Rules, 2002 read with Section 6 of the Central Excise Act, 1944 requires that every person who manufactures excisable goods shall get registered, therefore, the Noticee have contravened the provisions of Rule 9 of the said Rules and are liable for penalty under Rule 25(1)(c) of the said Rules and excisable goods manufactured by them was liable to confiscation.

8. The Noticee had not filed any declaration as required under Notification 36/2001-CE (N.T) dated 26.06.2001 thereby they have suppressed the material facts about the manufacture and clearance of all excisable goods, the extended period as contemplated in Section 11A was invokeable for recovery of duty not levied and not paid.

9. It also appeared that the duty on clearances of Magnesium Carbonate has not been levied and not paid by the Noticee by the reason of suppression of facts and had contravened the provisions of Central Excise Act, 1944 and the Central Excise Rules, 2002 with intent to evade payment of duty, the Noticee was liable to penalty as provided in Section 11AC of the Central Excise Act, 1944.

10. Therefore, Additional Commissioner, Central Excise Commissionerate, Bhavnagar issued a show cause notice No. V/15-70/DEM/HQ/2010-11 dated 13.01.2010 to the Noticee proposing the following actions: -

- (i) Recovery of Central excise duty amounting to Rs 7,88,485/- (Rupees seven lac, eighty eight thousand, four hundred and eighty five only) ( Rs 7,65,520/- Cex duty + Rs 15,310/- Ed.Cess + Rs 7,655/- SHE Cess) under Section 11A of the Central Excise Act, 1944 along with Interest under Section 11AB of the Central Excise Act, 1944;
- (ii) Imposition of penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002;
- (iii) Confiscation of 60 kgs of Magnesium Carbonate seized under Panchnama dated 21.07.2010 under Rule 25(1)(c) of the Central Excise Rules, 2002.

**11. Defence reply and personal hearing :**

11.1 The Noticee filed a written reply dated 23.08.2012 mainly contending as under :

(i) The show cause is time-barred for the period from 01.01.2009 to 31.12.2010 as not extended period can be invoked; that the impugned show cause notice is issued to us with an allegation that we have suppressed the material facts about the manufacture and clearances of all excisable goods manufactured and sold by us but there is no allegation that we have suppressed the above facts with wilful intention to evade duty; that intention to evade payment of duty is not mere failure to pay duty, it must be something more i.e. that the assessee must be aware that duty was leviable and he must deliberately avoid payment of duty payable under the law; that they had no intention to avoid any payment of duty as they were of the view that their main product viz. Salt is attracting NIL rate of duty and hence their clearance value of the previous financial year was not required to be taken into account for deciding the eligibility of SSI exemption during the current financial year, therefore, the duty was not paid as they had availed SSI exemption and there was no wilful suppression; that there cannot be suppression of fact when it is not wilful and therefore, it could not constitute a permissible ground for the purpose of proviso to Section 11A of the Act; the proviso to Section 11A of the Act is not invocable; that the show cause notice is time-barred for the period 01.04.2009 to 31.12.2010 as it is issued after one year;

(ii) Duty demanded to be abated from the cum-duty price actually received.

The Noticee submitted that the price on which Magnesium Carbonate had been sold should be considered to be cum-duty price and the assessable value should be determined after deducting the element of excise duty; that the sale price which is charged is deemed to be the value for the purpose of levy of excise duty but the element of excise duty, sales tax or other taxes which are included in the sale price are to be excluded in arriving at the assessable value meaning thereby that the cum-duty price when charged, the element of duty which is payable has to be excluded; that they had sold Magnesium Carbonate and the purchaser was not liable to pay any amount in addition thereto and it is this reason that they request to consider all these transactions as being cum-duty price.

(iii) The Noticee submitted that Section 4 of the Central Excise Act, 1944 provides for valuation of excisable goods for the purpose of charging of duty of excise; under Section 4(1) of the Act, the duty of excise is chargeable on any excisable goods with reference to the value which is deemed to be the price at which such goods are ordinarily sold by the assessee to a buyer where buyer is not a related person and the price is the sole consideration for the sale; that the explanation of Section 4(1) of the Act states that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and such

price-cum-duty excluding the sales tax and other taxes, if any, actually paid on such goods is also to be allowed as a deduction.

(iv) The Noticee submitted that the aforesaid Section clearly indicates that the price-cum-duty which is charged is deemed to be the value for the purpose of levy of excise duty but the element of excise duty, sales tax or other taxes which is included in the price is to be excluded in arriving at the assessable value. This Section has been construed by the Hon'ble Supreme Court of India in Assistant Collector of Central Excise and others Vs. Bata India Limited reported in 1996 (84) ELT 164(SC) = 1996 (4) SCC 563 and it is clear that when cum-duty price is charged then in arriving at the excisable value of the goods the element of duty which is payable has to be excluded; that the amount realised by them from the sale of excisable goods viz. Magnesium Carbonate has to be regarded as a price-cum-duty and in determining the value must be on which excise duty is payable the element of excise duty which must be regarded as having been incorporated in the sale price must be excluded; that there is nothing to show that once the demand was raised by the Department they sought to recover the same from their purchaser of excisable goods; that after the sale transaction was completed, the purchaser was under no obligation to pay any extra amount to the seller; that in such a transaction, it is the seller who takes on the obligation of paying all taxes on the goods sold and in such a case the said taxes on the goods sold are to be deducted under Section 4(1) of the Act and this is precisely decided by the Tribunal in many cases; that it is much clear that the sale price was cum-duty price.

(v) The Noticee relied on the observations of Hon'ble Supreme Court of India in Hindustan Sugar Mills Vs State of Rajasthan and Others in 1978 (4) S C C 271, at page 280 as under:

"Take for example, excise duty payable by a dealer who is a manufacturer. When he sells goods manufactured by him, he always passes on the excise duty to the purchaser. Ordinarily it is not shown as a separate item in the bill but it is included in the price charged by him. The 'sale price' in such a case could be the entire price inclusive of excise duty because that would be the consideration payable by the purchaser for the sale of the goods. True, the excise duty component of the price would not be an addition to the coffers of the dealer as it would to reimburse him in respect of the excise duty already paid by him on the manufacture of the goods. But even so, it would be part of the 'sale price' because it forms a component of the consideration payable by the purchaser to the dealer. It is only as part of the consideration for the sale of the goods that the amount representing excise duty would be payable by the purchase. There is no other manner of liability, statutory or otherwise under which the purchaser would be liable to pay the amount of excise duty to the dealer. And on this reasoning, it would make no difference whether the amount of excise duty is included in the price charged by the dealer or is shown as a separate item in the bill. In either case, it would be part of the 'sale price'..."

(vi) The Noticee contended that the example given in the aforesaid decision is clearly applicable in the present case. The sale price realised by us has to be regarded as the entire price inclusive of excise duty because they have by necessary implication taken on the liability to pay all taxes on the goods sold and has not sought to realise any sum in addition to the price obtained by it from the purchaser. The purchaser was under no obligation to pay any amount in excess of what had clearly been paid as the price of the excisable goods. They submitted that the abatement may be given to them in terms of the ratio of Larger Bench judgement rendered in case of Srichakra Tyres Ltd Vs. CCE, Madras - 1999 9108) ELT 361 (T).

(vii) Penalty under Section 11AC is not applicable: -

The Noticee submitted that the non-payment was due ignorance of law and larger period is not invocable and penalty is not sustainable. They submitted that in the absence of fraud and contravention of acts or rules with an intention to evade payment of duty penalty is not leviable and they relied on the following case laws:

- (a) Supreme Court judgement in case of Devans Modern Breweries Ltd Vs Commissioner of Central Excise - 2006 (202) ELT 744 = 2008 (10) STR 511 (SC);
- (b) Supreme Court judgement in case of CCE Vs HMM Ltd -1995 (76) ELT 497 (SC);
- (c) Supreme Court judgement in case of TTK Prestige Ltd Vs CCE - 2002 (146) ELT 488 (SC);

- (d) Supreme Court judgement in case of Hindustan Steel Ltd Vs State of Orissa – 1978 (2) ELT 159 (SC);
- (e) Punjab and Haryana High Court in case of CCE Vs S>B> Packaging Ltd – 2008 (223) ELT 360 (P & H) = 2008 (9) STR 124;
- (f) Tribunal judgement in case of Malwa Cotton Spinning Mills Ltd Vs CCE – 2008 (232) ELT 641;
- (g) Tribunal decision in case of Peter & Millers Packers Vs CCE – 2008 (232) ELT 635.

And submitted that none of the ingredients set out in Section 11AC of the Act has been met in their case, therefore, they are not liable for penalty under Section 11AC of the Act read with Rule 25 (1) of the Central Excise Rules, 2002. Finally, they requested to allow an opportunity of personal hearing.

(viii) **Person hearing** was fixed before the adjudicating authority on 19.09.2012, 11.10.2012 and 17.12.2012 but no body appeared to attend the hearing, however, M/s SSSM & Co., Chartered Accountant, Ahmedabad on behalf of the Noticee submitted a letter dated 14.09.2012 and 11.10.2012 requesting for hearing after 10.10.2012 and after 24.10.2012 respectively quoting their pre-occupancy with their statutory internal audit and a hearing before Tribunal in another matter and also submitted a letter dated 17.12.2012 containing written submission as follows: -

(ix) They submitted that the show cause notice is time barred for the period from 01.04.2009 to 31.12.2010 as the same is issued after one year and submitted that the documentary evidence did not prove the allegation made under the show cause notice that their client had suppressed the facts with wilful intention to evade duty. Moreover, there is neither evidence against their client regarding wilful suppression nor any discussion in the show cause notice, therefore, extended period could not be invoked.

(x) They submitted that suppression of facts should be wilful. The Hon'ble Supreme Court in Rainbow Industries Vs CCE - 1994 (74) ELT 3 (SC) = 1994 (6) SCC 563 = AIR 1994 SC 2783 = 1994 AIR SCW 4465 have held that in order for the extended period to apply two ingredients must be present – wilful suppression, mis-declaration etc and the intention to evade duty the same was followed in ONGC Vs CCE – 1995 (79) ELT 117 (CEGAT) and the same view was taken in Tamil Nadu Housing Board Vs CCE – 1995 Suppl (1) SCC 50 = 1994 (74) ELT 9 (SC). In this case it was held that the powers to extend period from one year to 5 years is exceptional powers and hence have to be construed strictly. It was held that fraud, collusion etc. and intention to evade duty must concur and in this case both of the ingredients are not present.

(xi) They submitted that the Noticee were under the bona fide impression that inasmuch as Salt is attracting Nil rate of duty, value of salt manufactured by him need not be included in the aggregate value for the purpose of value based exemption (SSI benefit) Notification. Hence it cannot be concluded that the Noticee have suppressed the facts with intention to evade duty. For this argument they relied on the decision in case of M/s Cosmic Dye Chemicals Vs CCE, Bombay reported in 1995 (75) ELT 721 (SC) wherein it was held that intent to evade duty must be proved for invoking proviso to Section 11A(1) of Central Excises and Salt Act, 1944 for extended period of limitation – Intent to evade duty built into the expressions “fraud” and “collusion” but “mis-statement” and “suppression” being qualified by immediately preceding words “wilful” and “contravention of any of the provisions of this Act or rules” being qualified by the immediately following words “with intent to evade payment of duty”. Since, there was no suppression of facts wilfully larger period could not be invoked and the show cause notice is time barred.

(xii) They submitted that there was no intention on the part of Noticee to evade payment of legitimate duty due to the exchequer. The Noticee had defaulted owing to their ignorance of law, therefore, transaction also did not attract penalty as there was no deliberate evasion of impugned amount of duty. Moreover, penalty could not be imposed for the reason that the statute provided for the same. They relied on Hindustan Steel Ltd Vs State of Orissa – 1978 (2) ELT (J 159) (SC) wherein Hon'ble Apex Court has observed as follows:

“The discretion to impose a penalty must be exercised judicially. A penalty will ordinarily be imposed in cases where the party acts deliberately in defiance of law or is guilty of contumacious or dishonest conduct or acts in conscious disregard of its obligation; but not in cases where there is a technical or venial breach of the provisions of the “Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute.”

Finally, they submitted to drop the demand for the period from 01.04.2009 to 31.12.2010 as the same was issued after one year and to re-quantify duty due within normal period after considering the value as cum-duty price and requested to refrain from imposing any penalty.

## 12. Discussion and findings: -

12.1 I find that the Noticee have filed their written reply dated 23.08.2012 and 17.12.2012 to the show cause notice dated 13.01.2011. I also find that three chances for attending the personal hearing were extended to the Noticee on 19.09.2012, 11.10.2012 and on 17.12.2012 but the Noticee have failed to avail the same. The adjudication proceeding cannot be delayed indefinitely, therefore, I take up the case to decide, based on Noticee’s written replies dated 23.08.2012 and 17.12.2012.

12.2 I have carefully gone through the facts of the case, defence replies filed by the Noticee and all the relevant documents placed in the file. On going through the facts of the case, I find that the Department has issued a show cause notice dated 13.01.2011 to the Noticee proposing to recover the central Excise duty amounting to Rs. 7,65,520/- on the clearance of excisable goods in excess of exemption limit of Rs 400 lac for the period from 2009-10 to 2010-11 in terms of condition (vii) of SSI exemption Notification no 08.2003-CE dated 01.03.2003.

12.3 The Noticee are manufacturer of excisable goods viz. Salt and Magnesium Carbonate falling under sub heading 2501 00 90 and 2836 99 20 of the First Schedule to the Central Excise Tariff Act, 1985. The Salt attracts Nil rate of duty while Magnesium Carbonate is dutiable goods and I find the Noticee were availing exemption in respect of Magnesium Carbonate under exemption Notification no. 08/2003-CE dated 01.03.2003. A search was carried out by the Anti-Evasion Branch of Central Excise Commissionerate, Bhavnagar and certain incriminating documents were seized under a Panchnama. The scrutiny of the seized documents revealed that the aggregate value of clearances of all excisable goods viz. salt and Magnesium Carbonate during the financial years 2008-09 and 2009-10 had crossed Rs 400 lac, therefore, in term of condition no (vii) of the Notification no 08/2003-CE dated 01.03.2003 the Noticee were not entitled to exemption for succeeding financial years. The show cause notice has proposed to recover central excise duty not levied and not paid under Section 11A along with interest under Section 11AB of the Central Excise Act, 1944. The notice also proposes imposition of penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002 and confiscation of 60kgs of Magnesium Carbonate which was seized under panchnama dated 21.07.2010 under Rule 25(1) of the Central Excise Rules, 2002.

12.4 For better appreciation of conditions of exemption Notification no.08/2003-CE dated 01.03.2003, condition no. 2 (vii) is reproduced here under :

“2. The exemption contained in this Notification shall apply subject to the following condition, namely,

(vii) the aggregate value of clearances of all excisable goods for home consumption by a manufacturer from one or more factories or from a factory by one or more manufacturers does not exceed rupees four hundred lakhs in the preceding financial year.”

The investigation carried out after scrutiny of the documents has revealed that the Noticee have performed the financial year-wise clearances of the excisable goods as under :

Year	Clearance Value of Salt. (in Rs.)	Clearance Value of Magnesium Carbonate (in Rs)	Total Clearance value of all excisable goods. (in Rs.)
2005-06	2,33,65,058/-	47,46,820/-	2,81,11,878/-
2006-07	2,76,57,514/-	54,12,800/-	3,30,70,314/-
2007-08	2,42,36,726/-	87,60,480/-	3,29,97,206/-
2008-09	3,36,72,765/-	64,58,000/-	4,01,30,765/-
2009-10	3,41,94,863/-	78,55,475/-	4,20,50,338/-
2010-11 (Upto May 2010)	43,73,420/-	12,88,340/-	56,61,760/-

From the above it clear that the Noticee have crossed the aggregate clearance value of all excisable goods of Rupees 400 lac in financial year 2008-09 and 2009-10, therefore, as per condition no (vii) of Notification no. 08/2003-CE dated 01.03.2003, the Noticee are not entitled to exemption during succeeding financial years i.e. 2009-10 and 2010-11, therefore the duty is rightly demanded in the show cause notice under the provisions of Section 11A of the Central Excise Act, 1944 and the notice is sustainable. For this, I rely on the decision of Tribunal, South Zonal Bench, Bangalore in case of M/s Arun Industries Vs. CCE, Hyderabad reported in 2005 (191) ELT 1041 (Tri-Bang) wherein it was held that value of clearance of excisable goods in preceding year though Nil rated/exempted to be included to calculate the limit of clearance of Rs 300 lacs (now Rs 400/- lac) for availing SSI exemption, mere fact that the goods attracted nil rate of duty does not mean that they are not excisable. Therefore in this case since the duty is not paid, Noticee are also liable to pay interest under the provisions of Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002.

12.5 The Noticee have contended that the show cause notice is time barred for the period from 01.04.2009 to 31.12.2010 and extended period could not be invoked. I find that it is the charge in the show cause notice that the Noticee have not filed any declaration as required under Notification no. 36/2001-CE (N.T.) dated 26.06.2001. The said notification provides exemption to a manufacturer from obtaining Registration under Rule 9 of the Central Excise Rules, 2002 on fulfilment of condition that he makes a declaration in the specified form. I find that the Noticee have not filed any declaration as required for excisable goods which are chargeable to nil rate i.e. Salt thereby they have suppressed the material facts with intent to evade payment of duty about the manufacture and clearance of all excisable goods. It was the investigation that has revealed the year-wise clearance of all excisable goods for the period from 2005-06 to 2010-11, I therefore hold that the Noticee have suppressed the material fact and therefore show cause notice has rightly invoked the extended period under the provisions of Section 11A of the Central Excise Act, 1944 and show cause notice is not time barred for the period from 01.04.2009 to 31.12.2010. In the result, the Noticee are liable to penalty under Section 11AC of the Central Excise Act, 1944 read with Rule (1) of the Central Excise Rules, 2002.

12.6 The Noticee have contended that the price on which Magnesium Carbonate had been cleared should be considered to be cum-duty price and the assessable value be determined after deducting the element of excise duty. I find that Section 4 of the Central Excise Act, 1944 provides for valuation of excisable goods for the purpose of charging duty of excise. The duty of excise is chargeable on any excisable goods with reference to the value which is deemed to be the price at which goods are ordinarily sold by the Noticee to a buyer where buyer is not a related person and the price is the sole consideration for sale. I find that the excisable goods viz. Magnesium Carbonate is cleared by the Noticee during the period from 2005-06 to 2010-11 in normal course and price was the sole consideration. Explanation to Section 4(1) states that the price-cum-duty of the excisable goods sold shall be the price actually paid to him for the goods sold and such price-cum-duty excluding sales tax and other taxes if any paid on the goods is allowable as deduction. Thus, the element of excise duty, sales or other taxes which is included in the price is required to be excluded in arriving at the excisable value. For this, I rely on the decision of Hon'ble Supreme Court of India in case of Assistant Collector, Central Excise and other Vs Bata India Limited - 1996 (86 ELT 164 (SC)).

12.7 The Noticee have contended that the penalty under Section 11AC of the Central Excise Act, 1944 is not applicable as the non-payment of excise duty on Magnesium Carbonate was due to ignorance of law and larger period is not invokeable and therefore penalty is not imposable. I have already concluded and held in the foregoing para supra that the Noticee have failed to file a declaration as required under provisions of Notification no 36/2011-CE(N.T.) dated 26.06.2001 for their excisable goods and have thereby suppressed the material facts with intent to evade payment of excise duty the longer period is rightly invoked and therefore penalty is rightly invoked under Section 11AC of the Central Excise Act, 1944. The case laws cited by the Noticee are, therefore, not applicable in this case.

12.8 In view of above conclusion, 60 kgs of Magnesium Carbonate seized under panchnama dated 21.07.2010 is liable to confiscation under Rule 25 (1)(C) of the Central Excise Rules, 2002.

In view of the facts, evidences, discussion and findings I pass the following orders.

#### ORDER

1. I determine the assessable value of excisable goods viz. Magnesium Carbonate for the period from 01.04.2009 to 28.02.2010 and 01.03.2010 to 31.05.2010 in terms of provisions of Section 4 of the Central Excise Act, 1944 to be the price-cum-duty and the element of Sales Tax and other taxes, if paid by the Noticee to be excluded for the purpose of assessable value of Magnesium Carbonate.
2. I confirm the Central Excise duty thereon at the applicable rate under the provisions of Section 11A of the Central Excise Act, 1944 along with interest thereon under the provisions of Section 11AB of the Central Excise Act, 1944.
3. I impose penalty equal to the duty of excise so determined in para 1 above in terms of Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002.
4. I confiscate 60 kgs of Magnesium Carbonate seized under panchnama dated 21.07.2010 under the provisions of Rule 25(1) of the Central Excise Rules, 2002.

*sd/-*

(HARCHARAN SINGH)  
ADDL.COMMISSIONER

By Registered Post. A.D.

To,

M/s Patel Salt and Marine Chemicals Private Limited,  
Near Railway Crossing,  
Kumbharwada,  
Bhavnagar – 364 006.

Copy to:

1. Commissioner, Central Excise and Service Tax, Bhavnagar.
2. Assistant Commissioner, Central Excise (AE), HQ, Bhavnagar.
3. Assistant Commissioner, Central Excise, City Division, Bhavnagar.
4. Superintendent, Central Excise, AR-1, Bhavnagar.

✓ Guard file.

*sd/-*

11/12/2012

ADDL.COMMISSIONER.