आयुक्त का कार्यालय, केन्द्रीय उत्पाद शुल्क, अहमदाबाद – I

७वी मंजिल , केन्द्रीय उत्पाद शुल्क भवन, पोलिटेकनिक के पास, आंबावाडी, अहमदाबाद -१५

OFFICE OF THE COMMISSIONER OF CENTRAL EXCISE,

7th FLOOR, CENTRAL EXCISE BHAVAN, NR. POLYTECHNIC, AMBAVADI, AHMEDABAD-15

निबन्धित पावती डाक द्वारा/**By R.P.A.D**

फा. **F.No.V.52/15-155/Dem/Shambhu/07**

आदेश की तारीख़/Date of Order:15-02-2012

जारी करने की तारीख़/Date of Issue:- 15-02-2012

द्वारा पारित/Passed by:- **राजू, आयुक्त**
RAJU, COMMISSIONER

मूल आदेश संख्या/Order-In-Original No.:05/COMMISSIONER/RAJU/AHD-I/2012

1. जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसे व्यक्तिगत प्रयोग के लिए निःशुल्क प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार, सीमा शुल्क, उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण, O-20, मेघाणीनगर, न्यु मेन्टल हॉस्पीटल कम्पाउन्ड, अहमदाबाद-380 016 को सम्बोधित होनी चाहिए।

Any person deeming himseif aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunai, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appeilate Tribunal, O-20, Meghani Nagar, Mental Hospitai Compound, Ahmedabad-380 016.

3. उक्त अपील प्रारुप सं. इ.ए.3 में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पद शुल्क (अपील) नियमावली, 2001 के नियम 3 के उप नियम (2) में विनिर्दिष्ट व्यक्तियों द्वारा हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियों में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए)। अपील से सम्बंधित सभी दस्तावेज भी चार प्रतियों में अग्रेषित किए जाने चाहिए।

The Appeai should be filed in form No. E.A.3. It shaii be signed by the persons specified in sub-rule (2) of Ruie 3 of the Centrai Excise (Appeais) Ruies, 2001. It shall be filed in quadrupiicate and shaii be accompanied by an equal number of copies of the order appeaied against. (one of which at least shall be certified copy). Aii supporting documents of the appeal should be forwarded in quadrupiicate.

Contd.....

4. अपील जिसमें तथ्यों का विवरण एवं अपील के आधार शामिल हैं, चार प्रतियों में दाखिल की जाएगी तथा उसके साथ जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलगन की जाएंगी (उनमें से कम से कम एक प्रमाणित प्रति होगी)।

The Appeal including the statement of facts and the grounds of appeal shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be a certified copy.)

5. अपील का प्रपत्र अंग्रेजी अथवा हिन्दी में होगा एवं इसे संक्षिप्त एवं किसी तर्क अथवा विवरण के बिना अपील के कारणों के स्पष्ट शीर्षों के अंतर्गत तैयार करना चाहिए एवं ऐसे कारणों को क्रमानुसार क्रमांकित करना चाहिए।

The form of appeal shall be in English or Hindi and should be set forth concisely and under distinct heads of the grounds of appeals without any argument or narrative and such grounds should be numbered consecutively.

6. अधिनियम की धारा 35 बी के उपबन्धों के अंतर्गत निर्धारित फीस जिस स्थान पर पीठ स्थित है, वहां के किसी भी राष्ट्रीयकृत बैंक की शाखा से न्यायाधिकरण की पीठ के सहायक रजिस्ट्रार के नाम पर रेखांकित माँग ड्राफ्ट के जरिए अदा की जाएगी तथा यह माँग ड्राफ्ट अपील के प्रपत्र के साथ संलग्न किया जाएगा।

The prescribed fee under the provisions of Section 35 B of the Act shall be paid through a crossed demand draft, in favour of the Assistant Registrar of the Bench of the Tribunal, of a branch of any Nationalized Bank located at the place where the Bench is situated and the demand draft shall be attached to the form of appeal.

7. न्यायालय शुल्क अधिनियम, 1970 की अनुसूची-1, मद 6 के अंतर्गत निर्धारित किए अनुसार संलग्न किए गए आदेश की प्रति पर 1.00 रूपया का न्यायालय शुल्क टिकट लगा होना चाहिए।

The copy of this order attached therein should bear a court fee stamp of Re. 1.00 as prescribed under Schedule 1, Item 6 of the Court Fees Act, 1970.

8. अपील पर भी रु. 4.00 का न्यायालय शुल्क टिकट लगा होना चाहिए।

Appeal should also bear a court fee stamp of Rs. 4.00.

<u>विषयः- कारण बताओ सूचनाः</u>

Sub:- Show Cause Notice No.Ch.52/03-24/05-06/Div.IV/DA, dated 11.05.2007, issued to M/s. Shambhu Textile Mills Pvt. Ltd. for demanding Central Excise duty amounting to Rs.1,22,19,970/- issued by the Commissioner, Central Excise, Ahmedabad-I – regarding:

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Brief Facts of the case:

1. M/s. Shambhu Textile Mills Pvt. Ltd., Kashiram Mill Compound, Ranipur, Narol, Ahmedabad (here-in-after referred as "the noticee"), having Central Excise Registration No. AACCS1114LXM001 at the material time, were engaged in the business of manufacture and clearance of excisable goods namely Cotton Fabrics and Man Made Fabrics falling under Chapter Heading No. 52, 54 and 55 of the First Schedule to Central Excise Tariff Act, 1985. They were using Grey of Cotton and MMF, Dyes, color, Chemicals, Packing material etc. as inputs, for manufacture of Cotton Fabrics and Man Made Fabrics and are availing the Cenvat credit of duty paid for such inputs. They have opted for clearances under the Notification Nos.29/2004-CE and 30/2004-CE both dated 09.07.2004, simultaneously.

2.1 The Central Government in exercise of powers conferred by sub section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) issued two Notifications No.29/2004-CE and Notification No.30/2004-CE, both dated 9.7.2004. The Notification No.29/2004-CE, dated 09.07.2004, exempts the excisable goods of the description specified in column (3) of the table and falling within the chapter, Heading No., or Sub Heading No. of the first schedule of the Central Excise Tariff Act, 1985, specified in the corresponding entry in column (2) of the said Table, from so much of the duty of excise specified their on under the first schedule to the Central Excise Tariff Act, as is in excess of the amount calculated specified in the corresponding entry in column (4) of the said table.

2.2 Notification No.30/2004-CE, dated 9.7.2004, stipulates that the assessee manufacturing excisable goods of the descriptions specified in the column 3 of the Table of the Chapter, Heading No., Sub-heading No of the first schedule of the Central Excise Tariff Act 1985 (5 of 1986), specified in the corresponding entry in column (2) of the said table were exempted from whole of the duty of excise leviable thereon under the Central Excise Act " **Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs has been taken under the provisions of the Cenvat Credit rules 2002".**

2.3 In this regard, for better appreciation and easy reference, the Notification No 30/2004-CE, dated 09.07.2004, which is the subject matter of the impugned Show Cause Notice, is reproduced below:

> *"Textiles and Textile Articles — Effective rate of duty to specified goods of Chapters 50 to 63*
>
> *In exercise of the powers conferred by sub-section (1) of section 5A of the Central Excise Act, 1944 (1 of 1944) read with sub-section (3) of section 3 of the Additional Duties of Excise (Goods of Special Importance) Act, 1957 (58 of 1957) and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 7/2003-Central Excise dated the 1st March 2003, published in the Gazette of India vide number G.S.R. 137(E), dated 1st March 2003, the Central Government, being satisfied that it is necessary in the public interest so to do, hereby exempts the excisable goods of the description specified in column (3) of the Table below and falling within the Chapter, heading No. or sub-heading No. of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) (hereinafter referred to as the Central Excise Tariff Act), specified in the corresponding entry in column (2) of the said Table, from whole of the duty of excise leviable thereon under the said Central Excise Act :*
>
> ***Provided that nothing contained in this notification shall apply to the goods in respect of which credit of duty on inputs or capital goods has been taken under the provisions of the CENVAT Credit Rules, 2002***

The relevant columns of the Table are as under:

Sl. No.	Chapter or heading No. or sub-heading No.	Description of goods
(1)	(2)	(3)
3.	52.04, 5205.11, 5205.19, 5206.11, 5206.12, 52.07, 52.08, 52.09	All goods
5.	54.01, 54.04, 54.05, 54.06, 54.07	All goods
6.	54.02, 54.03	Yarns procured from outside and subjected to any process other than texturising, by a manufacturer who does not have the facilities in his factory (Including plant and equipment) for manufacture of yarns or textured yarn (including draw twisted and draw wound yam) of heading 54.02 or 54.03. *Explanation,* - For the purposes of this exemption, "manufacture of yarns"

		means manufacture of filaments of organic polymers produced by processes, either: by polymerization of organic monomers, such as polyamides, polyesters, polyurethanes, or polyvinyl derivatives; or (b) by chemical transformation of natural organic polymers (for example celluiose, casein, proteins or algae), such as viscose rayon, celiulose acetate, cupro or alginates.
7.	5402.10, 5402.41, 5402.49, 5402.51, 5402.59, 5402.61, 5402.69	Nylon filament yarn or polypropylene muitifiiament yarn of 210 deniers with toierance of 6 per cent.
8.	55.05	All goods, except such goods which arises during the course of manufacture of fiiament yarns, monofilaments, filament tows or staple fibres or manufacture of textured yarn (inciuding draw twisted and draw wound yarn) of heading Nos. 54.02, 54.03, 55.01, 55.02, 55.03 or 55.04. *Explanation*. - For the purposes of this exemption, "manufacture of filament yarns, monofiiaments, filament tows or staple fibres" means manufacture of filaments or staple fibres of organic polymers produced by processes, either : (a) by poiymerization of organic monomers, such as polyamides, poiyesters, polyurethanes, or polyvinyi derivatives; or (b) by chemicai transformation of natural organic polymers (for example celluiose, casein, proteins or algae), such as viscose rayon, cellulose acetate, cupro or alginates.
9.	55.08, 55.09, 55.10, 55.11, 55.12, 55.13, 55.14	All goods
10.	55.06, 55.07	Staple fibres procured from outside and subjected to carding, combing or any other process required for spinning, by a manufacturer who does not have the facilities in his factory (inciuding plant and equipment) for producing goods of heading Nos. 55.01, 55.02, 55.03 and 55.04.
13.	58 (except 5804.90, 5805.90, 58.07, 5808.10)	All goods

2.4 The Government of India, Ministry of Finance, Department of Revenue, (Tax Research Unit) New Delhi, vide Circular No.795/28/2004-CX., dated 28.7.2004, issued from F. No. 345/2/2004-TRU, with reference to issue No. 1 that whether a manufacturer of Textiles or textile articles can avail full exemption under Notification No.30/2004-CE as well as clear similar or dissimilar goods on payment of duty under Notification No.29/2004-CE simultaneously, has clarified that Notification No.29/2004-CE (Prescribing optional duty at the rates of 4% for pure cotton goods and 8% for other goods) and No.30/2004-CE (prescribing full exemption) is independent Notifications and there is no restriction on availing both simultaneously. However, **the manufacturer should maintain separate books of account for goods availing of notification No.29/2004-CE and for goods availing of notification No. 30/2004-CE.**

2.5 Notification No.30/2004-CE, dated 9.7.2004, is very specific about the non-availment of Cenvat credit, at input stage for availing duty exemption. The CBEC had further clarified that both the Notification are independent and there is no restriction on availing both simultaneously provided that the manufacturers should maintain separate books of accounts for goods availing of Notification No.29/2004-CE and for goods availing of notification No.30/2004-CE.

2.6 During scrutiny of ER.1 returns submitted by the said noticee for the period July, 2004 to February, 2006, it was observed that the noticee had started availing benefit of both notifications with effect from July, 2004. **It was also observed that the noticee had started availing benefit of both the aforesaid notifications simultaneously, with effect from July, 2004. It was also observed that duty payment particulars shown in the table 4 & 5 of ER.1, did not tally with the duty payment made on fabrics cleared under Notification No.29/2004**, and therefore, on oral inquiry from the noticee it was revealed that the said difference was because they were reversing the credit taken on the inputs used in exempted goods; **it was further observed that the noticee was not maintaining the separate books of account for the goods**

availing Notification no. 29/2004-CE and for the goods availing Notification no. 30/2004-CE: that the duty amount shown was the reversal of input credit. Therefore, a letter dated 06.01.2006 was issued by the Range Superintendent to the noticee requesting them to intimate as to whether separate records were being maintained and also regarding the practice being followed by them in respect of goods cleared by them under Notification No.29/2004 and No.30/2004 both dated 9.7.2004.

2.7 In response to the letter of the Range office, the noticee vide their letter dated 10.01.2006 intimated the Range Superintendent that they were not maintaining separate accounts till February 2005 and thereafter they were maintaining the separate accounts and reversing the credit of duty availed on dyes and chemicals used in the manufacturing of exempted final product on proportionate basis at the end of the month.

3. It appeared that the noticee on one hand, is reversing the Cenvat credit availed on the inputs used in the manufacture of exempted final product and at the same time they have intimated to the Range Superintendent that they were not maintaining separate records till February 2005 but thereafter they were maintaining the separate accounts and reversing the credit of duty availed on dyes and chemicals used in the manufacturing of exempted final product on proportionate basis at the end of the month. The condition of the Notification No.30/2004-CE, dated 09.07.2004, clearly provides that no Cenvat credit can be availed on the goods cleared without payment of duty, thus availing Cenvat credit first and subsequent proportionate reversal disqualifies the noticee from the exemption under Notification no. 30/2004-CE dated 09.07.2004. Therefore summons dated 28.03.06, 06.06.06, 08.06.06, and 17.08.06 were issued to the noticee to ascertain the correctness of the claim.

4. A statement of Shri Vimal kumar Jagdishprasad Agrawai, Offcer-In-Charge of the noticee was recorded under Section 14 of the Central Excise Act, 1944 on 21.8.2006, before the Superintendent of Central Excise A.R.I, Division IV, Ahmedabad-I, wherein, he inter-alia

stated that, he was the Offcer-In-Charge of *M/s. Shambhu Textile Mills Pvt. Ltd* and all work pertaining to Central Excise Duties was being carried out under his direction, supervision and administrative control; that they were engaged in processing of cotton/man made fabrics; that their unit was receiving grey/unprocessed/semi processed cotton/man made fabrics from other factories as well as from the market for further processes such as bleaching, dyeing, finishing, printing mercerizing etc. to make the final goods. He further stated that they had started availing benefit of Notification No.29/2004-CE, dated 09.07.2004 and Notification No. 30/2004-CE, dated 09.07.2004, simultaneously with effect from 09.07.2004 and were aware about the provisions of Notification No. 29/2004-CE, dated 09.07.2004 and Notification No.30/2004-CE, dated 9.7.2004. On being asked, he further stated that he was aware of the Circular No. 795/28/2004-CX. Dated 28.7.2004 issued from F. No. 345/2/2004-TRU, wherein the Board had clarified the position, and directed the manufacturer to maintain separate books of accounts for goods availing Notification No 29/2004-CE and for goods availing Notification No. 30/2004-CE. On being asked as to whether the unit had maintained separate books of account for all the inputs, in respect of their goods availing benefit of Notification No. 29/2004-CE and for goods availing Notification No. 30/2004-CE, **he stated that they had not maintained separate accounts till Feb-2005 until being pointed out by the Department to do so**. On being asked regarding availment of credit on inputs, he stated that since July-2004 up to the date of audit i.e. March-2005 they had reversed the Cenvat credit of Rs.9,40,615/- along with interest, upon being asked to do so by the Central Excise Department. From March-2005 onwards, appropriate duty (as applicable) had been paid on the final products in the manufacture of which duty paid inputs had been used in or in relation with the goods cleared under Notification No.29/2004-CE, dated 09.07.2004, and wherever goods had been cleared availing the benefit of Notification No.30/2004-CE, dated 9.7.2004, without payment of duty, in those cases Cenvat credit attributable to inputs had been reversed under the provision of Rule 6(3) of the Cenvat Credit Rules, 2002 (now Cenvat Credit Rules, 2004), at the end of the month. From April-2005 to December-2005 they had been reversing the Cenvat credit at the end

of every month after arriving at the ratio of Cenvat credit availed for the whole of the month i.e. total credit availed on inputs during the month divided by total quantity of the fabric cleared for Home Consumption.

5. On scrutiny of monthly ER-1 returns submitted by the noticee for the period from July, 2004 to February, 2006, it appeared that the said noticee had cleared 3,99,85,626 L.Mtrs. of Processed fabrics (1,48,32,460 L. Mtrs of Cotton Fabrics + 2,51,53,166 L.Mtrs. of Man made Fabrics) valued at Rs.21,06,90,000/- (Rs. 12,18,70,936/- for Cotton Fabrics + Rs. 8,88,19,064/- for Man made Fabrics), attracting total Central Excise duty of Rs. 1,22,19,970/- [BED Rs. 1,19,80,362/- + Ed. Cess Rs. 2,39,608/-] as detailed in Annexure "A' to the Show Cause Notice, by contravening the condition of Notification No.30/2004-CE, dated 9.7.2004, and the clarificatory Circular issued by the CBEC. Thus the noticee was liable to pay the duty on the aforesaid quantity of fabrics cleared without payment of duty.

6. It also appeared that the noticee have contravened the provisions of Rule 22(2) of the Central Excise Rules, 2002, in as much as they have failed to furnish the list of all the records prepared or maintained by them for accounting of transactions in regard to receipt, purchase, manufacture, storage, sales or delivery of the goods, including inputs and capital goods, and thereby they rendered themselves liable to penalty under the provisions of Rule 27 of the Central Excise Rules, 2002.

7. It appeared that duty payment particulars shown in the ER-I returns did not match with the duty payments made on the fabrics cleared under Notification No.29/2004-CE, dated 09.07.2004; that the details of the CENVAT Credit availed by the said noticee has not been shown separately for the inputs used in the manufacture of goods availing the benefit of Notification No. 29 /2004-CE & 30/2004-CE, both dated 09.07.04 and the noticee has debited pro-rata credit at the end of the month for the goods cleared under 30/2004-CE dated 09.07.2004, which is in contravention of the condition stipulated in the

said Notification; that the noticee was aware of the CBEC Circular No 795/28/2004-CX. Dated 28.7.2004, issued from F. No. 345/2/2004-TRU by the Government of India, Ministry of Finance, Department of Revenue, (Tax Research Unit) New Delhi, which requires that the noticee should maintain separate books of accounts for goods availing the benefit of Notification No. 29 /2004-CE & 30/2004-CE, both dated 09.07.04 and in response to the Jurisdictional Range officer's letter dtd.10-01-2006, the noticee replied that they were maintaining separate accounts for manufacture of exempted goods under Notification No. 30/2004-CE & dutiable goods under Notification No. 29/2004-CE and they are also maintaining separate accounts for inputs for both the Notifications. **Whereas it appeared that the noticee has not maintained separate books of accounts for inputs used in the manufacture of goods cleared on payment of duty under Notification No. 29/2004-CE & goods cleared under exemption Notification No. 30/2004-CE and has mis-stated these facts to the Department.** Thus it appeared that the noticee has mis-stated the facts and contravened the condition of the exemption Notification No. 30/2004-CE dated 09.07.04 and also the CBEC clarifying Circular No 795/28/2004-CX. dated 28.7.2004. These acts of Contravention appeared to constitute offence of the nature and type as described in Rule 25(1) (a),(b)&(d) of Central Excise Rules 2002, which attracts confiscation of goods in question and penalty under Section under 11AC of Central Excise Act, 1944. Thus it appeared, that they are liable for penalty under Section under 11AC of Central Excise Act, 1944 read with Rule 25(1) (a), (b) & (d) of Central Excise Rules 2002. It appeared that the said noticee has misstated the facts and contravened the provisions of the Notifications issued under Central Excise Act, 1944, with an intent to evade payment of duty and therefore the duty worked out in Annexure- A to the Show Cause Notice is required to be demanded and recovered from the said noticee by invoking extended period of five years under the proviso to Section 11A (1) of the Central Excise Act, 1944.

8. In view of the facts narrated above, **M/s. Shambhu Textile Pvt. Ltd., Kashiram Mill Compound, Ranipur, Narol, Ahmedabad, were issued a Show Cause Notice bearing**

F.No.Ch.52/03-24/05-06/Div.IV/DA, dated 11.05.2007, calling upon them to show cause to the Commissioner, Central Excise, Ahmedabad-I as to why :

(i) Central Excise duty of Rs.1,22,19,970/- (CENVAT Rs.1,19,80,362/- + Education Cess Rs.2,39,608/-) as mentioned above should not be demanded and recovered from them invoking the extended period of 5 years under Section 11A (1) of the Central Excise Act, 1944.

(ii) Penalty under Section 11AC of the Central Excise Act, 1944, and Rule 25(1) of the Central Excise Rules, 2002, should not be imposed on them for the contravention as mentioned above.

(iii) Interest at the prescribed rate, should not be recovered from them under Section 11AB of the Central Excise Act, 1944.

(iv) Penalty under Rules 27 of the Central Excise Rules, 2002, should not be imposed upon them for the above mentioned contraventions.

(v) Goods in question should not be confiscated under Rule 25(1) of the Central Excise Rules, 2002. However the goods are not available for confiscation.

9. The said show cause notice was decided by the then adjudicating authority vide OIO No. 38/COMMISSIONER/RKS/AHD-I/2009 dated 23.11.2009;

a) Confirmed the demand of Central Excise Duty amounting to Rs.1,22,19,970/- under the first proviso to sub-section (1) of Section 11 A of the Central Excise Act, 1944.

b) Ordered recovery of interest involved on the Central Excise duty amounting to Rs. 1,22,19,970/- at the appropriate rate prescribed under Section 11AB of CEA, 1944.

c) Imposed penalty of Rs. Rs. 1,22,19,970/- under the provisions of Section 11 AC of Central Excise Act 1944.

d) Held that 3,99,85,626 L. Mtrs. of processed fabrics valued at Rs. 21,06,90,000/-, which have been cleared without payment of duty, were liable to confiscation under the provisions of Rule 25(1) of the Central Excise Rules, 2002. However, since the goods were not available for confiscation, refrained from actual confiscation of the same.

e) Imposed penalty of Rs. 5,000/- under the provisions of Rule 27 of the Central Excise Rules, 2002

10. Being aggrieved by the Order in Original , the said noticee have filed appeal before the Hon'ble CESTAT, Ahmedabad wherein the CESTAT while relying upon the judgement of the Hon'ble Gujarat High Court in the case of CCE V/s. Ashima Dyecot Ltd. reported at 2008 (232) ELT 580 (Guj) and in the case of CCE, Ahmedabad V/s. Maize products reported at 2008 (89) RLT 211) (Guj.) have set aside the impugned order and remanded the matter to the Commissioner for fresh decision in light of the law declared by Hon'ble High Court of Gujarat on the disputed issue vide Order No. A/1818-1822/WZB/AHD/2010 & S/1274-1278/WZB/AHD/2010 dated 12.10.2010 and CESTAT Order No. M/1043/WZB/AHD/2011, dated 07.06.2011. They also directed that the appellants are at liberty to place before the Commissioner their submissions as regards quantum of input credit so reversed by them.

Defence Reply:

11. The noticee was requested to file their written reply vide letter dated 07.03.2011 with regard to the CESTAT's order in the remanded proceedings. The noticee have filed their written submission vide letter dated 12.05.2011 wherein they have furnished their submission as under:

11.1 For the period from July 2004 to February, 2006, a demand of Rs. 1,22,19,970/- was raised against M/s.Shambhu Textile Mills Pvt.Ltd., vide Show Cause Notice F.No. Ch.52/03-24/05-06/Div-IV/DA dated 11.5.2007. This demand with interest and penalty was confirmed vide OIO No. 38/COMMISSIONER/RKS/AHD-I/2009. Their appeal against the said order of the Commissioner was however decided by the Appellate Tribunal, Ahmedabad vide order No. A/1818-1822/WZB/Ahd/2010 dated 12.10.2010. The Appellate Tribunal has referred to the judgement of the Hon'ble Gujarat High Court in cases of Commissioner V/s. Maize Products **2008 (89) RLT 211 (Guj)** and Commissioner V/s. Ashima Dyecot Ltd. **2008 (232) ELT 580 (Guj)** and held that in the case of Maize Products (supra) reversal of credit even at appeal stage was held to be in accordance with law whereas quantum of credit to be reversed could be demonstrated before the Commissioner with reference to the inputs and credit taken thereon.

11.2 They further submitted that the Appellate Tribunal has remanded the matter to the Commissioner for fresh decision in light of the law declared by the Hon'ble Gujarat High Court on the disputed issue, and they were also granted opportunity to place before the Commissioner their submissions as regards quantum of input credit reversed by them. These observations and specific directions for remand are contained in para 8 of the above referred final order of the Tribunal.

11.3 They also submitted that on 9th July, 2004, the Central Government issued two Notifications, Notification No. 29/2004-CE and Notification No. 30/2004-CE for various textile products including processed fabrics. By Notification No. 29/2004-CE the Central Government prescribed concessional rate of duty for various goods including textile fabrics and Cenvat credit was also allowed for the inputs used in or in relation to manufacture of such textile fabrics removed on payment of concessional rate of duties under this Notification.

11.4 By other Notification No. 30/2004-CE issued on the same day, the Central Government granted exemption to various textile

goods including textile fabrics subject however to the condition that credit of duty on inputs or capital goods should not be taken under the Cenvat Credit Ruies for availing this exemption.

(i) The Centrai Government also ciarified through the CBEC that simuitaneous availment of both these notifications was also permissible because the Government knew that the processors like them wouid iike to avail Cenvat credit by paying concessionai rate of duty for the goods exported to foreign countries whereas the processors wouid iike to ciear the processed fabrics under exemption when sold in domestic market for which no Cenvat credit would be availed by them. For ailowing processors to thus, avaii Cenvat credit for inputs used in relation to manufacture of processed fabrics exported and also to ailow them to ciear simiiar goods nameiy processed fabrics for home consumption under exemption, the above clarification was issued by the Central Government through the Board.

(ii) For manufacturing processed fabrics, the main inputs are unprocessed fabrics (i.e. grey) and dyes and chemicals. The dyes and chemicais used in reiation to manufacture of processed fabrics exported as weli as processed fabrics removed for home consumption are ordinariiy common and it is also not possibie nor practicabie to purchase separate consignments of dyes and chemicals for use in relation to production of processed fabrics meant for export on one hand and those meant for saie in the local market on the other hand; and one more contributory factor for purchasing common inputs in the nature of dyes and chemicals has been that a processor would ordinarily not have any knowledge or information at the time of purchasing dyes and chemicals as to whether they wouid be used in relation to production of processed fabrics which would be ultimately exported or they would be cleared for home consumption. For these reasons, therefore, all the processors including them had been purchasing duty paid dyes and chemicals and records of such dyes and chemicals were also kept in the Cenvat register as well as in raw material account.

(iii) After the processed fabrics were cleared for export and also for home consumption, the manufacturers like them would be in a position to know the quantities of such fabrics and consequentiy also the quantities of duty paid dyes and chemicals used in reiation to both the types of processed fabrics. On the basis of the caiculations of inputs made by the processors like them with respect to the quantities of processed fabrics removed for home consumption under exemption, the total amount of Cenvat credit availed on such duty paid input was being worked out and this amount was being debited/reversed on periodical basis. Because of various reasons and factors, it was not possibie for them to know the exact quantities of inputs attributabie to the final products cieared under exemption at the time of removai of such fabrics from the factory; and since it was possible to arrive at the quantities of inputs and the duties involved therein for the final products cleared under exemption when a proper and thorough reconciliation of aii the duty paid inputs received in the factory, the consignments of finai products cleared under exemption as well as on payment of duties, the ratio of inputs used for above two types of final products etc. was made, they were debiting/reversing or paying back the amount equal to Cenvat credit on inputs attributable to the exempted finai products on periodical basis. The details of such reversal/payment and also the documents showing such payment/reversai for the Cenvat credit of inputs used in relation to the goods cleared under exemption for domestic market are enclosed and marked as **Annexure-I collectively.**

(iv) It is on the basis of the details submitted by them in their ER-I Returns for the period from September 2004 to January, 2005 that the above show cause notice has been issued to them on the ground that they had cieared a totai quantity of 5956231 L.Mtrs of fabrics during the period under exemption Notification No. 30/2004-CE without maintaining separate books of accounts and contravening condition of the said Notification read with Circular dated 28.7.2004 because they had reversed the credit of duty availed on dyes and chemicals on pro-rata basis on such inputs used in relation to manufacture of exempted goods in each month whereas allegedly, it was not permissible to take Cenvat credit and then reverse/debit the same on monthly basis for

availing the said exemption. Larger period of limitation is also invoked on the ground that acts of contravention had been committed by them with an intent to evade payment of Central Excise duty.

11.5 They submitted that now the above issues and controversy raised against them are to be decided as directed by the Appellate Tribunal vide para 8 of the final order dated 12.10.2010 above referred, in the light of the law declared by the Hon'ble Gujarat High Court in the cases like Maize Products (supra) and Ashima Dyecot Ltd. (supra). Therefore, a brief reference may also be made to this case law of the Hon'ble Gujarat High Court.

(a) The Commissioner V/s. Maize Products (supra), the Hon'ble Gujarat High Court has upheld the decision rendered by the Appellate Tribunal, Ahmedabad reported in **2007 (79) RLT 662.** A perusal of the decision of the Appellate Tribunal in the case of Maize Products shows that seven decisions were referred to and relied upon by the assessee and upon considering the decisions, the Appellate Tribunal observed that the demand was highly disproportionate to the credit availed on the common inputs which could be attributed to goods which had been cleared without payment of duty. The Appellate Tribunal accepted the offer of the assessee to reverse the entire credit attributable to the exempted products involved in that case and the order of the Commissioner confirming the demand at the rate of 8%/10% of the price of the exempted final products was set aside, and the Appellate Tribunal also directed the Commissioner to consider and accept the assessee's offer to reverse the entire credit on the common inputs. The Appellate Tribunal also directed the department to re-determine the credit taken on the common inputs with a further direction to the assessee to produce the necessary evidence in form of Chartered Accountant's certificates for the relevant period; and it was further directed by the Appellate Tribunal that if any further credit was to be reversed, the same shall be reversed within four weeks from the date of receipt of the communication from the department. A copy of this decision on the Appellate Tribunal in case of Maize Products 2007 (79) RLT 662 is enclosed and marked as **Annexure-II.**

(b) The above decision was fully upheld by the Hon'ble Gujarat High Court and while dismissing the Tax Appeal of the Revenue against the decision of the Appellate Tribunal the Hon'ble High Court held that the directions issued by the Tribunal were merely on consonance with the requirement of the relevant rule and it was not possible to state that the Tribunal had committed any error in issuing such direction. A copy of the judgement of the Hon'ble Gujarat High Court reported in **2008 (89) RLT 211 (Guj)** is enclosed and marked as **Annexure-III.**

(c) To the same effect is the judgement of the Hon'ble Gujarat High Court in case of Commissioner V/s. Ashima Dyecot Ltd. **2008 (332) ELT (Guj.)** and a copy thereof is enclosed and marked as Annexure-IV. Now, in view of this case law and in view of the directions of the Appellate Tribunal given while remanding the case to the Commissioner, the issues and controversy raised in the show cause notice may be considered and discussed.

11.6 As stated in para 2(iv) above, the issue and controversy raised in this case is that the eligibility condition of Notification No. 30/2004-CE above referred was not fulfilled by them as they had taken credit of duties on inputs used for manufacturing final products cleared under the above exemption and in this regard, a further issue is also raised in the show cause notice that strict compliance of such eligibility condition was necessary for availing exemption because the Notification was very specific about the non-availment of Cenvat credit at input stage. As regards reversal of amount equal to the credit of duty as regards dyes and chemicals used in relation to manufacture of exempted final products in February, 2005 on the basis of average or pro-rata consumption; the issue raised is that such reversal at a later stage was not in accordance with the eligibility condition of the Notification; and this issue is also raised on the same basis that a strict compliance of the eligibility condition was necessary in as much as the Notification was very specific about non-availment of Cenvat credit at input stage.

11.7 At the outset, they submitted that the above issue and controversy raised in the show cause notice are not proper in as much

as it is judicially held in a number of cases decided by the Hon'ble Courts of Law that credit reversed or an amount equai to the credit debited by an assessee resulted in a situation as if credit was not taken by the assessee. It is also judicially heid by the Courts of Law that the point of time of such reversal, or the stage of reversal or debiting the concerned amount, was not reievant in as much as what was material and relevant was that the assessee should not avail double benefits by claiming exemption on finai products and also Cenvat credit for the inputs used for such exempted finai products. It is also judicially held by the Courts of Law that in case the assessee had debited or reversed reduced or iess amount than the actual credit invoived in input used for exempted final products, then the balance amount ought to be paid back by the assessee when pointed out by the Revenue upon re-determination of the credit figure; and it is aiso judiciaily held by the Courts of Law that the assessee may also be liabie for paying interest in case of iate or deiayed reversai of fuii or part amount of Centrai Excise duty. The underlining principle of such judgments rendered by the Hon'ble Court of Law is that the assessee should not avail double benefits, and the assessee shouid pay back appropriate amounts in case any double benefit was taken by him. The judgments rendered by the Hon'bie Court of Law have been followed by the Hon'ble Appellate Tribunal also in a number of cases and therefore, in addition to the above referred judgments of the Hon'ble Gujarat High Court, the foilowing judgments and decisions may be relied upon in support of this proposition.

(1) Hello Minerais Water (P) Ltd, V/s. UOI reported in 2004 (174) ELT 422 (AB)

(2) Franco Italian Co.Pvt.Ltd V/s. Commissioner reported in 2000 (12_ ELT 792 (Tribunai-LB)

(3) Hi-Line Pens Pvt.Ltd. V/s. Commissioner reported in 2003 (158) ELT 168 (Tri-Del.)

(4) Bharat Earth Movers Ltd. V/s. Collector reported in 2001 (136) ELT 225 (Tri-Bang.)

(5) Tube Investments of India Ltd. V/s. Commissioner reported in 2004 (177) ELT 880 (Tri-Chennai)

(6) Kitply Industries Ltd. V/s. Commissioner of Customs, New Kandla reported in 2001 (130) ELT 236 (Tri-Kolkata)

11.8. They further submitted that the basic judgement for the above propositions is one rendered by the Hon'ble Supreme Court in case of Chandrapur Magnet Wires Pvt.Ltd. **1995 (81) ELT 3 (SC)** wherein the Hon'ble Supreme Court has held that credit reversed by the assessee as regards the inputs contained in the exempted final product meant as if the credit was not taken by the assessee. While referring to this judgement of the Hon'ble Supreme Court, the Hon'ble Allahabad High Court has in case of Hello Minerals Water (P) Ltd, (supra) observed in para 18 that benefit of Notification granting exemption had to be given on the final product since the reversal of credit on inputs was done at the Tribunal's stage because reversal of Modvat credit amounts to non-taking of credit on the inputs. Further, in para 20 of the judgement, the Hon'ble Allahabad High Court has further held that the principle flowing from the judgement of the Hon'ble Supreme Court in Chandrapur Magnet Wires Pvt.Ltd. (supra) was not that amount of Cenvat credit must be reversed before removal of the final products, but the principle was that once amount equal to the credit was reversed by the assessee, it was a situation as if no credit was taken because it was only with regard to Circular No. 22/8/86 dated 10.4.1986 that the Hon'ble Supreme Court observed in case of Chandrapur Magnet Wires Pvt.Ltd. (supra) that credit was required to be debited before removal of exempted final products. With reference to various other decisions and also a larger Bench order in case of Franco Italian Co. (supra) the Hon'ble Allahabad High Court has further held that reversal of credit or payment of amount equal to credit even at a later stage was permissible and upon such reversal or debiting or payment of amount equal to the credit, it would be as if no credit on inputs was taken.

11.9. In case of Maize Products (supra) also, the assessee was allowed to reverse amount of credit within four weeks from the amount or figure being pointed out by the Commissioner of Central Excise and the assessee's offer to do so made before the Hon'ble Appellate Tribunal, Ahmedabad was accepted and translated in the

final order of the Hon'ble Tribunal which came to be upheld not only by the Hon'ble Gujarat High Court but also by the Hon'ble Supreme Court in as much as the SLP filed by the Revenue against the judgement of the Hon'ble Gujarat High Court reported in 2008 (89) ELT 211 has been dismissed by the Hon'ble Supreme Court.

11.10 They further submitted that the issue and controversy raised in this show cause notice do not survive. Reversal of input stage credit at a later stage is permissible in law and benefit of any exemption Notification cannot be with-held even if the assessee reversed or debited the amount equal to the input credit even at a later stage i.e. not before removal of the final products. With regard to the Notification NO. 30/2004-CE also, this principle is applied by the Hon'ble Appellate Tribunal in case like K.G. Denim Ltd. V/s. Commissioner, Salem 2005 (189) ELT 424 and Forbes Gokak Mills Ltd. V/s. Commissioner of Central Excise, Belgaum 2006 (06) LCX 259, and also by the Hon'ble Appellate Tribunal at Ahmedabad in cases like Ashima Dyecot Ltd. (supra). The basis adopted in the show cause notice that reversal of credit by them in February, 2005 was not in compliance with the eligibility condition of the Notification is therefore without any justification and without any legal backing. Since reversal of credit in February, 2005 and the quantum of pro-rata amount reversed by them are not in any dispute, the denial of the exemption only because they reversed/debited the input credit for the period from September, 2004 to February, 2005 in February, 2005 is without any merit.

11.11 They also emphasized that the amount reversed by them towards credit of inputs involved in manufacture of exempted final products being Rs. 22,73,647/- was not disputed nor was any dispute about the quantum of this credit reversed/debited by them raised in the show cause notice. It was only while passing the previous OIO No. 38/COMMISSIONER/RKS/AHD-1/2009 that an issue was raised in para 15.3 of the order that a sum of Rs. 8,15,246/- was not reversed by them in as much as, allegedly, the Cenvat credit of the inputs used in exempted final products was Rs. 30,88,893/- as against the amount of Rs. 22,73,647/- reversed by them during July, 2004 to January, 2006.

When no dispute about the quantum of credit reversed/debited by them was raised in the show cause notice though it was issued on the basis of statutory records including their Cenvat Register, PLA and monthiy returns from which the amount of Cenvat credit debited/reversed was taken by the Revenue while issuing the show cause notice, no such dispute about the amount of credit to be reversed could have been raised while passing the order on the show cause notice. Be that as it may it would be the Revenue's obligation to point to them with evidence that there was actually less reversal of credit to the extent of Rs. 8,15,246/- and therefore, without substantiating such less reversal, the conclusion about the reduced amount having been reversed/debited by them could not have been arrived at against them.

11.12 They therefore, submitted that the issue of less reversal of credit is not involved in this case and in any case, no such findings could be arrived at and benefit of Notification NO. 30/2004-CE could not be denied to them without establishing that reversal of any further amount was required to be made by them and without allowing them an opportunity of debiting/reversing the remainder, if any, in view of the law laid down in case of Maize Products (supra).

11.13 On the basis of the above referred detailed discussion, the legal position that emerges is that even when an assessee reverses or pays back the amount of credit taken on the inputs used in relation to the manufacture of particular final products, such reversal or paying back of credit would result in a situation where the assessee was deemed to have not taken the credit at all. The further legal position that emerges from the above referred case law is that such reversal may be at the time of clearance of the goods from the factory, may be at a time subsequent to such removal of final products from the factory or even also may be after the Revenue initiated investigation and enquiries against the assessee in the matter.

11.14 They further submitted that factually in the present case, the entire credit of duty on inputs on the exempted clearances of 39985626 L.Mtrs. processed fabrics is reversed during July 2004 to

January 2006. The credit of inputs used for the above exempted final products cleared from July 2004 to February, 2006 was thus, fully reversed. Thus, the entire credit is debited during July 2004 to January, 2006 and this fact was also reflected in their returns for the period from July 2004 to January, 2006.

11.15 The enquiry in the present case apparently commenced by January, 2006 during which statement of their Officer-in-Charge was also recorded by the Range Superintendent. Thus, reversal of credit was made by them much before the enquiry in this commenced and also much before the financial year 2005-06 came to an end. Their case therefore, fails within the ratio of the decision rendered by the Appellate Tribunal in cases like Franco Italian Co.Pvt.Ltd. (supra), Hi-Line Pens Pvt.Ltd. (supra), Tube Investments Pvt.Ltd. (supra) and Kitply Industries Ltd. (supra) and also within the ratio laid down by the Hon'bie Allahabad High Court in case of Helio Mineral Waters Pvt.Ltd. (supra). They cannot be said to have taken credit of duty on inputs in these circumstances within the meaning of this condition and/or restriction under the proviso to Section 30/2004-CE.

11.16 Even after the scrutiny of their credit register, returns as well as the enquiry including recording of statement of their Officer-in-charge, no dispute is raised in the show cause notice about the quantum of inputs as well as the credit of duty on such inputs used for manufacture of final products cleared under exemption of the above Notification. Even though they have clarified by the above referred letters that they had reversed credit of duty availed on dyes and chemicals on pro-rata basis used in manufacturing of exempted goods during August 2004 to November 2005 for clearances of exempted goods from August 2004 to November 2005. It is not suggested in the show cause notice by the Revenue that these was any error or mistake in the pro-rata basis adopted by them or that reversal of the credit was actually not in proportion to the credit of inputs like dyes and chemicals used in the manufacturing exempted goods. Thus, the reversal of credit as well as the quantum of credit reversed by them is also not the disputes raised in this case.

11.17 They submitted that there is no double benefit or double advantages taken by them in this case. If they had taken credit of duty on inputs used in respect of the goods cleared under exemption of the above notification, then it would certainly be a case where the condition of the Notification stood contravened and they obtained illegal and unlawful benefit of input stage credit in respect of goods cleared under exemption. However, they have not done so, and the credit of duty on inputs admittedly having been reversed in July, 2004 i.e. much prior to the time when the Revenue raised this issue, the requirement of the above notification stands fulfilled in their case. The exemption of this Notification availed by them therefore has been perfectly legal and valid, and consequently, the show cause notice deserves to be vacated.

11.18 However, as stated in above, any remainder i.e. any amount of credit that remains to be debited in the facts of this case may be pointed out to them with the details and supporting documents and thereupon they shall be duty bound to make goods the deficiency in view of the law laid down by the Hon'ble Gujarat High Court in case of Maize Products (supra). In view of the facts discussed in above referred paragraphs with a special emphasis on the fact that no dispute about the quantum of credit reversed by them is raised in the show cause notice they submit that there is really no dispute about the actual amount of credit that they have already debited/ reversed during the period question. However, they are still open to take any curative action. If required, as regards any shortfall in debiting/ reversing the due amount of credit upon being pointed out with evidence by the Revenue but otherwise they emphasize that no double benefit or double advantage is taken by them in this case.

11.19 Invocation of the extended period of limitation is also an action without jurisdiction in the facts of this case, it is suggested in the show cause notice that they had not given details regarding availment of input credit used in the manufacture of the exempted final goods, intent to evade payment of Central Excise duty is alleged on this basis for invoking the extended period of 5 years.

11.20 However, this basis is factually and legally incorrect in as much as the fact of availment of input credit as well as reversal of such credit have been well within the knowledge of the Excise Department. It is stated in the show cause notice itself that details of the goods cleared under exemption of Notification No. 30/2004-CE were taken from the returns filed by them for the period in question. These returns, however, also contained details of credit of duty on inputs taken by them which was attributable to such exempted goods cleared during that particular month. Details of credit shown in the same return would show that the Department was aware about taking of input credit and also clearance of exempted goods as otherwise there would be no significance of showing such credit and exempted clearances in the return. Further, the extracts of the credit register submitted with the monthly return would also bear out that they had taken credit of duty on inputs as and when the inputs were received in their factory and this way also, taking of input credit used in the manufacture of the final products was reported to the Range and Divisional Officers. When the Revenue Officers knew that they were availing benefit of Notification NO. 30/2004-CE also, and when these Officers also knew from the above returns that the credit was taken by them the allegations levelled in the notice that details of availment of input credit used in the manufacture of exempted final goods were not given by them was not sustainable. Therefore, there is no justifiable reason for alleging any suppression of facts against them and consequently extended period of limitation is also invoked without jurisdiction and justification.

11.21 The demand of Rs. 1,22,19,970/- is also on a higher side and incorrect in view of the correct principle of valuation embodied under Section 4 of the Act. In cases like the present one assuming without admitting that there was any justification in the demand of duty, the figure taken by the Revenue as the assessable value is always to be taken as cum-duty price. A perusal of Annexure-A to the show cause notice reveals that the selling price of the goods in question is taken as the assessable value and duty demand is calculated thereon, but the figures shown in this Annexure would have to be considered as cum-duty price and the assessable value of the

goods would have to be worked out by calculating backwards in view of Section 4 of the Act and the formula for arriving at the assessable value in such cases as given by the Hon'ble Supreme Court in the case of UOI V/s. MRF Ltd. reported in 1995 (77) ELT 433 (SC), which is also followed by the Larger Bench of the Appellate Tribunal in case of Sri Chakra Tyres Ltd. V/s. CCE, Madras reported in 1999 (108) ELT 361.

11.22. The proposal for imposition of penalty under Rule 25 of the Rules read with Section 11AC of the Act also deserves to be vacated as there is no justification in demand of duty leveled against them in this case. There is no cogent and reliable evidence in support of the charges levelled in the show cause notice and therefore, no penalty would be justified on the basis of charges so levelled, merely on assumption and presumptions. Penalty is quasi-criminal in nature and therefore, it cannot be imposed on mere assumptions and presumptions or hearsay. Neither the facts of the case justify or warrant imposition of any penalty, nor a specific allegation is made in the show cause notice for imposing penalty on them. They had not acted dishonestly or contumaciously and therefore, not even a token penalty would be justified. The present one is not a case where they had committed contravention of any of the Rules of the Act with an intent to evade payment of duty. There is no violation of any nature committed by them. They have also not committed breach of any Rules or the Act with an intent to evade payment of duty. In this view of the matter, no penalty could be justifiably imposed on them in law.

11.23. The proposal of impose penalty under Rule 27 of the Rules also does not hold any water in the facts of the present case for the simple reason that there is no breach of the provisions of the Rules by them with any malafide intention. The matter of penalty is governed by the principles as laid down by the Hon'ble Supreme Court in the landmark case of M/s. Hindustan Steel Limited reported in 1978 ELT (J159) wherein the Hon'ble Supreme Court has held that penalty should not be imposed merely because it was lawful to do so. The Apex Court has further held that only in cases where it was proved that the assessee was guilty of conduct contumacious or dishonest and the error committed by the assessee was not bonafide but was with a

knowledge that the assessee was required to act otherwise, penalty might be imposed. In the instant case aiso, Department has not alieged, much iess proved, that there is any breach of the provisions of the Rules by them with any malafide intention. Under the circumstances, no dishonest or contumacious conduct on their part having been proved, penaity would not be justified in the fact of the present case.

11.24 The proposai of discharge interest under Section 11AB of the Centrai Excise Act, 1944 is aiso without any authority in iaw is as much as the provisions of Section 11AB is not attracted in the instant case. Section 11AB provides for interest in addition to duty where any duty of excise has not been levied or paid or has been short levied or short paid or erroneous refunded with an intent to evade payment of duty. In the instant case, there is no short ievy or short payment or on-levy or non-payment of any excise duty. Therefore, the proposai to change interest under Section 11AB of the Act is aiso not maintainable in the present case.

11.25 In the above premlses, they submitted that the recovery of Rs. 1,22,19,970/- proposed against them in this case does not hold any water and therefore, the proposai to recover this amount as Excise duties deserves to be vacated aiong with other proposals or interest and penalty. They also requested to consider the above referred submission as additional ones i.e. in addition to the submissions and expianations and aiso case iaw submitted before the Commissioner of Central Excise under their reply dated 15.06.2007 because they have not repeated the submissions and explanations already put forth under the above referred document, nameiy reply dated 15.06.2007. They have in the present note, concentrated only on the directions issued by the Hon'ble Tribunai while remanding the case and the saiient issues in this connection and therefore, they request to consider the submissions and expianations aiready put forth in the previous adjudication also because the present note is only for the purpose of additional submissions in the remanded proceedings. In view of the above they requested to withdraw the show cause notice with aii the proposais levelled thereunder in the interest of justice.

11.26 The noticee in their reply dated 15.06.2007, to the Show Cause Notice, has inter-alia, submitted that :-

(i) Instead of not taking the credit on the inputs used in the manufacture of goods to be cleared under Notification No.30/2004-CE, we were taking credit, but at the end of each and every month, the total amount of Cenvat credit taken on such inputs were debited, thus, it tantamount to no credit taken.

(ii) No credit was taken on the grey fabrics, which were to be used for the manufacture of fabrics for clearances under exemption Notification No. 30/2004-CE.

(iii) When everything was disclosed in our monthly returns (ER-1 returns), the ER-1 return for the month of July, 2004 was filed in August, 2004, why the department kept silent for and issued the first letter on this issue only in the month of January, 2006.

(iv) The similar issue was raised by the Ahmedabad-II Commissionerate in respect of one unit M/s Omkar Textile Mills Limited, Naroda, and the matter had reached the CESTAT; that since the issue was sub-judiced before the higher authority, they were awaiting for its decision before going and bluntly replying to the officers of the department about their misinterpretation of the law.

(v) The issue is no more Res Integra as the same very issue has been decided by the Honorable CESTAT, at Ahmedabad vide Order No.A/836 to 838/WZB/A'bad/07, dated 18.4.2007, has set aside the OIO No.241/ Commissioner/2005, dated 28.9.2005, that in this Order, the Honorable CESTAT has clearly held that the credit availed and reversed would amount to the situation as if the same was not availed, thus, satisfying the condition of Notification No.30/2004-CE.; that since the appellate jurisdiction of the present Commissioner, Central Excise, Ahmedabad-I, the present adjudicating authority, lies with the same bench of the Honorable CESTAT which has

passed the above said Order dated 18.4.2007, the judicial discipline requires that the Commissioner should follow the ratio laid down by the CESTAT and drop the proceedings initiated.

(vi) Since on the merit of the case, the proposed demand of duty is required to be quashed and set aside, the consequential actions of demanding interest and imposing penalty are also required to be set aside; this is not a case of deliberate evasion of central excise duty, at the most this is case of technical interpretation where the bonafide of the manufacturer cannot be doubted; that when the bonafide are clear and the demand of duty has arisen out of technical interpretation of the provisions of notification, it does not invited for imposition of penalty.

11.27 The noticee had also requested to consider their submissions made vide their letter dated 14.10.2009, wherein it has been, inter-alia, submitted that :

(i) They were taking the credit on the inputs used in the manufacture of goods to be cleared under Notification No.30/2004-CE, but at the end of each and every month, the total amount of Cenvat credit taken on such inputs was debited by them, thus, it tantamount to no credit taken.

(ii) Maximum amount of Cenvat credit they are getting from the grey fabrics and separate registers were maintained for grey fabrics used under the two disputed notifications, no credit was taken on the grey fabrics which were to be used for the manufacture of fabrics for clearances under Notification no.30/2004-CE. It was only for the color and chemicals, since the quantity to be used was not certain, at the time of receipt of color and chemicals Cenvat credit was taken for the entire quantity, thereafter, whatever quantity of color & chemicals (the quantum of credit is very less) which were used in the processing of fabrics to

be cleared under Notification No.30/2004-CE, the credit was reversed subsequently after the inputs went into use.

(iii) After clearance of goods under Notification No.30/2004-CE, they were debiting the Cenvat credit therefore their intention was clear that they were not getting any benefit from it and not desired to make a revenue loss to the exchequer. All these facts were disclosed by them in their monthly returns (ER-1 returns).

(iv) The issue was raised during the audit of the unit, in January 2005. The officers at the time of audit directed them to reverse the Cenvat credit and never asked that the exemption would not be available to them in that situation. Had it done so, they would have followed the procedure guided by them. They immediately reversed the amount of Cenvat credit of Rs. 9,40,615/- alongwith interest during the audit itself. Further, they have reversed the Cenvat credit of Rs. 8,30,626/- vide Cenvat account entry no. 1674 dated 10.02.05 and Rs. 1,09,989/- vide Cenvat account entry no. 1765 dated 19.03.05.

(v) Since, the department was of the view that the credit reversal will suffice for eligibility of the exemption, they adopted to follow the said procedure till March 2005 only. Again on the directions of the department they started reversing the Cenvat credit on day to day basis from April 2005 onwards.

(vi) The issue is no more Res Integra as the same very issue has been decided by the Honorable CESTAT, at Ahmedbad in its decision in the case of three appellants viz. M/s Omkar Textiles, M/s Diamond Textiles and M/s Ashima Dyecot Ltd., vide order dated 16.04.07, relied upon the decision of the Hon'ble Supreme Court in case of Chandrapur Magnet (Wires) Pvt. Ltd., V/s CCE, Nagpur {1995 (81) ELT 3 (SC)} and held that the reversal of

credit of duty originally availed would amount to the effect as if no credit has been availed.

(vii) The findings rendered by the Honourable Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. Vs Collector of Central Excise Nagpur, reported in 1996 (81) E.L.T. 3 (S.C.) are clearly applicable to the present matter;

(viii) It is true that, they have reversed the credit taken on the inputs used in manufacture of these goods; that the ratio laid down in this decision rendered by the Honourable Supreme Court in the case of Chandrapur Magnet Wires (P) Ltd. (supra) is squarely applicable to the facts of the present case and maintenance of separate books of accounts at the initial stage cannot be considered to be a condition precedent for the purpose of claiming the benefit of exemption.

(ix) Even otherwise, Rule 3 says that the manufacturer or producer of the final product or provider of output services shall be allowed to take credit on various items enumerated therein; that this issue had come up for consideration before the Allahabad High Court in the case of Hello Minerals Water (P) Ltd. v. Union of India, reported in 2004 (174) ELT 422 (All.), wherein it is held that "reversal of Modvat credit amounts to non-taking of credit on the inputs. Hence, the benefit has to be given of the notification granting exemption/rate of duty on the final products since the reversal of credit on the input was done at the Tribunal's stage"; that while arriving at this conclusion, the Allahabad High Court has referred to various judgments under which such reversal was made subsequently and still the benefit was given to the assessee.

(x) If debit entry is permissible to be made, credit entry for the duties paid on the inputs utilised in manufacture of the

final exempted product will stand deleted in the accounts of the assessee; that in such a situation, it cannot be said that they have taken credit for the duty paid on the inputs utilised in the manufacture of the final exempted product under Rule 57A; that in other words, the claim for exemption of duty on the disputed goods cannot be denied on the plea that we have taken credit of the duty paid on the inputs used in manufacture of these goods; that there are plethora of judgments at various levels in favour of the noticee.

(xi) In the similar matter of M/s. Ashima Dyecot and others, the CESTAT, Ahmedabad has given the decision in favour of the assessee. The department has gone in the High Court but the Honourable High Court in its decision reported at 2008 (12) S.T.R. 701 (Guj.) has held that "since the Tribunal has correctly applied the law laid down by the Honourable Supreme Court and the issue is well settled, we are of the view that no question of law, much less any substantial question of law, arises out of the order of the Tribunal and hence, all the three appeals are, accordingly, dismissed"; that the department filed a SLP in the Supreme Court against this order and the Honourable Supreme Court has recently dismissed the appeal filed by the department. Therefore the issue is now settled and the entire notice is required to be quashed and set aside.

(xii) This is not a case of deliberate evasion of central excise duty, and at the most this is case of technical interpretation where the bonafide of the manufacturer cannot be doubted; that all the textile units were following the same procedure and the said procedure was in the knowledge of the department that if one unit is following a procedure differently it may be assumed that there is any intention to evade the revenue but when many textile units were following the same procedure it can not be said that we were following such procedure with intention to evade the revenue; that it is an established law position

when there is a difference of interpretation, the benefit should go to the manufacturer.

(xiii) The CBEC has cleared the matter vide circular no. 858/16/2007-CX, dated 8.11.2007; that the Board in para 2 of the circular has clarified that "The matter has been examined. In para-8 of the above referred Supreme Court decision, it has been held that even when credit is taken, if the entry is reversed before utilization, it would amount to not taking credit; that this is given in the context of erstwhile notification No. 14/2002-C.E., which is similar to Notification No. 30/2004-C.E., dated 9-7-2004; that both the notifications deal with textile articles falling under Chapters 50 to 63 of the Central Excise Tariff; that all goods falling under Chapters 50 to 63 of the Tariff are covered under Rule 6(3)(a) of the Cenvat Credit Rules, 2004, which stipulates that if Cenvat Credit is taken on inputs used in the manufacture of exempted goods falling under these Chapters, then the manufacturer shall reverse the credit so taken".

(xiv) When they have debited the Cenvat credit of inputs there was no loss to the government. Only thing that initially they had taken Cenvat credit and this was done as they were also clearing the goods on payment of central excise duty under Notfn.No.29/2004-CE. They have not utilized the Cenvat credit taken on dyes and chemicals and the reversal of Cenvat credit was done before utilization, as they had a sufficient balance in our RG23A Pt.II account. The denial of the entire exemption and the demand of central excise duty on the entire clearances are not justifiable.

(xv) When the bonafide are clear and the demand of duty has arisen out of technical interpretation of the provisions of notification, it does not invite for imposition of penalty; that in Hindustan Steel Ltd. v. State of Orissa - 1978 (2) ELT (J 159) (S.C.), the Supreme Court pointed out that

the liability to pay penalty does not arise merely upon proof of default; that an order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation.

(xvi) The Principal Bench of CESTAT New Delhi in case of M/s Spice Systems Ltd. Vs Commissioner of Customs, Central Excise Noida reported at 2008 (231) E.L.T. 650 (Tri. - Del.), has held that the "applicability of Notification No. 5/98-C.E. (Sl. No. 69, Condition No. 10) - Issue settled by Apex Court in the case of N.M. Nagpal (P) Ltd. [2008 (222) E.L.T. 486 (S.C.)] - Submission that issue involved purely a question of legal interpretation as to fulfillment of condition of notification which finally settled by Supreme Court, hence no justification for penalty." Therefore the penalty under section 11 AC is far fetched for the same reason in this case.

11.28 Further the noticee vide their letter dated 27-01-2012 had submitted that in continuation to various submissions already made on the issue, as regards reversal of cenvat credit on pro-rata basis, they would like to say and submit following few lines.

(i) Their unit was audited by the departmental officers on 7, 8 and 9.2.2005 and Audit Report No.79/2005 dt.6.5.2005 was issued. The audit was for the period from 01/2003 to 01/2005 and as per Para 1 of the Audit Report the cenvat credit taken on the colour chemicals used in the finished goods cleared under exemption notfn.no.30/2004-CE was not being reversed. Accordingly, the audit party asked them to work out the cenvat credit attributable to the colours and chemicals so used in finished goods cleared under exemption, which they worked out to Rs.9,40,615/-,

they debited the said amount of cenvat credit and also department recovered interest from them for the period involved.

(ii) It is pertinent to point out that it was observed in the Audit Report that there was no provision under the Cenvat Credit Rules for pro-rata reversal of cenvat credit and therefore, reference was made by the department to the higher authorities. However, till date they have not been informed about any clarification received from higher authorities in this regard. Hence, when the department has already recovered the cenvat credit on pro-rata basis and also interest thereon, the issue for the period under audit i.e. upto January, 2005 is settled.

(iii) The period from February, 2005 and March, 2005 they have reversed the cenvat credit in the month of April, 2005, the cenvat credit of Rs.3,51,526.32 has been reversed in the month of April, 2005, which includes cenvat credit reversible for the month of February, 2005, March, 2005 and April, 2005. A copy of cenvat credit account is enclosed herewith to show that from the cenvat credit account they have deducted the amount of Rs.3,51,526.32 (which is proportionate cenvat credit involved on the colours & chemicals used in the finished goods cleared under exemption during February, 2005, March, 2005 and April, 2005. From April, 2005 to January, 2006, they have reversed the cenvat credit proportionately every month (day to day entry basis) and also reflected the reversal in the RG-23 Part-II return. However, the fact remains that the cenvat credit actually attributable has been reversed. Accordingly, a chart showing month wise clearance of L.Mtrs of fabrics cleared for home consumption, L.Mtrs of fabrics under exemption, cenvat credit actually reversed on proportionate basis has been prepared and is enclosed with this letter. This chart would show that they have actually reversed cenvat credit

amounting to Rs.20,86,824/- for the period from February, 2005 to January, 2006,as against Rs.21,48,278/- shown in column of Pro-rata required to be reversed in the table prepared by the department. Moreover, the figures shown in the table prepared by the department are not as per RG-23 Part-II return, which they are discussing in the next paragraph and also attaching a worksheet showing figures of HC Clearance, Exempted clearance, Cenvat credit taken during particular month and cenvat credit reversed on the proportion basis during the particular month. This would show that the actual cenvat credit reversed by them is correct and there is no short reversal. They would also like to submit that the figures shown in the table prepared by the department are not correct for certain months and therefore this worksheet is required to be revised. The pro-rata cenvat credit required to be reversed shown in the table is wrong. The figures of clearance of fabrics under exemption shown in the table are wrong.

(iv) Besides, they would also like to say and submit that the issue of reversal of cenvat credit on proportionate basis is not the subject matter of the show cause notice, hence, asking them to reverse the cenvat credit as per the worksheet given by the department is beyond the scope of show cause notice, hence, such demand even if it is confirmed, it will have to be dropped at the higher stage by the authorities as it is a trite of law that the adjudicating authority cannot go beyond the scope of show cause notice.

(v) As regards the observations that the divisional Assistant Commissioner had informed him that they were reversing the cenvat credit belatedly and that too only a small amount, they submit that this observations is absolutely unsustainable as it is far from the facts. The facts are that not only the trade but even the department was also under dilemma as to whether simultaneous availment of Notfn.No.29/2004-CE and Notfn.No.30/2004-CE was

permissibie and other questions related thereto. This is also from time to time after the issuance of both these notifications. They were maintaining separate records in respect of grey fabrics, packing materials, etc, only the colour and chemicals were such which the they could not ascertain the usage thereof for the manufacture of dutiable or exempted goods, hence, they did not maintain these records separateiy and after being pointed out by the audit officers, they started working out the cenvat credit required to be reversed on the basis of proportion of colour and chemicals used in dutiable and exempted fabrics.

(vi) It will be seen from the abstract of RG-23-A-Pt.II for the month of February, 2005 that there was sufficient balance available in their books of accounts and the department asking them to reverse the differentiai cenvat credit would never have existed, the calculation of the department is wrong in the worksheet. Moreover, the said balance is available in their cenvat credit account as on date and they are ready to reverse the same.

(vii) In principle when they had maintained balance of cenvat credit which was finally attributable to the inputs used in the exempted goods and the said credit has never been used and whenever they have reversed the said credit it has only been a entry in the books reducing the available balance, it has never been the situation that they had exhausted the availability of cenvat credit. Therefore, the judgment of the Honorable Supreme Court in the case of Chandrapur Magnet has been followed by them in letter and spirit. The present demand of duty on the entire clearance denying exemption of Notfn.No.30/2004-CE is therefore illegal and the impugned order is therefore required to be quashed and set aside. The figures which they have shown in the worksheet being produced by them with this reply may be verified from RG-23 PART-II returns

availabie on record with the department to find out the actual amount reversed by them is correct or not.

(viii) Finally, they would submit that since principally your Honor has accepted the contention raised by them and in the Tribunal's decision remanding the matter for denovo consideration based on judgment of the Honorable High Court of Gujarat in the case of Ashima Denims, the issue on merit is to be decided in their favour barring the reversal of cenvat credit on pro-rata basis which also they have proved that the actual reversal done by them is on the basis of pro-rata and there is no short reversal which would be evident from the worksheet produced by them .

(ix) Therefore, it is their humble submission to drop the show cause notice issued for recovery of differential central excise duty raised on the basis of simultaneous availment of benefit under Notfn.No.29/2004-CE and Notfn.No.30/2004-CE.

Personal Hearing:

12. The Personal Hearing in the matter was fixed on 26.05.2011, which was postponed to 08.06.2011. However, the noticee vide their letter dated 30.05.2011 sought for adjournment of the said hearing. Accordingly, the next date of Personal Hearing was fixed on 14.06.2011 wherein the notice vide letter dated 14.06.2011 have requested for another date. Thereafter the PH was fixed on 22.09.2011 which was refixed on 28.09.2011. The notice vide letter dated 26.09.2011 have requested for adjournment. Another date of PH was fixed on 13.10.2011. The noticee attended the personal hearing and sought for adjournment for four weeks. The noticee was requested to submit the statements/documents and records of relevant period to show the quantum of credit reversed by them before the JRO vide letter dated 08.11.2011 and 24.11.2011, but the noticee has not responded to the requests. Thereafter the noticee was granted

personal hearing on 15.11.2011 which was postponed to 07.12.2011. The party was also requested to produce records before the JAC by 04/12/2011 vide letter dated 29.11.2011, but they have not come forward. Thereafter, the personal hearing was fixed on 07.12.2011 The noticee attended the personal hearing and have sought two weeks time to produce documents before the Range Office. Another date of personal hearing was granted on 03.01.2012 wherein the notice vide letter dated 03.01.2012 have requested for adjournment. The noticee was again requested vide letter dated 06.01.2012 to produce all the relevant records/documents before the Jurisdictional Deputy Commissioner for verification by 13.1.2012, but they failed to do so. The personal hearing in the matter is again fixed on 17.01.2012. The advocate of the noticee had attended the P.H. and submitted their written submission and conveyed that they do not have the documents like Cenvat Register, Returns etc. for the period in question because the period involved in these cases is more than 5 years in past, and the assessee now having opted for full exemption from payment of excise duty, none of them has kept this type of statutory registers and records any longer.

Discussions and Findings:

13. I find that the Noticee alleged to have availed the provisions contained in the Notifications no. 29/2004-CE. and 30/2004-CE. both dated 09-07-2004, simultaneously without maintaining separate accounts for the inputs used in the finished products cleared by them under the said Notifications and without reversing the equivalent Cenvat Credit attributable to the inputs used in the finished products cleared by them under Not. No. 30/2004-C.E. dated 09-07-2004 before effecting such clearances and hence the said Show Cause Notice was issued.

13.1 I have carefully gone through the evidence available on record, including Show Cause Notice (SCN) dated 07.03.2007, the submissions made by the noticee vide their written submissions dated 30.05.2007, 12.10.2009, 05.09.2011, 17.01.2012 and 27.01.2012 and the Hon'ble CESTAT's order No. A/1818-1822/WZB/AHD/2010 &

S/1274-1278/WZB/AHD/2010 dated 12.10.2010 and CESTAT Order No. M/1043/WZB/AHD/2011, dated 07.06.2011 in the case.

13.2 While passing the above order, the Hon'ble CESTAT have relied upon the judgement of the Hon'ble Gujarat High Court in the case of CCE V/s. Ashima Dyecot Ltd. reported at 2008 (232) ELT 580 (Guj) and in the case of CCE, Ahmedabad V/s. Maize products reported at 2008 (89) RLT 211) (Guj.) **Also Considering the appeal and submission of the noticee that they are in a position to demonstrate before Commissioner that the quantum of credit reversed by them was equivalent to the credit taken by them on the said input,** the Hon'ble CESTAT vide their above order allowed the stay petitions unconditionally and set aside the impugned order and remanded the matter to the Commissioner for fresh decision in the light of the law declared by the Hon'ble High Court of Gujarat on the disputed issue. They also directed that the appellants are at liberty to place before Commissioner their submissions as regards quantum of input credit so reversed by them."

13.3 The issue before me is to decide the case afresh in the light of Hon'ble CESTAT's Ahmedabad order No. A/1818-1822/WZB/AHD/2010 & S/1274-1278/WZB/AHD/2010 dated 12.10.2010 and CESTAT Order No. M/1043/WZB/AHD/2011, dated 07.06.2011. Accordingly I proceed to decide the case afresh.

13.4 As per the order of the Hon'ble Gujarat High Court, the reversal of the Cenvat credit is allowed even at the appeal stage and had been held in accordance with law in the case of CCE, Ahmedabad V/s. Maize Products reported at 2008 (89) RLT 211 (Guj.). A perusal of the order of the Hon'ble High Court wherein the appeal of the department against the order of the CESTAT was dismissed go on to show that the said appeal was dismissed only on the ground that the "..... **entire controversy has been decided by the Tribunal by merely remitting the matter to the Adjudicating Authority to re-determine the credit in accordance with law. If any reversal has been made by the respondent assessee, the same is**

subject to verification and adjustment if ultimately any further amount is found reversible".

13.5 I also infer from various decisions of the Tribunal , High court and Apex court, "that Cenvat credit taken and reversed before utilisation or reversed even at the appeal stage amounts to a situation that credit not taken" in as much as the quantum of reversal of credit has to be preceded by a proper verification and re-determination. I am also of the view that the Hon'ble CESTAT had remanded the instant case for fresh proceedings for the very same reason.

13.6 Further, I find that as per the above decision, it is clear that re-determination of reversal of Cenvat Credit is mandatory. **Also in pursuance to the CESTAT's order in this case, the noticee was requested to submit the statements/documents and records of relevant period to show the quantum of credit reversed by them** before the JRO vide letter dated 08.11.2011 and 28.11.2011. The noticee was again requested vide letter dated 06.01.2012 to produce all the relevant records/documents before the Jurisdictional Deputy Commissioner for verification by 13.1.2012. They also sought time to produce records but failed to do so. **Enough opportunities have been offered to the noticee, to come forward with the records/documents to demonstrate the reversal of credit made by them but they have not responded to the requests.**

13.7 However. I find that the noticee vide their written submissions dated 17-01-2012 have expressed their inability to produce/ demonstrate the required records/ documents. They further submitted that in the orders passed by the predecessor Commissioner of Central Excise, details of reversal of Cenvat credit by the noticee have been recorded, and a reference to the report of their letter from the office of the Jurisdictional Assistant Commissioner in respect of the noticee is also made. They have requested to make available to them the letters/reports referred in the order passed by the then Commissioner in order to demonstrate the quantum of reversal made by them. Further , vide their letter dated 27.01.2012 have submitted

that the calculations made in the previous order was wrong and hence the reversal of credit made by them so far was correct and there was no short reversal and also the reversal of credit was not the subject matter of the show cause notice. **The Jurisdictional Deputy Commissioner vide his letter dated 13-02-2012 had reported that the noticee could not produce any original documents for verification and in the absence of the required records/documents the range office was unable to verify the reversal of Cenvat credit. I find that on one hand the noticee submit that they can not produce any records for verification and on the other hand they claim that the calculations shown in the table of the previous Order is incorrect which contradicts their own submissions. I also opine that mere submissions with out proper proof to substantiate their claim would not in any way come to their help.**

13.8 From the CESTAT's order in the case, I find that **the noticee had taken a stand that the Cenvat credit availed in respect of inputs used in the manufacture of final products cleared under Not. No.30/2004 stands reversed by them and they are in a position to demonstrate the quantum of credit reversed before Commissioner. As such the onus to demonstrate/ prove the same before commissioner rests with them. Despite making a claim before the Tribunal, that they are in a position to demonstrate and also despite adequate opportunities offered to them to come forward to demonstrate their stand they had expressed their inability to do so or produce the records/documents for verification to prove that quantification shown in OIO passed by the then Commissioner is incorrect.**

13.9 Now I find that in the absence of any statutory records made available for verification, it is not possible to ascertain the quantum of reversal of Cenvat credit attributable to the inputs used in the manufacture of exempted final products.

13.10 Having discussed in the foregoing paragraphs, I find that the noticee :

a) have not maintained separate accounts as per the mandatory requirements for availing of benefit of exemption under Notification No. 30/2004-CE dated 09.07.2004;

b) have failed to demonstrate the quantum of Cenvat credit reversal in pursuance to the CESTAT's order despite adequate opportunities have been offered to them.

c) have neither followed the statute in total adherence in as much as they failed to follow the provisions of Not.no.30/2004 CE dated 09-07-2004 nor have followed the directions of the order of the Hon'ble CESTAT in as much as they failed to demonstrate the quantum of reversal of Cenvat credit made by them.

13.11 Now, coming to the decisions put forward by the noticee and by the Hon'ble CESTAT while remanding the case i.e. of Hon'ble Gujarat High Court in the case of M/s. Ashima Dyecot Ltd and M/s. Maize Products and the Hon'ble CESTATs order in the instant case, it is clear that the reversal of Cenvat credit was allowed even at the appeal stage but regarding quantum of the reversal of credit, the said order accentuated that the same is subject to verification.

13.12 Despite making a claim before the Tribunal, I find that the noticee had expressed their inability to demonstrate or produce the records/documents to prove that quantification shown in OIO is incorrect. Hence I do not have any other option but to hold that the noticee is not eligible to the benefit of exemption under Not. No. 30/2004 CE dated 09-07-2004.

13.13 Further, I find that regarding liability of penalty on the noticee, under Section 11 AC of the Central Excise Act, 1944, in the instant case, the noticee has wrongly availed the benefit under

exemption Notification No.30/2004-CE, dated 9.7.2004, and have cleared their goods without payment of appropriate Central Excise duty and has thus contravened the provisions of Notification No.30/2004-CE, dated 9.7.2004, in as much as they have availed the Cenvat credit on their inputs used in the manufacture of exempted goods and not maintained the separate accounts for their inputs used in dutiable and exempted goods. In this case, as already held above, the noticee has taken the Cenvat credit on such inputs, used in the manufacture of goods cleared under exemption, and thereby they have contravened the provisions of Notification No.30/2004-CE, dated 09.07.2004, with intent to evade payment of duty. The above act on the part of the noticee, has therefore, rendered themselves liable to penalty, under Section 11AC of the Central Excise Act, 1944. I find that, in the case of **UOI Vs. Dharmendra Textile Processors reported 2008(231) ELT3 (SC), the Larger Bench of Hon'ble Supreme Court has held that there is no discretion to reduce penalty under Section 11AC.** Accordingly, the penalty equal to duty short paid, is liable to be imposed on the noticee, in this case.

13.14 According to Rule 25 (1)(a), (b), and (d) of Central Excise Rules, 2002, if a manufacturer removes any excisable goods in contravention of any of the provisions of these rules or the notifications issued under these rules; nor accounts for any excisable goods manufactured and contravenes any of the provisions of these rules or the notifications issued under these rules with intent to evade payment of duty, then all such goods shall be liable to confiscation. In this case, the noticee has contravened the condition of the exemption Notification No.30/2004-CE, dated 09.07.2004, issued under Central Excise Act, 1944 read with the clarificatory Circular No.795/28/2004 dated 28.7.2004 issued by the Board, even though we were aware of the condition stipulated under the said notification. **All these acts of contravention on the part of the noticee have been committed with an intent to evade payment of Central Excise duty and therefore these acts of contravention constitute offence of the nature and type as described in Rule 25 (1) (a), (b) & (d) of Central Excise Rules, 2002 which attracts confiscation of goods in question. Therefore, I hold that the said 3,99,85,626 L. Mtrs.**

of processed fabrics valued at Rs. 21,06,90,000/-, which have been cleared without payment of duty, are also liable for confiscation under Rule 25 (1) (a), (b) & (d) of Central Excise Rules, 2002. However, since the goods are not available, for confiscation, I refrain from actual confiscation of the goods.

13.15 I also find that the noticee has failed to furnish the list of all the records, prepared or maintained by them, for accounting of transactions in regard to receipt, purchase, manufacture, storage, of inputs used in the manufacture of goods cleared on payment of duty under Notification No.29/2004-CE, dated 09.07.2004, and goods cleared without payment of duty by availing the benefit of exemption under Notification No.30/2004-CE, dated 09.07.2004. As such, I hold that the noticee has contravened the provisions of Rule 22(2) of the Central Excise Rules, 2002, and hence liable to penalty under the provisions of Rule 27 of the Central Excise Rules, 2002.

14. In view of the foregoing discussion, I pass the following order:

ORDER

14.1 I confirm demand of Central Excise Duty amounting to **Rs.1,22,19,970/- (Rupees One Crore Twenty Two Lakhs Nineteen Thousand Nine Hundred Seventy Only)** (as detailed in Annexure 'A' to the Show Cause Notice, dated 07.03.2007), against **M/s. Shambhu Textile Mills Pvt. Ltd., Kashiram Mill Compound, Ranipur, Narol, Ahmedabad,** under the first proviso to sub-section (1) of Section 11 A of the Central Excise Act, 1944, and order recovery thereof.

14.2 I **order recovery of interest involved on the Central Excise Duty amounting to Rs.1,22,19,970/-**, as confirmed above, from **M/s. Shambhu Textile Mills Pvt. Ltd., Kashiram Mill Compound, Ranipur, Narol, Ahmedabad,** at the appropriate rate prescribed under Section 11AB of the Central Excise Act, 1944.

14.3 I **impose a penalty of Rs.1,22,19,970/- (Rupees One Crore Twenty Two Lakhs Nineteen Thousand Nine Hundred Seventy Only) on M/s. Shambhu Textile Mills Pvt. Ltd., Kashiram Mill Compound, Ranipur, Narol, Ahmedabad,** under the provisions of Section 11 AC of Central Excise Act 1944.

14.4 I **hold that the 3,99,85,626 L.Mtrs. of processed fabrics valued at Rs. 21,06,90,000/-, which have been cleared without payment of duty, as discussed in the foregoing paras, are liable for confiscation** under the provisions of Rule 25(1) (a), (b) & (d) of the Central Excise Rules, 2002. However, since the goods are not available for confiscation, I refrain from actual confiscation of the same.

14.5 I **impose a penalty of Rs.5,000/- (Rupees Five Thousand Only) on M/s. Shambhu Textile Mills Pvt. Ltd., Kashiram Mill Compound, Ranipur, Narol, Ahmedabad,** under the provisions of Rule 27 of the Central Excise Rules, 2002.

15. In terms of the provisions of Section 11 AC of Central Excise Act 1944, where such duty, as determined under sub-section (2) of Section 11 A and the interest payable thereon under Section 11AB of the Central Excise Act, 1944, **is paid within thirty days from the date of the communication of the order** of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section, **shall be twenty-five per cent of the duty so determined**.

15.1 Accordingly, **M/s. Shambhu Textile Mills Pvt. Ltd., Kashiram Mill Compound, Ranipur, Narol, Ahmedabad,** are given an option to avail the offer of payment of **reduced penalty amounting to Rs.30,54,993/- (25% of Rs.1,22,19,970/-)** under Section 11AC of the Central Excise Act, 1944, **subject to the**

condition that the entire amount of duty determined and confirmed in para 14.1 i.e. Rs.1,22,19,970/- alongwith interest at appropriate rate, as ordered in para 14.2, and the 25% of penalty of Rs.1,22,19,970/- as imposed vide para 14.3 of the said order, i.e. Rs.30,54,993/- is paid within the period of thirty days, of the communication /receipt of this order. If the same is not paid within 30 days of receipt of the order, then the said option will not be available to them and they will be liable to pay the entire amount of penalty of Rs.1,22,19,970/-, as imposed on them, under Section 11AC of the Central Excise Act, 1944, as per para 14.3 of the order.

ATTESTED

J.V.L. PRASAD
SUPERINTENDENT (O&A)
CENTRAL EXCISE, H.Q.
AHMEDABAD-I

(RAJU)
COMMISSIONER,
CENTRAL EXCISE,
AHMEDABAD-I.

F.No.V.52/15-155/Dem/Shambhu/07 Dated: 15.02.2012

By Hand Delivery:

To.
M/s. Shambhu Textile Mills Pvt. Ltd.,
Kashiram Mill Compound, Ranipur,
Narol,
Ahmedabad.

Copy for information and necessary action to :

1) The Chief Commissioner, Central Excise, Ahmedabad Zone, Ahmedabad.
2) The Additional Commissioner (R.R.A.), Central Excise, Ahmedabad-I.
3) The Joint Commissioner (Preventive), Central Excise, Ahmedabad-I.
4) The Joint Commissioner (Legal & Prosecution), Central Excise, Ahmedabad-I.
5) The Assistant Commissioner, Central Excise, Div-IV, Ahmedabad-I.
6) The Superintendent, Central Excise, AR-I, Division-IV, Ahmedabad – I.
7) The Superintendent (Systems), Central Excise, Ahmedabad-I
8) Guard File.