सत्यमेव जयते

आयुक्त का कार्यालय) ,अपीलस(
Office of the Commissioner,
केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय
Central GST, Appeal Commissionerate-Ahmedabad
जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.
CGST Bhavan,Revenue Marg,Ambawadi,Ahmedabad-380015
. ☎ :079-26305065 टेलेफैक्स :079 26305136 –
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DIN-202011164SW0000777D55

स्पीड पोस्ट

क फाइल संख्या : File No : V2/40/GNR/Appeals/2019-20/16360 TO 16365

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-003-APP-39/20-21**
दिनाँक Date : **29.10.2020** जारी करने की तारीख Date of Issue 24/11/2020

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original No. **AHM-CEX-003-ADC-PMR-001-19-20** दिनाँक: **25.04.2019**, issued by Additional Commissioner of Central GST & Central Excise, Gandhinagar Commissionerate.

ध अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

M/s Bloom Dekor Ltd.,
Plot No. 267, Village Oran, N.H. No. 8,
Taluka-Prantij, District-Sabarkantha.

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गएं सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अतत नीचे बताए गए मामलों के बारे में पूवोक्त धारा को उप–धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(क) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(ख) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(B) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो डयूटी केडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(c) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए–8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनाँक से तीन मास के भीतर मूल–आदेश एवं अपील आदेश की दो–दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35–इ में निर्धारित फी के भुगतान के सबूत के साथ टीआर–6 चालान की प्रति भी होनी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/– की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपीलः–
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35–बी/35–इ के अंतर्गतः–

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में 2nd माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल ओदश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता हैं।

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention in invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण **(सिस्टेट)**, के प्रति अपीलो के मामले में कर्तव्य मांग (Demand) एवं दंड (Penalty) का 10% पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा [illegible] रुपए है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* खंड 11D के तहत निर्धारित राशि;
(ii) लिया गलत सेनवैट क्रेडिट की राशि;
(iii) सेनवैट क्रेडिट नियमों के नियम 6 के तहत देय राशि.

⇨ यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील' दाखिल करने के लिए पूर्व शर्त बना दिया गया है

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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

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

इस इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

In view of above, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute."

ORDER-IN-APPEAL

M/s Bloom Dekor Ltd., Plot No.267, Village Oran, N.H. No.8, Taluka: Prantij, District-Sabarkantha (hereinafter referred to as the "*appellant*") has filed the present appeal against the Order-in-Original No.AHM-CEX-003-ADC-PMR-001-19-20 dated 25.04.2019 (hereinafter referred to as the "*impugned order*") passed by the Additional Commissioner of CGST& Central Excise, Gandhinagar Commissionerate (hereinafter referred to as the "*adjudicating authority*").

2. The facts of the case, in brief, are that the appellant is engaged in manufacture of Paper Based Decorative Laminate Sheets falling under Chapter Heading 48239019of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as "*CETA*") and was holding Central Excise Registration No.AAACB6221BXM001 and Service Tax Registration No.AAACB6221BST001. During the course of audit of financial records of the appellant by the officers of department, for the period January-2013 to December-2013, certain discrepancies were noticed which were conveyed to them vide FAR No. 185/2014-15(Excise) dated 08.12.2014 by the Assistant Commissioner of Central Excise & Service Tax, Audit-I, Ahmedabad. Finally, a Show Cause Notice (hereinafter referred to as the "*SCN*") dated 07.02.2018 was issued by the Additional Commissioner of CGST & Central Excise, Gandhinagar Commissionerate alleging following violations:

(i) cenvat credit on capital goods to the tune of Rs.3,20,653/- taken by them is not eligible as the goods do not qualify to be treated as Capital Goods;

(ii) cenvat credit amounting to Rs.98,256/- short reversed on capital goods upon which benefit of depreciation claimed under Income Tax Act;

(iii) cenvat credit amounting Rs.3,21,842/- reversed/paid short on the goods which were sold again after receiving back from the customers and upon which the cenvat credit was taken when goods were received back after original sale;

(iv) wrong availment of cenvat credit amounting Rs.5,25,252/- on imported inputs, damaged during transit, and thus could not be utilized for production of Final Goods;

(v) wrong availment of cenvat credit to the tune of Rs.41,238/- for common input service used for dutiable goods as well as for exempted goods i.e. trading goods which are exempted from payment of central excise duty as well as from service tax;

(vi) Short payment of duty amounting to Rs.2,98,000/- on account of reconciliation of balance sheet vis-à-vis ER 1 for the period 2012-13;

(vii) short payment of duty amounting Rs.14,35,823/- on account of difference in price between the value on which goods transferred to Depots and the value of goods on which sale took place from the said Depots;

(viii) clearance of goods, involving duty to the tune of Rs.74,10,774/-,to units over which control exercised by the key management of the assessee or clearance made to related person;

3. After hearing the appellant, the adjudicating authority vide the impugned order confirmed the demand of duty as proposed in the SCN along with interest by invoking extended period under Section 11A(4) and Section 11AA of the Central Excise Act, 1944 respectively. Penalties were also imposed upon the appellant under Section 11AC of the Central Excise Act, 1944 read with (i) Rule 15 of the Cenvat Credit Rules, 2004 and (ii) Rule 25 of Central Excise Rules, 2002.

4. Being aggrieved with the impugned order, appellant preferred an appeal on the grounds that:

(i) regarding the cenvat credit of Rs.3,20,653/-availed by them on the HR Plates and sheets, MS Channels etc. and all other items, which are not considered as capital goods, were used in the factory for support repair and maintenance of capital goods and excise duty paid on these items were availed as cenvat credit on capital goods; without utilizing such goods, the machines and equipments could not be utilized for the manufacturing activity further this issue is now settled by virtue of judgement of the Apex Court in case of M/s. Rajasthan Spinning & Weaving Mills Ltd. reported at 2010(255)ELT 481(SC); the Apex Court in case of Sirpur Paper Mills reported at 1998(97) E3(SC), M/s. Solid Correct Engineering reported at 2010(252) ELT 481(SC) and in M/s. Scientific Engineering House Pvt. Ltd. reported at 1986 SCC page 11 that any goods used even for erecting and supporting plant or machines were a part and parcel of the manufacturing plant and machines; that goods in question is undisputedly used in the factory in relation to manufacture of final goods;

(ii) regarding the cenvat credit amounting to Rs.98,256/-, short reversed on capital goods upon which benefit of depreciation claimed under Income Tax Act, they have not taken double benefit of availment of cenvat credit and depreciation on cenvat credit amount under the Income Tax Act and they have claimed depreciation on the net addition of Rs.91,77,475/- after deducting 100% cenvat credit;

(iii) regarding the cenvat credit amounting Rs.3,21,842/- on duty paid returned rejected goods which were cleared again on payment of duty, it is submitted that they assessed the extent of damage and attempted to repair the same however the same goods could not be sold as first quality and were sold in the normal course of business at lesser price; that under Rule 16(2) of Central Excise Rules, 2002 the credit is required to be reversed only when the goods are removed without undertaking any operation thereon whereas they had undertook various repair/rectification operation on the returned goods so as to sale it again though at a lesser price; the said goods were sold as laminated sheets to the different customers and duty is paid on transaction value;

(iv) regarding the wrong availment of cenvat credit amounting Rs.5,25,252/- on imported base papers which were damaged during transit and were not fit to be used for manufacturing, it is submitted that only 30%-40% of the said goods were damaged and only that much goods were not utilized as inputs; that rest of the imported base papers were utilized for the manufacture; that the value of damaged stock was Rs.6,88,637/- and the duty involved was Rs.86,154/- only therefore the demand of Rs.5,25,252/- is totally incorrect;

that they have lodged claim for only 30%-40% of the goods and the claim was sanctioned to the extent of Rs.4,75,960/- ;

(v) regarding the wrong availment of cenvat credit to the tune of Rs.41,238/- for common input service used for dutiable goods as well as for exempted goods i.e. trading goods, it is submitted that the demand is confirmed for availment of credit of service tax paid on Chartered Accountant service only; that activity of trading goods has been disclosed by them while filing ER-4 return under which "details of traded goods" are required to be disclosed; that forms/formats prescribed by the Govt. do not contain any column or place for recording of trading business which is carried out by the manufacturer; that trading business is conducted from a different place located away from factory and separate accounts are maintained for trading business thus cenvat credit of such common input service was not availed by them; moreover only that much credit could be denied and recovered which was taken or availed wrongly and demand of 5% or 6% of the value of exempted activities is not permissible; ER-1 return prescribed for manufacturer does not contain any column or space for declaring details of traded goods;

(vi) regarding the short payment of duty of Rs.2,98,000/- on account of reconciliation for the period 2012-13 , it has been submitted that the sales mentioned in the balance sheet also includes sales generated through their depot and Department has already raised dispute on the assessable value of such depot sale; that the figures of sales appearing in their balance sheet are the figures which they have to mention in terms of the provisions of Company's Act and various other act;

(vii) regarding the short payment of duty on account of goods transferred to their Deport at Ahmedabad (Sarkhej) and Chandigarh, they submitted that method adopted by the Department for determining the differential value in respect of Deport sale is not proper and the differential duty would be Rs.23,255/- and Rs.4,67,065/- respectively;

(viii) regarding the clearance of goods to related person M/s. Suncare Ltd. and M/s. Karan Interior Ltd., it is submitted that the appellant is a limited company and the above referred two buyers of their goods were also companies and all the three companies are incorporated under the provisions of Companies Act and therefore the Directors and Shareholders of such companies are distinct and independent of the companies; that the existence of companies are independent and separate of the shareholders and directors; that such companies can never be related person of each other or one another, unless they are holding company and subsidiary company; that 'related party disclosure' under Accounting Standard AS-18 is totally unconnected with the concept of 'related person' under Section 4 of the Central Excise Act; that the principle flows from various case laws indicate that the buyer and seller should have mutuality of interest in the business of each other then only they can be said to be related person under Section 4 of the Central Excise Act, 1944; that in case of manufacturer and buyer being the companies, mutuality of interest cannot be inferred from common Directors but could be inferred from mutuality of interest between companies only;

(ix) that the demand is time barred as the issues have been raised on the basis of verification of their books of account and statutory records and this is not the case that either the information has not been provided by them or they

have supplied the wrong information; that the information was already reflected and disclosed in their books of accounts on which demand has been raised; that since information was available in their records, there cannot be any suppression;

(x) that penalty is a quasi-criminal matter and can be imposed in case where malafide intention or guilty conscious of an assessee is established and in this case there is no suggestion or allegation of any malafide intention to evade payment of duty; reliance is placed on the judgement of Apex Court in case of M/s. Hindustan Steel Ltd. reported at 1978 ELT (J159) wherein it is said that penalty should not be imposed merely because it was lawful to do so and in their case they did not act dishonestly or contumaciously.

5. Personal hearing in this case was accorded to the appellant on 18.08.2020. Shri Amal P. Dave, Advocate, on behalf of the appellant, appeared for the hearing. He reiterated the submissions made in the Appeal Memorandum. He submitted a copy of SCN dated 03.08.2018 issued by Himmatnagar Division to contend that there was duplication of demand on the issue of price difference at factory gate vis-à-vis stock transfer to Depot and demand of duty on differential price. Hence, the demand is time-barred. He further submitted a compilation of case laws on various issues. He placed reliance on the case law of Thiru Arooran Sugars v/s. CESTAT, Chennai reported at 2017(355)ELT 373(Mad.) on the issue of admissibility of Cenvat on MS Channel etc. As regards related party transactions, they stated that the related parties under Income-Tax is different than related person under Central Excise Act. Further, there was no mutuality of interest in the entire transaction even if the Directors were common in some of the firms.

6. I have carefully gone through the facts of the case, grounds of appeal in the Appeal Memorandum and the records/documents available in the matter. It is observed that the issues to be decided in the present appeal are as under:

(i) Whether cenvat credit availed on capital goods on strength of invoices in respect of supply of M.S. Channel, Shriving Rack, H.R. Flat etc. to the tune of Rs.3,20,653/- by the appellant is eligible;

(ii) Whether appellant has taken dual benefit i.e. taken cenvat credit on capital goods (Press Mould) and also claimed benefit of depreciation under Income Tax Act on the said capital goods;

(iii) Whether there was a short payment of duty amounting to Rs. 3,21,842/- on account of difference in amount of cenvat credit availed by the appellant on rejected goods, which were subsequently cleared without carrying out any process amounting to manufacture on payment of duty on the transaction value (which is less than the amount upon which original sale took place) and whether there was a short payment of central excise duty on this count;

(iv) Whether cenvat credit amounting to Rs. 5,25,252/- availed on imported inputs, which is claimed to be damaged during transit and on which Insurance was also claimed, and allegedly claimed to be unfit for utilization for production of Final Goods, has been rightly availed by the appellant;

(v) Whether there is wrong availment of cenvat credit to the tune of Rs.41,238/- for common input service used for clearance of dutiable goods as well as for exempted goods i.e. trading goods which are exempted from payment of central excise duty as well as from service tax;

(vi) Whether there is Short payment of duty amounting to Rs.2,98,000/- on account of reconciliation of sales figures appearing in Excise Returns Vis-à-vis Balance Sheet for the period 2012-13;

(vii) Whether there was a short payment of duty amounting to Rs. 14,35,823/- on account of price difference between clearance of goods made on stock transfer to the different depots of the appellant from where the goods were ultimately sold;

(viii) Whether the goods cleared by the appellant to M/s. Suncare Traders Ltd. and M/s. Karan Interior Ltd. can be said to be cleared to person over which control exercised by the key management personnel of the appellant and hence fall under the category of related person transaction and whether there was a short payment of duty amounting to Rs. 74,10,774/- as per the provisions of The Central excise Act, 1944 read with Rule 9, 2 (b) and 2 (c) of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000.

The issues have arisen on account of audit of the records of the appellant undertaken by the Department and communicated vide FAR No.185/2014-15 dated 08.12.2014 issued by Assistant Commissioner of Audit – I Commissionerate, Ahmedabad.

7. Since several issues are involved in the case, it would be proper to discuss each issue separately in seriatim.

7. 1. As regards the cenvat credit availed by the appellant on capital goods amounting to Rs.3,20,653/-, it is observed that the appellant has availed CENVAT Credit of capital goods on the strength of invoices pertaining to M. S. Channel, H. R. Plate, Shriving Rack, etc. falling under Chapter 72 of the Central Excise Tariff Act, 1985. It is the contention of the Department that the said goods do not qualify to be treated as Capital Goods as they do not fall within the purview of definition of capital goods and that they were used for supporting, repair and maintenance of the capital goods and in the repair of and maintenance of chimney. The appellant, on the other hand, contended that the cenvat credit availed by them as capital goods on the HR Plates and sheets, MS Channels etc. were used in the factory for support, repair and maintenance of capital goods.

Rule 2(a) of CENVAT Credit Rules, 2004 defines 'Capital Goods' as under:

"(a) "capital goods" means:-

(A) The following goods, namely:-

(i) All goods falling under Chapter 82, Chapter 84, Chapter 85, Chapter 90, heading 6805, grinding wheels and the like, and parts thereof

falling under heading 6804 of the First Schedule to the Excise Tariff Act;

(ii) Pollution control equipment;

(iii) Components, spares and accessories of the goods specified at (i) and (ii);

(iv) Moulds and dies, jigs and fixtures;

(v) Refractories and refractory materials;

(vi) Tubes and pipes and fittings thereof;

(vii) Storage tank and

(viii) Motor vehicles other than those falling under tariff headings 8702, 8703, 8704, 8711 and their chassis but including dumpers and tippers, Used –

(1) in the factory of the manufacturer of the final products but does not include and equipment or appliance used in an office; or

(1A) outside the factory of the manufacturer of the final products for generation of electricity or for pumping of water for captive use within the factory; or

(2) for providing output service;

(B) Motor vehicle designed for transportation of goods including their chassis registered in the name of the service provider, when used for-

(i) Providing an output service of renting of such motor vehicle; or

(ii) Transportation of inputs and capital goods used for providing an output service; or

(iii) Providing an output service of courier agency;

(C) Motor vehicle designed to carry passengers including their chassis, registered in the name of the provider of service, when used for providing output service of-

(i) Transportation of passengers; or

(ii) Renting of such motor vehicle; or

(iii) Imparting motor driving skills;

(D) Components, spares and accessories of motor vehicles which are capital goods for the assessee;"

Further, the relevant Para 3 of CBEC Instruction issued from F. No. 267/11/2010-CX8 dated 08.07.2010 is reproduced below:

"3. .....The credit on inputs used in the manufacture of capital goods, which are further used in the factory of the manufacturer is also available, except for items like cement, angles, channels, CTD or TMT bars and other items used for construction of factory shed, building or laying of foundation or making of structures for support of capital goods. Further, credit shall not be admissible on inputs used for repair and maintenance of capital goods."

It is observed from the definition as well as Board's Clarification above that the goods in dispute falling under Chapter No. 72 of the Central Excise Tariff Act, 1985 on which the appellant has availed cenvat credit as capital goods do not fall within the definition of Capital Goods and that the CBEC Instruction has further clarified that cenvat credit is not admissible on the goods used for repair and maintenance of capital goods. The appellant themselves have admitted that the said goods were used for repair and maintenance after which no doubt is left that the cenvat credit on such goods is not available to the appellant.

7.1.1. It is further observed that the appellant has alternatively raised admissibility of product in question as inputs. I find that this issue was not raised earlier before the adjudicating authority and hence it would not be proper to consider their plea in this regard in appeal proceedings. It is further observed that they have relied upon various judicial pronouncements in support of their claim that the goods were eligible to be treated as capital goods. I have gone through all the judgements relied upon by the appellant and it is observed that the facts of the present case are different from the facts of the case relied upon by the appellant. In some cases the goods were used for construction of chimney as per the norms for pollution control; in some cases the goods were used for fabrication of supporting structure for pollution control machinery. Further, there are other judgements where the goods were not considered capital goods. Besides that, the judgement in case of M/s. Thiru Aroon Sugars has not attained finality and the Hon'ble Supreme Court has granted leave filed by the Department against the said order. As the appellant has also contended the eligibility of goods to be considered as inputs, it would be proper that the matter be remanded back to the adjudicating authority to consider their plea.

7.2. It is observed that the appellant had availed CENVAT credit of Rs.8,85,052/- as capital goods on Press Mould received during 2012-13 and simultaneously availed depreciation under Section 32 of the Income Tax act, 1961. However, they reversed an amount of Rs. 7,86,796/- only before availing depreciation instead of the full amount as alleged in the SCN resulting in short reversal of Rs. 98,256/- which was ineligible under Rule 4 (4) of the Cenvat Credit Rules, 2004. The appellant has contended that they have not taken double benefit of availment of cenvat credit and depreciation on cenvat credit amount under the Income Tax Act and they have claimed depreciation on the net addition of Rs.91,77,475/-, after deducting 100% cenvat credit. This issue requires examination of relevant documents. The Department has claimed that the amount has not been reversed fully whereas it is the argument of the appellant that they have reversed the cenvat credit fully. Under the circumstances, it would be prudent that the issue may be remanded back to the adjudicating authority to verify the facts and give a conclusive finding by passing a fresh order in this respect after following the principle of natural justice. Appellant is also directed to put forth documentary evidence before the adjudicating authority in support of their claim and for claiming any benefit, the burden to prove so is upon the appellant.

7.3. It is further observed that the appellant has cleared their finished products (Laminated Sheets) to their customers on payment of duty. Subsequently, some of these products were returned back being defective and the appellant availed CENVAT Credit on them. It has been alleged that since these products were subsequently cleared without any further process amounting to manufacture on payment of duty on clearance value, the appellant should have paid the an amount equal to CENVAT credit availed on such rejected goods which has resulted in short reversal of CENVAT Credit /short payment of

duty amounting to Rs.3,21,842/- as per provision of Rule 16 of the Central Excise Rules, 2002 read with Rule 3 (5) of Cenvat Credit Rules, 2004. It is contended by the appellant that they assessed the extent of damage of the rejected goods and attempted to repair the same however the same goods could not be sold as first quality and were sold in the normal course of business at lesser price. They further contended that under Rule 16(2) of Central Excise Rules, 2002, the credit is required to be reversed only when the goods are removed without undertaking any operation thereon whereas they had undertook various repair/rectification operation on the returned goods so as to sale it again though at a lesser price. They further stated that goods were sold as laminated sheets to the different customers and duty is paid on transaction value.

7.3.1. The Relevant part of Rule 16 of the Central Excise Rules, 2002 is reproduced as under:

> *"16. Credit of duty on goods brought to the factory.-*
> *(1) Where any goods on which duty had been paid at the time of removal thereof are brought to any factory for being re-made, refined, re-conditioned or for any other reason, the assessee shall state the particulars of such receipt in his records and shall be entitled to take CENVAT credit of the duty paid as if such goods are received as inputs under the CENVAT Credit Rules, 2002 and utilize this credit according to the said rules.*
>
> *(2) If the process to which the goods are subjected before being removed does not amount to manufacture, the manufacturer shall pay an amount equal to the CENVAT credit taken under sub-rule (1) and in any other case the manufacturer shall pay duty on goods received under sub-rule (1) at the rate applicable on the date of removal and on the value determined under sub-section (2) of section 3 or section 4 or section 4A of the Act, as the case may be."*
>
> (emphasis supplied)

It can be seen from the above that Rule 16(1) of Central Excise Rules, 2002, stipulates that if the goods, once cleared from the factory (upon which duty has been paid), is brought back to factory for being remade, refined, reconditioned or for any other reason, the duty paid on these goods can be taken as CENVAT credit as if such goods are received as inputs. Further, Rule 16(2) requires the manufacturer to pay an amount equal to the cenvat credit taken under Rule 16(1) on removal of such goods if the process, to which the goods were put to, does not amount to manufacture. I observe that it is not under dispute that the goods which were sold originally and brought back to factory were laminated sheets and when these goods were sold again they were sold as laminated sheets only. Hence, such goods were finished goods for the appellant both the time. It is further observed that the appellant has not put on record any evidence to establish their claim regarding any process undertaken on such goods which amounts to manufacture and hence their claim in this regard lacks factual support. In the present case, even after carrying out any process on such goods, the said goods of the appellant remains same i.e. laminated sheets which were cleared on lesser price. Therefore, as per Rule 16(2) of the Central Excise Rules, 2002 discussed above, the appellant are required to pay the amount equal to

the cenvat credit taken as input under Rule 16(1) of the said Rules when such goods were removed from factory. Further, the Board's Circular No.354/81/2000-TRU quoted by the appellant is out of context and misplaced in as much as the same does not contain any clarification as claimed by the appellant. I, therefore, find no reason to interfere with the order passed by the adjudicating authority and uphold the same on this issue.

7.4. It is further observed that the appellant had received Insurance Claims in respect of imported materials (base paper) covered under 6 Bills of Entry which were damaged in transit and which was not accepted by them and so not utilized in manufacture of finished goods. Hence, they were not eligible to avail cenvat credit amounting to Rs.5,25,252/- on such goods. It has been contended by the appellant that only 30%-40% of the said goods were damaged and only that much goods were not utilized as inputs. The rest of the imported goods i.e. base papers were utilized for the manufacture of final products. The value of damaged stock was Rs.6,88,637/- and the duty involved was Rs.86,154/- only therefore the demand of Rs.5,25,252/- is totally incorrect. It was further stated that they had lodged claim for only 30%-40% of the goods and the claim was sanctioned to the extent of Rs.4,75,960/-. It was also stated that they had already debited the amount of Rs.86,154/- before the issuance of SCN.

7.4.1. It is observed from Page 41 of the impugned order that the adjudicating authority has observed that the appellant has claimed to submit detailed worksheet as Annexure C reflecting each Bill of Entry, however no such worksheet was enclosed with the reply. Hence, contentions of the appellant was not explained before the adjudicating authority. In view of the above, it would be proper that the matter would be remanded back to the adjudicating authority for consideration of the contentions of the appellant regarding quantification of demand as well as amount already paid against the revised quantification. I, therefore, remand the issue back to the adjudicating authority to verify the claims of the appellant and pass a fresh order in this respect by following the principle of natural justice. Appellant is also directed to put forth documentary evidence before the adjudicating authority in support of their claim in the remand proceedings.

7.5. As regards the issue of wrong availment of cenvat credit amounting to Rs.41,238/- for common input service used for manufacture of dutiable goods (Laminate Sheets) as well as for exempted goods i.e. trading of Flush Doors, which are exempted from payment of central excise duty as well as from service tax, it has been contended by the appellant that the demand is confirmed for availment of credit of service tax paid on Chartered Accountant service only. It has been contended that activity of trading of goods has been disclosed by them while filing ER-4 return under which "details of traded goods" are required to be disclosed and as the forms/formats prescribed by the Govt. do not contain

any column or place for recording of trading business which is carried out by the manufacturer, it can not be alleged that they had resorted to suppression or mis-declaration of any facts. It is further contended that trading business is conducted from a different place located away from factory and separate accounts are maintained for trading business thus cenvat credit of such common input service was not availed by them. It was also contended that only that much credit could be denied and recovered which was taken or availed wrongly in non-compliance of Rule 6 (1) of Cenvat Credit Rules and demand of 5% or 6% of the value of exempted activities is not permissible. The Form ER-1 return prescribed for manufacturer does not contain any column or space for declaring details of traded goods.

7.5.1. The facts of the present issue reveal that the appellant is involved in some trading activity apart from being engaged in manufacturing activity. Therefore, if the Chartered Accountant has provided some service to the company/appellant regarding the accounts of the company/appellant, it would be considered for all their activities. Had it been the case that the Chartered Accountant has provided the services only regarding the manufacturing activity of the company/appellant, then it was obligatory on part of the company/appellant to get the Invoice/Bill specifically mentioning about it in the invoice/bill. If the bill/invoices does not incorporate such distinction, it would definitely be treated towards both the activity of the company. The appellant is in the tax regime since long and also availing professionals' service in their business. Therefore, it cannot be accepted from them that they are unaware of such types of issues in their line of business. In the self-assessment regime, the onus is cast upon the assessee to avail only such credit which is eligible to them and prove its genuineness. The appellant has contended that they have already paid back the amount along with interest. But since they paid it under protest, it was obligatory on part of the adjudicating authority to deal with the issue according to the law. Further, there also seems some contradiction with regard to the amount demanded in the matter in the impugned order. The adjudicating authority in page 45 of his order observed the amount of Rs.41,238/- as the amount of cenvat credit availed on the impugned common input service i.e. Chartered Accountant Service whereas the SCN describes the said amount as 6% of the value of exempted clearance. Thus, it would be prudent that the matter may be remanded back to the adjudicating authority to look into the issue again and pass a fresh order after following the principle of natural justice. The appellant is also directed to put forth proper documents before the adjudicating authority in support of their contentions.

7.6. It is further observed that demand of Rs. 2,98,000/- has been confirmed on account of difference in sales figures shown in the Balance Sheet under various heads of sales reported for the Financial Year 2012-13 compared to sales figures shown in the Excise

Returns for the period 2012-13. It has been contended by the appellant that the sales mentioned in the balance sheet also include sales generated through their depot and Department has already raised dispute on the assessable value of such depot sale. It was further submitted that the figures of sales appearing in their balance sheet are the figures which they have to mention in terms of the provisions of Company's Act and various other act. In such a scenario, confirmation of demand against their depot sales would not be legally sustainable. I find that the adjudicating authority has not given any finding in this regard and hence it would be proper and justified that the issue may be remanded back to him for fresh consideration and pass a reasoned order under the provisions of law. The appellant is also directed to submit the relevant documents in respect of their claim before the adjudicating authority.

7.7. It is further observed that the appellant has transferred their finished goods on stock transfer basis to their Depot situated at Ahmedabad (Sarkhej) and Chandigarh and the department has alleged short payment of duty amounting to Rs.14,35,823/- on account of difference in price between the value on which goods were sold at factory gate and the value of goods on which sale took place from the said Depots. The demand has been confirmed based on Rule 7 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with Rule 2 (b) and Rule 2 (c). The appellant has contended that the method adopted by the Department for determining the differential value in respect of Depot sale at Ahmedabad (Sarkhej) and Chandigarh is not proper and the differential duty would be Rs.23,255/- and Rs.4,67,065/- respectively.

7.7.1. It is observed that the adjudicating authority has specifically mentioned in the impugned order that though the appellant have claimed that they had worked out the differential duty yet they had not provided it to him for consideration. It is further observed that the appellant seems to have made their calculation based on quantification in Audit Objection, whereas the quantification as available in Annexure A to the SCN is different from the one in audit para. Hence, it would be proper that the matter be remanded back to the adjudicating authority so as to consider the contention of the appellant and pass fresh order as per the provisions of law. The appellant is also directed to put forth relevant supporting documents in support of their claim of quantification.

7.8. It is further observed that demand of Central Excise duty amounting to Rs.74,10,774/- has been confirmed against the appellant on account of the fact that they had cleared their finished goods to M/s. Suncare Ltd. and M/s. Karan Interior Ltd. over which the Key Management Personnel of the appellant firm exercised control and hence the transaction came under the category of related party transaction and as per Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000

read with Rule 2 (b), Rule 2 (c) and Rule 7 along with Section 4(3)(b) of the Central Excise Act, 1944, the value of the cleared goods would be those prevailing at the time of clearance from related person. It has been contended by the appellant that theirs is a limited company and the above referred two buyers of their goods were also companies and all the three companies are incorporated under the provisions of Companies Act and therefore the Directors and Shareholders of such companies are distinct and independent of the companies. The existence of companies are independent and separate of the shareholders and directors and that such companies can never be related person of each other or one another, unless they are holding company and subsidiary company. The 'related party disclosure' under Accounting Standard AS-18 is totally different from the concept of 'related person' under Section 4 of the Central Excise Act. The principle flowing from various case laws indicate that the buyer and seller should have mutuality of interest in the business of each other then only they can be said to be related person under Section 4 of the Central Excise Act, 1944. In case of manufacturer and buyer being the companies, mutuality of interest cannot be inferred from common Directors but could be inferred from mutuality of interest between companies only.

7.8.1. Section 4 of the Central Excise Act, 1944 deals with the valuation to be considered for the purpose of ascertaining duty demand. The relevant part is reproduced below:

SECTION [4.Valuation of excisable goods for purposes of charging of duty of excise. *—*

(1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall -

(a) in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the ***assessee and the buyer of the goods are not related*** *and the price is the sole consideration for the sale, be the transaction value;*

(b) ***in any other case****, including the case where the goods are not sold, be the value determined in such manner as may be prescribed.*

*[****Explanation****. — For the removal of doubts, it is hereby declared that the price-cum-duty of the excisable goods sold by the assessee shall be the price actually paid to him for the goods sold and the money value of the additional consideration, if any, flowing directly or indirectly from the buyer to the assessee in connection with the sale of such goods, and such price-cum-duty, excluding sales tax and other taxes, if any, actually paid, shall be deemed to include the duty payable on such goods.]*

(2) The provisions of this section shall not apply in respect of any excisable goods for which a tariff value has been fixed under sub-section (2) of section 3.

(3) For the purpose of this section,-

(a) "assessee" means the person who is liable to pay the duty of excise under this Act and includes his agent;

(b) ***persons shall be deemed to be "related"*** *if -*

(i) they are inter-connected undertakings;

(ii) they are relatives;

(iii) amongst them the buyer is a relative and a distributor of the assessee, or a sub-distributor of such distributor; or

(iv) they are so associated that they have interest, directly or indirectly, in the business of each other.

Explanation*. — In this clause -*

[(i) "inter-connected undertakings" means two or more undertakings which are inter-connected with each other in any of the following manners, namely :-

(A) if one owns or controls the other;

(B) where the undertakings are owned by firms, if such firms have one or more common partners;

(C) where the undertakings are owned by bodies corporate,-

(I) if one body corporate manages the other body corporate; or

(II) if one body corporate is a subsidiary of the other body corporate; or

(III) if the bodies corporate are under the same management; or

(IV) if one body corporate exercises control over the other body corporate in any other manner;

(D) where one undertaking is owned by a body corporate and the other is owned by a firm, if one or more partners of the firm, —

(I) hold, directly or indirectly, not less than fifty percent of the shares, whether preference or equity, of the body corporate; or

(II) exercise control, directly or indirectly, whether as director or otherwise, over the body corporate;

(E) if one is owned by a body corporate and the other is owned by a firm having bodies corporate as its partners, if such bodies corporate are under the same management;

(F) if the undertakings are owned or controlled by the same person or by the same group;

(G) if one is connected with the other either directly or through any number of undertakings which are inter-connected undertakings within the meaning of one or more of the foregoing sub-clauses.

***Explanation 1.** — For the purposes of this clause, two bodies corporate shall be deemed to be under the same management, -*

(i) if one such body corporate exercises control over the other or both are under the control of the same group or any of the constituents of the same group; or

(ii) if the managing director or manager of one such body corporate is the managing director or manager of the other; or

(iii) if one such body corporate holds not less than one-fourth of the equity shares in the other or controls the composition of not less than one-fourth of the total membership of the Board of directors of the other; or

(iv) if one or more directors of one such body corporate constitute, or at any time within a period of six months immediately preceding the day when the question arises as to whether such bodies corporate are under the same management, constituted (whether independently or together with relatives of such directors or employees of the first mentioned body corporate) one-fourth of the directors of the other; or

(v) if the same individual or individuals belonging to a group, while holding (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in one such body corporate also hold (whether by themselves or together with their relatives) not less than one-fourth of the equity shares in the other; or

(vi) if the same body corporate or bodies corporate belonging to a group, holding, whether independently or along with its or their subsidiary or subsidiaries, not less than one-fourth of the equity shares in one body corporate, also hold not less than one-fourth of the equity shares in the other; or

(vii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individual (whether independently or together with his relatives) or the same body corporate (whether independently or together with its subsidiaries); or

(viii) if not less than one-fourth of the total voting power in relation to each of the two bodies corporate is exercised or controlled by the same individuals belonging to a group or by the same bodies corporate belonging to a group, or jointly by such individual or individuals and one or more of such bodies corporate; or

(ix) if the directors of one such body corporate are accustomed to act in accordance with the directions or instructions of one or more of the directors of the other, or if the directors of both the bodies corporate are accustomed to act in accordance with the directions or instructions of an individual, whether belonging to a group or not.

Explanation II.— *If a group exercises control over a body corporate, that body corporate and every other body corporate, which is a constituent of, or controlled by, the group shall be deemed to be under the same management.*

Explanation III. — *If two or more bodies corporate under the same management hold, in the aggregate, not less than one-fourth equity share capital in any other body corporate, such other body corporate shall be deemed to be under the same management as the first mentioned bodies corporate.*

Explanation IV. — *In determining whether or not two or more bodies corporate are under the same management, the shares held by financial institutions in such bodies corporate shall not be taken into account.*

Further, Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 states as under:

RULE 9. *[Where whole or part of the excisable goods are sold by the assessee to or through a person who is related in the manner specified in any of the sub-clauses (ii), (iii) or (iv) of clause (b) of sub-section (3) of section 4 of the Act, the value of such goods shall be the normal transaction value] at which these are sold by the related person at the time of removal, to buyers (not being related person); or where such goods are not sold to such buyers, to buyers (being related person), who sells such goods in retail.*

7.8.2. It is observed that the adjudicating authority appears to have held M/s Suncare Traders Ltd. and M/s Karan Interiors Ltd. as related persons of the appellant by considering them as inter-connected undertakings as defined under Section 4(3)(b) of the Central Excise Act, 1944. If that be the case, then provisions of Rule 9 of the Valuation Rules would not apply directly in the case as valuation in case of inter-connected undertakings is governed by provisions of Rule 10 of the Valuation Rules. If that is not the case, it should have been clearly discussed by the adjudicating authority in the impugned order as to how the firms are related in terms of Section 4(3)(b) of the Act. The adjudicating authority does not seem to have examined these legal aspects in this regard in his order in its right perspective. I have gone through the judicial pronouncements cited by the appellant wherein it has been held that shareholders of a public limited company do not, by reason only of shareholding, have an interest in the business of company. Hence, I find force in the argument of the appellant that there has to be a mutuality of interest between the firms in question. I find that the adjudicating authority has not examined the issue based on the judicial pronouncements. Hence, it would be proper to remand the matter to him to examine the issue again as per the relevant legal provisions and in the light of the judicial pronouncements cited by the appellant.

8. As regards the issue of limitation, since the substantial issues in question are being remanded to the adjudicating authority, the appellant is free to raise this issue before the adjudicating authority.

9. In view of the discussions made above, all the issues covered in the impugned order, except the one pertaining to short reversal of CENVAT Credit /short payment of duty amounting to Rs. 3,21,842/- as per provision of Rule 16 of the Central Excise Rules, 2002, need proper examination afresh and is, therefore, remanded back to the adjudicating authority for fresh consideration to the extent discussed above in this order. The part of the impugned order confirming demand of Rs.3,21,842/- mentioned above along with interest is upheld as per discussion held in Para 7.3 and Para 7.3.1 of this Order. The penalty imposed in this matter under Section 11AC of the Central Excise Act, 1944 is also upheld as the appellant failed to comply with the provisions of Rule 16 of the Central Excise Rules, 2002 with a wrong notion and without proper justification which proved their malafide intent in contravening the provisions of Rule 16 ibid.

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

The appeal filed by the appellant stands disposed off in above terms.

29 October, 2020.

(Akhilesh Kumar)
Commissioner (Appeals)
Date: 29.10.2020

Attested

(Anilkumar P.)
Superintendent (Appeal)
CGST, Ahmedabad.

BY R.P.A.D. / SPEED-POST TO :
M/s. Bloom Dekor Ltd.,
Plot No.267, Village Oran,
N.H. No.8, Taluka Prantij,
Distt-Sabarkantha.

Copy to:-
1. The Principal Chief Commissioner, CGST &Central Excise, Ahmedabad Zone.
2. The Commissioner/Commissioner, CGST &Central Excise, Gandhinagar Comm'rate.
3.The Addl. Commissioner, CGST & Central Excise, Gandhinagar Comm'rate.
4.The Asstt. Commissioner, System, CGST & Central Excise, Gandhinagar Comm'rate.
5.TheAsstt/Dy.Commissioner, CGST& Central Excise, Himmatnagar Division, Gandhinagar.
6. Guard File.
7.P.A. File.