आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क ,अहमदाबाद – उत्तर, कस्टम हॉउस, प्रथम तल, नवरंगपुरा ,अहमदाबाद- 380009		OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009
फ़ोन नंबर./ PHONE No.: 079-27544557	फैक्स/ FAX : 079-27544463	E-mail:- oaahmedabad2@gmail.com

निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./ **F.No.** V.31/15-06/OA/2017 आदेश की तारीख़/Date of Order: - 17.10.2017

जारी करने की तारीख़/Date of Issue: - 20.10.2017

द्वारा पारित/Passed by:- जी. सी. जैन *IG. C. Jain*

अपर आयुक्त / *Joint Commissioner*

मूल आदेश संख्या / Order-In-Original No. 04/JC/2017/GCJ

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

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

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरूद्ध अपील ,इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी ,अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रू .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act,1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(1) उक्त अपील की प्रति।

(2) निर्णय की प्रतियाँ अथवा जिस आदेश के विरूद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रू) 2.00 .दो रूपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(1) Copy of accompanied Appeal.

(2) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय: -कारण बताओ सूचना/Show Cause Notice **F.No. V.31/15-06/OA/2017 dated 15.03.2017 issued to M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand-Viramgam Road, Village Vasna, Taluka Sanand, Dist. Ahmedabad.**

Brief facts of the case:-

M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand- Viramgam Road, Village Vasna, Taluka Sanand, Dist. Ahmedabad (hereinafter referred to as the Noticee), were holding Central Excise Registration Number AAACD0105GXM002 for the manufacture of Insecticides/ Pesticides and Fungicides falling under Chapter 38; Animal & Vegetable Fertilizers (Organic Manure) failing under Chapter 31 of the Schedule to the Central Excise Tariff Act, 1985 (herein after referred to as the Tariff Act). The Noticee is paying duty on the insecticides/pesticides and fungicides of Chapter 38, whereas the animal or vegetable fertilizers of Chapter 31 manufactured under the brand names 'Dhanzyme granules', and 'Dhanzyme Gold granules' are being cleared without payment of duty by claiming their classification under S.H. 31010099 of the said Tariff Act, which attracts nil tariff rate of duty.

2. The noticee is having another unit at Udhampur in Jammu and Kashmir. The Officers of Central Excise Commissionerate, Jammu & Kashmir examined the classification of "Dhanzyme Liquid" and "Dhanzyme Gold', manufactured and cleared in/from their unit at Jammu and it was found that the said products, in liquid form, were being manufactured and cleared in litres in unit quantities of 100 ml, 250 ml, 500 ml and 1000 ml, thereby weighing less than 10 kg by weight in all cases. The unit at Udhampur also informed that entire quantity manufactured/cleared during the month is converted in Kgs and shown as a single entry with the unit of quantity as "kg" in their statutory returns. The unit at Udhampur also informed during the course of investigation by the Officers of Jammu & Kashmir that at their Sanand unit also they had been manufacturing fertilizers of the brands of "Dhanzyme;, "Dhanzyme Gold", both in liquid and granular form and was also not paying Central Excise duty on the clearance of the products classifying their products under chapter heading 31010099 being NIL rate of duty.

3. Tariff heading 3101 of CETA, 1985 read as "Animal or vegetable fertilizers, whether or not mixed together or chemically treated; fertilizers produced by mixing or chemical treatment on animal or vegetable products." However, Tariff heading 31051000 reads as " Mineral or Chemical Fertilizer containing two or three of the fertilizing elements nitrogen, phosphorous and potassium; other fertilizers; Goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg." The underline words were inserted in the Tariff heading 3105 with effect from 28.02.2005 thereby enlarging the scope of this heading so as to cover the goods of this chapter i.e. chapter 31, if the products are packed in packages of gross weight not exceeding 10 kgs. In view of this, the said goods appeared to be classifiable under sub¬heading 31051000 of the Tariff Act and chargeable to Central Excise duty and not under sub-heading 31010099 as claimed by the Noticee.

4. On the basis of information received from the Central Excise Commissionerate, Jammu & Kashmir, to examine the issue of classification of the said products in detail, the factory premises of the Noticee was visited by the officers of Hqrs, Preventive of the erstwhile Central Excise Commissionerate, Ahmedabad-II along with two independent Panchas on 17.10.2016. Shri Raj Kumar Kanodia , President of the said noticee who was present at the time of visit of preventive officers, informed in presence of panchas that M/s Dhanuka Agritech Limited is holding Central Excise Registration Number AAACD0105GXM002 & engaged in the manufacturing of Insecticides and Fungicides falling under Chapter 38; Animal & Vegetable Fertilizers (Organic Manure} falling under Chapter 31 of the Schedule to the Central Excise

Tariff Act, 1985; that M/s Dhanuka Agritech Limited cleared/manufactured Insecticides/ Fungicides falling under Chapter 38 after payment of appropriate duties of excise; that the animal or vegetable fertilizers (organic manure) so manufactured under their brand names, namely Dhanzyme granules & Dhanzyme Gold Granules, were cleared at nil rate of duty by claiming classification under Tariff sub-heading 31010099 of the Central Excise Tariff Act, 1985, which attracts 'nil' rate of duty; that the major raw material/ active ingredient for the manufacture of Dhanzyme granules & Dhanzyme Gold Granules is 'Bio-Extract Organic Fertilizer' received in concentrated form which was a sea weed extract of vegetable/animal origin and that concentrated bio extract organic fertilizer, received under Tariff Heading 31010099 at nil rate of duty, was processed by adding Emulsifiers, DEG {Diethylene Glycol) and De¬Mineralized water for manufacturing Dhanzyme Gold Granules & for Dhanzyme Granules, it was processed by adding De-Mineralized water, the finished goods so manufactured in granular form were packed in pet jar, bucket, HDPE bag, pouches in HDPE Bag, pouches in HDPE drum of volume of 1 kg, 4 kg, 5 kg, 8 kg, 10 kg, 12 kg, 16 kg, 48 kg, & 50 kg and cleared at nil rate of duty by classifying under sub-heading 31010099 of the Central Excise Tariff Act, 1985.

4.1 Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited, Sanand, Ahmedabad explained the Preventive Officers in presence of panchas that they cleared/ manufactured Dhanzyme Gold Granules in various forms like 10 nos. of 1 kg each pet jar put in one case, 2 nos. of 10 kg each bucket put in one case, 4 nos. of 5 kg each pet jar put in one case & 5 nos. of 5 kg each hdpe bag put in one case. He informed that they cleared manufactured Dhanzyme Granules in various forms like 12 nos. of 4 kg each pouch packed in HDPE drum, 1 no. of 16 kg bucket, 1 no. of 48 kg HDPE drum, 1 no. of 50 kg HDPE drum, 24 nos. of 1 kg each pouch put in HDPE bag, 2 nos. of 10 kg each bucket put in one case, 2 nos. of 12 kg each carry bag put in HDPE bag, 3 nos. of 8 kg each pouch put in HDPE bag, 6 nos. of 4 kg each pouch put in HDPE bag & 6 nos. of 8 kg each pouch put in HDPE drum. He further informed that each unit pack provides the detailed information regarding composition of products, name of the manufacturer, batch no., manufacturing date, expiry date, net weight, maximum retail price and recommendation how to use it & it is in such pack which itself was in marketable condition however they were putting in the bulk pack (which also provides the similar information as the unit pack provides) for the sake of easy storing & transportation.

4.2 Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited,. Sanand, Ahmedabad showed Stock transfer / Tax Invoice No. SI-SND-1617-000490 dated 23.06.2016 to the Preventive Officers in presence of panchas wherein he proved his aforesaid claim about the various volumes of Dhanzyme Granules & Dhanzyme Gold Granules cleared under the said Tax Invoice. He further informed that each manufactured finished goods namely Dhanzyme Gold Granules having 10 nos. of 1 kg each pet jar put in one case which was cleared to their Depot on stock transfer under Tax Invoice and thereon the said consignment is cleared from their Depot to their Dealers under Tax Invoice and thereafter the said consignment was cleared in unit pack such as 1 kg, 4 kg, 5 kg, 8 kg & 10 kg as per demand of the customers.

4.3 The Preventive Officers, in presence of panchas, explained Shri Raj Kumar Kanodia that the classification under Tariff Heading 31010099 claimed by M/s Dhanuka Agritech Limited, Sanand, for their product namely animal or vegetable fertilizer 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' being manufactured and cleared in unit packs of 1 kg, 4 kg, 5 kg, 8 kg, 10 kg, and were equal or below 10 kg by weight; was not correct and it should be classified

under Tariff Heading 31051000 because Tariff Heading 3105 covers "Mineral or Chemical Fertilizer containing two or three of the fertilizing elements nitrogen, phosphorus and potassium; other fertilizers; Goods of that chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg"; that as most of the unit packs contain material weight equal or less than 10 kg, so the said products which are falling under sub-heading 31050010 which attracts tariff rate of 12.5% duty, however, Notification No. 12/2012-CE dated 17.3.2012 which prescribes effective rates of duty on specified goods of various chapters, covers goods of Chapter 31 at Sr. No. 128 which reads 'all goods, other than those which are clearly not to be used as fertilizers', prescribes rate of duty @1% ad-valorem subject to condition No. 25 which provided that

> *"If no credit under rule 3 or rule 13 of the Cenvat Credit Rules, 2004, has been taken in respect of the inputs or input services used in the manufacture of these goods".*

4.4 After acknowledging the correct position of law in respect of classification of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' under Central Excise Tariff subheading 31051000, Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited, Sanand, Ahmedabad admitted before the Preventive Officers, in presence of panchas, that 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' manufactured and cleared in the unit packs of 1 kg, 4 kg, 5 kg, 8 kg, 10 kg, all of which were packages of gross weight not exceeding 10 kg are appropriately classifiable under Tariff sub¬heading 31051000 of the Tariff Act instead of Tariff S.H. No. 31010099. Further, Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited, Sanand, Ahmedabad accepted before the Preventive Officers in presence of panchas that if any duty liabilities arise on the finished goods namely 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' which were cleared without payment of duty as of now, they would pay the appropriate duty after consulting with their legal consultant.

4.5 Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited, Sanand, Ahmedabad submitted before the Preventive Officers in presence of panchas that M/s Dhanuka Agritech Limited was keeping separate accounts of cenvatable common inputs under Cenvat Credit Rules, 2004, which were used for the manufacturing of dutiable & exempted finished goods. Therefore, he clarified that M/s Dhanuka Agritech Limited, Sanand, Ahmedabad was eligible & liable for paying duty @1% on 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' which were cleared without payment of duty as of now due to incorrect classification, since they were not availing cenvat credit on common inputs.

4.6 Thereafter, Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited, Sanand, Ahmedabad produced the total clearance value of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' with effect from 2014-15 upto September 2016 as their accounting system was updated from 2014-15.

S.No.	Financial Year	Total Clearance Value from the factory to Various Depot on the basis of 70% of the MRP.	Duty @1% ad-valorem subject to condition No. 25 of Notification No. 12/2012-CE dated 17.3.2012
1	2014-15	Rs. 269440185/-	Rs. 2694402/-
2	2015-16	Rs. 306592669/-	Rs. 3065927/-
3	2016-17 {upto Sept. 2016)	Rs. 180766032/-	Rs. 1807660/-

Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited, Sanand, Ahmedabad informed the Preventive Officers in presence of panchas that the total clearance value in respect of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' for the financial year 2012-13 & 2013-14 would be produced within two days as it was currently available at the Head Office, Gurgoan, Haryana. Thereafter, the Preventive Officers, in the presence of panchas, Shri Raj Kumar Kanodia & Shri Bhavesh J Kamdar, Deputy General Manager of the unit, had verified the stock position of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' lying in the bonded store and verified the same as per the entries made in books of accounts and found in order and the value of the same on the basis of 70% of the MRP amounts to Rs 88730790/-. He also confirmed that if any duty liability arises on clearance of 10 kg. unit pack of above said products, M/s Dhanuka Agritech Limited would discharge the central excise duty after consulting with the legal consultant of the firm. Further, Shri Raj Kumar Kanodia informed the Preventive Officers in presence of panchas that as and when they will clear the aforesaid finished goods from their factory premises, they will pay the central excise duty @1% ad-valorem subject to condition No. 25 of Notification No. 12/2012-CE dated 17.3.2012.

5. Further statement of Shri Raj Kumar Kanodia, President of M/s Dhanuka Agritech Limited, D-I/A-B, Ajanta Industrial Estate, Sanand-Viramgam Road, Village-Vasna-Iyava, Taluka-Sanand, Ahmedabad was recorded on 17.10.2016 under Section 14 of the Central Excise Act, 1944 wherein, after seeing and verifying the panchnama, he agreed with the contents mentioned therein and he reiterated the submissions/explanations made/given before the preventive officers while drawing the said panchnama.

6. Since the packing of the liquid/granules animal or vegetable fertilizer 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' manufactured and cleared by M/s Dhanuka Agritech Limited, Sanand, Ahmedabad were in unit packs of 1 kg, 4 kg, 5 kg, 8 kg, 10 kg, and were equal or below 10 kg by weight; its classification under Tariff Heading 31010099 claimed by the Noticee does not appear to be correct, in as much as, Tariff Heading 31051000 of Chapter 31 covers **"Mineral or Chemical Fertilizer containing two or three of the fertilizing elements nitrogen, phosphorus and potassium; other fertilizers; Goods of this chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg"** whereas, Tariff Heading 3101 reads **'Animal or vegetable fertilizers, whether or not mixed together or chemically treated; fertilizers produced by mixing or chemical treatment of animal or vegetable products**. Further, the subheadings of Chapter Heading 3101 namely 31010010 covers guano; 31010091 covers animal dung; 31010092 covers animal excreta and 31010099 cover 'others'. Therefore, from a careful reading of the heading 3101, it appears that animal or vegetable fertilizers whether or not mixed together and whether or not chemically treated would be covered under this heading, however, when these animal or vegetable fertilizers are manufactured in tablets or similar forms or ***in packages of a weight not exceeding 10 kg***, they appear to be classifiable under Tariff sub-heading 31051000 which is more specific than sub-heading 31010099. Rule 3(a) of the 'General Rules for the Interpretation of this Schedule 'also provides that 'the heading which provides the most specific description shall be preferred to the heading providing a more general description'. The Hon'ble Supreme Court, in the case of Speedways Rubber Co. V/s. CCE 2002(143) ELT 8 has also held that the heading which provides the most specific description shall be preferred to heading providing a more general description. Therefore, it appears that the classification of the animal or vegetable fertilizers

claimed by the Noticee under sub-heading 31010099 is not correct and it appears to be appropriately classifiable under sub-heading 31051000, being the most specific description of the goods of the Noticee.

7. Further statement of Shri Raj Kumar Kanodia, the President of the said noticee was recorded on 18.1.2017 under Section 14 of the Central Excise Act, 1944, wherein he, *interalia*, stated M/s Dhanuka Agritech Limited is registered under Central excise department & engaged in the manufacturing of Insecticides and Fungicides falling under Chapter 38; Animal & Vegetable Fertilizers (Organic Manure) falling under Chapter 31 of the Schedule to the Central Excise Tariff Act, 1985 ; that they are paying duty on the goods namely insecticides/ pesticides and fungicides under Chapter 38, whereas they were not paying any duty on the fertilizers being manufactured with the brand names 'Dhanzyme', 'Dhanzyme Gold' as all those products are Sea weed formulations / bio-fertilizers falls under chapter heading 3101; that M/s Dhanuka Agritech Limited has manufactured & cleared Dhanzyme Gold Granules in various packages like 10 nos. of 1 kg each pet jar put in one case, 2 nos. of 10 kg each bucket put in one case, 4 nos. of 5 kg each pet jar put in one case & 5 nos. of 5 kg each HDPE bag put in one case & also manufactured Dhanzyme Granules in various packages like 12 nos. of 4 kg each pouch packed in HDPE drum, 1 no. of 16 kg bucket, 1 no. of 48 kg HDPE drum, 1 no. of 50 kg HDPE drum, 24 nos. of 1 kg each pouch put in HDPE bag, 2 nos. of 10 kg each bucket put in one case, 2 nos. of 12 kg each carry bag put in HDPE bag, 3 nos. of 8 kg each pouch put in HDPE bag, 6 nos. of 4 kg each pouch put in HDPE bag & 6 nos. of 8 kg each pouch put in HDPE drum. He further stated that that products are packed in unit package of volume of 1kg, 4kgs, 5kgs, 8kgs, 10kgs, which are treated as the retail packs which never exceeded 10kgs, but in 10kgs buckets gross weight exceeds 10kgs, and other packages in a unit package of 12kgs, 16kgs, 48kgs & 50kgs are being sold as bulk packing; that each unit pack provides the detailed information regarding composition of products, name of the manufacturer, batch no., manufacturing date, expiry date, net weight, maximum retail price and recommendation how to use that & that is in such pack which itself is in readily marketable condition however they are putting in the bulk pack (which also provides the similar information as the unit pack provides) for the sake of easy storing & transportation; that each manufactured finished goods namely Dhanzyme Gold Granules having 10 nos. of 1 kg each pet jar put in one case which is cleared to their Depot on stock transfer under Tax Invoice and thereon the said consignment is cleared from their Depot to their Dealers under Tax Invoice and thereafter the said consignment may cleared in unit pack such as 1 kg, 4 kg, 5 kg, 8 kg & 10 kg net weight as per demand of their customers or in the same pack size supplied by their factory; that they were not showing the production / clearance in different packing sizes as they are doing for all other products; that rather, the entire quantity manufactured / cleared during the month is converted in Kg and shown as a single entry with the "unit of quantity" as "Kg" in the statutory ER-1 returns and claiming the exemption Notification 12/12-Cx dated 17.03.2012 at sr. No 128; that the major raw material for their product namely 'Dhanzyme' and 'Dhanzyme Gold', is Bio-extract Organic Fertilizer (in bulk form) which is being received without payment of duty being chargeable to NIL rate of duty under tariff heading 3101 00 99, therefore, question of taking Cenvat credit does not arise. He further stated that the said raw materials are also imported from China on payment of Customs/Excise duty, but on which they had not taken any CENVAT Credit on it; that the other inputs viz. DEG are common dutiable inputs which are used in the manufacture of dutiable insecticides / pesticides and exempted products i.e. fertilizers; that they receive duty paid invoices separately for that

product and they do not take any Cenvat credit and they maintain separate account for DEG. He further stated that they are not taking any Cenvat credit on the inputs used in the manufacture of fertilizers; that the Di-mineralized water, which is obtained from DM Water plant installed inside the factory and in the DM water plant also, no Cenvatable inputs are used; that as regards packing materials, they are using packing materials namely plastic buckets, caps, printed labels, HDPE bags and corrugated boxes which are received with pre-printed / embossed description of the fertilizer products; that though the packing materials are duty paid but being distinct and identifiable to be used for exempted goods, they do not take any Cenvat credit on them; He then produced the total clearance (upto 8kg and upto 10 kg separately) value of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' under unit packages upto weight of 10 kgs net weight with effect from 2012-13 upto September 2016,, which are as under

Sr. No.	F.Y.	clearance value(upto 8 kgs/10 kgs)in Rs.	Total Transaction Value in Rs.	Excise Duty in Rs.(@)l% + 2% Edu. Cess & 1% Higher Edu. Cess
1	2012-13	**145455889** **83794190**	229250079	2292501
2	2013-14	**188448452** **89327588**	277776040	2777760
3	2014-15	**220599184** **95603308**	316202492	3162025
4	2015-16	**216505367** **110271860**	326777227	3267772
5	2016- 17(upto Sept. 2016	**95149229** **57172156**	152321385	1523214
	Total	**866158121/436169102**	**1302327223**	**13023272**

On being asked, he further stated the total clearance value in respect of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' upto the weight of 10 kgs net for the financial year 2012-13 to 2016-17(upto Sept'16) is RS. 130,23,27,223/- and duty liability will be Rs. 1,30,23,272/- (including 10kg net weight bucket) @1% ad- valorem and 2% Edu. Cess and 1% Higher education Cess from 2012-13 to Feb.2015 are to be added which comes to Rs. 1,64,646/- & Rs, 82,323/- respectively, hence total duty required to be paid of Rs. 1,32,70,241/- subject to condition No. 25 of Notification No. 12/2012-CE dated 17.3.2012; that he accepted that if any duty liabilities arises on the finished goods namely 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' which are cleared without payment of duty as of now, they would pay the appropriate duty after consulting with their legal consultant. He further stated that they had paid Rs. 23,79,835/-(Duty Rs. 21,74,256/- + Interest of Rs. 2,05,579/-) under protest vide challan no 01396 dated 24.10.2016 against the duty & interest for the period October 2015 to September 16 (upto weight of 8kgs clearance of("Dhanzyme", "Dhanzyme Gold") and the same was intimated to concern range office vide their letter dated 24.10.2016. He then stated that presently they are paying central excise duty @ 1% on removal the above said product (upto 8kgs) to their branch warehouse on transaction price which has been decided by their branch office. On being asked regarding reason behind for non-payment of central excise duty on retail pack of 10 kgs of "Dhanzyme", "Dhanzyme Gold", he stated that the as per his opinion the

gross weight of the said pack (including bucket) is more than 10 kg, but the gross weight of the material inside the bucket is 10kgs, that's why they were not paying the Central Excise duty on retail pack of 10 kgs. On being asked about the sales pattern, he stated that all the clearances of these exempted products are made through their sale depots and they affix M.R.P. on these fertilizer products and raise invoice of an amount equal to 50% to 70% of the M.R.P. printed on these products but it was always not fixed. That invoice amount / assessable value was being shown as per above percentage as the value of clearance in their monthly ER-Is returns; On being asked about the price being charged by the sale depots from the independent buyers / distributors, he stated that sales statement from the depots is not received in Sanand factory and is being dealt with by their head office at Gurgaon and they have collected the said information from their head office and submitted the same for the year 2012-2016(upto September 2016) as mentioned in above table.

8. A statement of Shri Vinod Kumar Bansal, Chief Financial Officer of the said noticee was recorded on 09.02.2017 under Section 14 of the Central Excise Act, 1944, wherein he, *interalia*, stated that he was looking after day to day business activities of the unit namely banking, overall accountancy, taxation, costing etc. for their company i.e. M/s. Dhanuka Agritech Ltd., Building No. 5 A, DLF Cyber city, Phase -III Gurgoan-122002 and M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta industrial Estate, Sanand Viramgam Road, Village Vasna Taluka Sanand, Ahmedabad is their another manufacturing unit; that he had been shown a panchnama dated 17.10.2016 which was drawn under the provisions of Central Excise Act, 1944 at the factory premises of M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand Viramgam Road, Village Vasna Taluka Sanand, and the statement of Rajkumar Kanodia, President Of M/s. Dhanuka Agritech Ltd., Sanand, Ahmedabad was recorded on 18.01.17 and after seeing and understanding the same, he agreed with the facts mentioned in the said panchnama ; that M/s. Dhanuka Agritech Ltd., Building No. 5 A, DLF Cyber city, Phase -III Gurgoan-122002 is their corporate office and having manufacturing units at udhampur, Gurgaon, and Sanand, Ahmeedabad; that they have a four zonal warehouse at Sohra (Gurgaon), Sanand (Ahmedabad), Hyderabad & Kolkata; that they have number of branch offices and number of depots in all over India. He further stated that the said firm is engaged in the manufacturing activity of insecticide, fungicides, animal or vegetable fertilizers falling under chapter heading 31 & 38 of CETA 1985 and registered with Central Excise department having Central Excise Registration No. AAACD0105GXM002; that after understanding regarding the correct position of law, the animal or vegetable fertiliser "Dhanzyme Granules' & 'Dhanzyme Gold Granules' manufactured and cleared by them in unit packs of 1 kg, 4 kg, 5kg, 8kg & 10kg and are equal or below 10 kg by weight; its classification under Tariff Heading 31010099 claimed by M/s. Dhanuka Agritech Ltd. is not correctly classified and its classification should be under Tariff Heading 3105 (@1% excise duty under Notification No. 12/2012, sr. No. (128) instead of 3101 (Nil rate of duty) because Tariff Heading 3105 covers "Mineral or Chemical Fertilizer containing two or three of the fertilizing elements nitrogen, phosphorus and potassium; other fertilizers; Goods of this chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg"; that as most of the unit packs contain material weight equal or less than 10 kg, so the said products which may be falling under sub-heading 31050010 which attracts tariff rate of 12.5% duty, however, Notification No. 12/2012-CE dated 17.3.2012 which prescribes effective rates of duty on specified goods of various chapters, covers goods of Chapter 31 at Sr. No. 128 which reads "all goods, other than those which are clearly not to be used as fertilizers'. the sr.

No. 128 prescribes rate of duty @1% ad-valorem subject to condition No. 25 and condition No. 25 read as :"If no credit under rule 3 or rule 13 of the Cenvat Credit Rules, 2004, has been taken in respect of the inputs or input services used in the manufacture of these goods".; On being asked, he further stated that their marketing pattern as such that they transfer their manufactured goods to their depot at the rate of 60%/70% of the MRP and further goods sold from depot to their dealers invariable lesser than above said transfer price as they give the quantity/cash discount to their dealers; that on being asked regarding information printed in their product pack, he stated that their each unit pack provides the detailed information regarding composition of products, name of the manufacturer, batch no., manufacturing date, expiry date, net weight, and recommendation for how to use it & MRP and they are also putting the same information in the bulk pack and each and every pack is marketable and they do the same for the sake of easy storing & transportation. On being asked regarding clearance of "Dhanzyme" & "Dhanzyme Gold" product for the year of 2012-13 to 2016-17 (Upto Sep 16), he submitted Annexure-A, which showing the details of clearance of the said products (Upto 8kg net weight) for the year 2012-16 (Upto Sep 16), wherein the total clearance value for the above said is Rs. 86,61,58,121/- (Duty @1% is Rs. 86,61,581/-). He also submitted Annexure "B" which showing the details of clearance of the above said products (10kg net weight) for the year 2012-16 (Upto Sep 16), wherein the total clearance value for the said is Rs. 43, 61, 69,102/- (Duty @1% is Rs. 43,61,691/-). He further stated that the total clearance for the F.Y. 2012¬13 to 2016-17 (Upto Sep 2016) is as under:-

Worksheet of total clearance from the factory premises of M/s. Dhanuka Agritech, Ahmedabad during 2012-13 to 2016-17 (Upto Sep 16)				
Sr.No.	**F.Y.**	**clearance value(upto 8 kag/10 kgs)**	**Total Transaction Value**	**Excise Duty (@ 1%)**
1	2012-13	**145455889** **83794190**	229250079	2292501
2	2013-14	**188448452** **89327588**	277776040	2777760
3	2014-15	**220599184** **95603308**	316202492	3162025
4	2015-16	**216505367** **110271860**	326777227	3267772
5	2016-17	**95149229** **57172156**	152321385	1523214
	Total		**1302327223**	**13023272**

He, on being asked about the payment of above said duty liability, stated that they had already paid amounting to Rs. 23,79,835/- against the clearance of "Dhanzyme" & "Dhanzyme Gold" (Upto 8kg.) for the period from October 2015 to September 2016, but regarding the payment against the clearance the 10kg can be taken in the consideration after consulting with their legal advisor; that they will not discharge the previous duty liability as they had not suppressed any facts to the Central Excise Department regarding production and clearance of the products in question.

9. In the case of Northern Minerals Ltd. V/s. Commissioner-2001(131)ELT355 (Tri-Del) and maintained by the Hon'ble Supreme Court as reported in 2003(156)ELTA161(S.C.) wherein the

product "Dhanzyme", a bio fertilizer, being a plant growth promoter has been held to be classifiable under sub-heading 3101.00 of the Tariff Act. However, a perusal of the above judgment reveals that the issue before the Hon'ble Tribunal was whether the product "Dhanzyme" was a 'plant growth promoter classifiable under sub-heading 3101 or a 'plant growth regulator' classifiable under sub¬heading 3808.20 and the Tribunal observed that plant growth regulator is a natural or synthetic compound, other than nutrients, which can inhibit, promote or otherwise alter physiological process in plants, whereas a plant growth promoter only promotes plant growth and would not inhibit it. Therefore, the product "Dhanzyme" was held as a plant growth promoter classifiable under sub-heading 3101.00.

10. It is further observed that the said judgment was delivered with reference to the Central Excise Tariff Act, 1985 prior to its amendment vide Central Excise Tariff (Amendment) Act, 2004 (5 of 2005). With effect from 28.2.2005, the Central Excise Tariff was restructured and six digit Classification Code was changed to eight digit Classification Code thereby substituting the First Schedule and the Second Schedule of the Tariff. With effect from 28.2.2005, the Schedule 1 of the Tariff Act has been aligned with the 'Harmonized Commodity Description and Coding System' (HSN) of the World Customs Organization. A perusal of the entries relating to tariff heading 3105 reveals that its description has been changed, in as much as, the words **'goods of this chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg'** have been inserted w.e.f. 28.2.2005. With the insertion of these underlined words, the wording of Chapter Notes to Chapter 31 has also been changed, in as much as, Chapter Note 2 which earlier read "Heading 3102 applies only to the following goods' now reads 'Heading 3102 applies only to the following goods, ***provided that they are not put up in the form of packages described in heading 3105'***. Similarly, Chapter Notes of headings 3103 and 3104 have also been changed so as to exclude the products put up in the form or packages as described in chapter heading 3105. Therefore, it appears that during the period covered under the above mentioned judgment, the goods being animal or vegetable fertilizers were appropriately classifiable under sub-heading 3101.00. However, subsequent to change in the Tariff Act w.e.f. 28.2.2005; heading 3105 read as **"Mineral or Chemical fertilizers containing two or three of the fertilizing elements, nitrogen, phosphorous and potassium; other fertilizers; goods of this chapter in tablets or similar forms or in packages of a gross weight not exceeding 10kg".** Notes under heading 3101 of the said HSN also says, **"However, these products fall in heading 31.05 when put up in the forms or packages described in that heading i.e. heading 31.05"**. Therefore, the underlined words inserted in heading 3105 enlarged the scope of this heading to cover the goods of this Chapter if packed in packages of gross weight not exceeding 10 kg. In view of this, it appears that the judgment relied upon by the Noticee would not be applicable to such goods subsequent to the amendment in the Tariff Act w.e.f. 28.2.2005 and classification of these fertilizer products cleared in packing of gross weight upto 10 kg weight would be changed from sub-heading 31010099 to 31051000. This observation also finds support from HSN Notes to Chapter 31 wherein the Explanatory Note under heading 3105 reads as **"This heading also covers the goods of this Chapter if put up in tablets or similar forms or in packages of a gross weight not exceeding 10 kg".**

11. From the foregoing, it appears that the product of the Noticee i.e. 'Dhanzyme', and 'Dhanzyme Gold' manufactured from bio-extract organic fertilizer is nothing but a granules form

of vegetable fertilizer. Its classification under Chapter 31 as a 'fertilizer' is not disputed, however, due to its manufacture and clearance of Dhanzyme Gold Granules in the shape of buckets in various forms like 10 nos. of 1 kg each pet jar put in one case, 2 nos. of 10 kg each bucket put in one case, 4 nos. of 5 kg each pet jar put in one case & 5 nos. of 5 kg each HDPE bag put in one case. 12 nos. of 4 kg each pouch packed in HDPE drum, 24 nos. of 1 kg each pouch put in HDPE bag, 2 nos. of 10 kg each bucket put in one case, 3 nos. of 8 kg each pouch put in HDPE bag, 6 nos. of 4 kg each pouch put in HDPE bag & 6 nos. of 8 kg each pouch put in HDPE drum. Their each unit pack provides the detailed information regarding composition of products, name of the manufacturer, batch no., manufacturing date, expiry date, net weight, maximum retail price and recommendation how to use it & it is in such pack which itself was in marketable condition however they were putting in the bulk pack (which also provides the similar information as the unit pack provides) for the sake of easy storing & transportation. All packages having their gross weight not exceeding 10 kg; As such, the products appear to be appropriately classifiable under Tariff sub-heading 31051000 of the Tariff Act as mentioned above.

12. As regards assessment of duty liability due to change in classification, it appears that sub-heading 31050010 attracts tariff rate of 12% duty, however, Notification No. 12/2012-CE dated 17.3.2012 which prescribes effective rates of duty on specified goods of various chapters, covers goods of Chapter 31 at Sr. No. 128 which reads **'all goods, other than those which are clearly not to be used as fertilizers'**. This Sr. No. 128 prescribes rate of duty @1% ad-valorem subject to condition No. 25 and condition No. 25 read as follows:

> ***"If no credit under rule 3 or rule 13 of the Cenvat Credit Rules, 2004, has been taken in respect of the inputs or input services used in the manufacture of these goods".***

13. Further, Notification No. 2/2011-CE dated 1.3.2011 prescribes concessional rate of 6% duty on specified goods. Sr. No. 21 of this Notification covers **"all goods, other than those which are clearly not to be used as fertilizers'**. Therefore, the goods of heading 31051000 would attract duty @1% plus cesses, without the facility of Cenvat Credit on inputs and input services or duty @ 6% plus cesses, with the facility of Cenvat Credit.

14. Further, Shri Raj Kumar Kanodia, President of the said noticee, in his statement dated 18.1.2017 has stated that they have not availed any Cenvat Credit on the inputs used in the manufacture of goods of Chapter 31.

15. As regards the assessable value of the fertilizer products for the purpose of charging duty, the preventive officers observed that the clearances of the products 'Dhanzyme' and 'Dhanzyme Gold' was being made through their sales depots located at Sohna (Gurgaon), Ahmedabad/ Sanand (Gujarat) and Kolkata. A perusal of the sales invoices of the Noticee revealed that the Noticee affix MRP on that products (though the goods of Chapter 31 are not covered under the provisions of Section 4A of the Central Excise Act, 1944) and raise invoice of an amount equal to 50% of the MRP to its depots. This 50% MRP amount is shown as assessable value in the ER-1 Returns of the Noticee. Since, the value shown to be charged from their own sales depots/ branches being related buyers cannot be adopted as the correct assessable value of the goods for the purpose of charging duty under Section 4 of the Central Excise Act, 1944; the value for charging duty appears to be the price at which sales depots are clearing the said goods to the independent buyers i.e. their distributors, in as much as, Rule 7 of the Central Excise Valuation Rules, 2000 provides that "where the excisable goods are not sold

by the assessee at the time and place of removal but are transferred to a depot or any other place or premises from where the excisable goods are to be sold after their clearances and where the assessee and the buyer of the goods are not related and the price is the sole consideration for the sole, the value shall be the normal transaction value of such goods sold from such other place". Therefore, the value charged by the depots/branches of the Noticee from their distributors/ unrelated buyers would be the transaction value for the purpose of charging duty.

16. The Noticee, during the investigation, submitted some sample invoices issued by the depots/branches to distributors. The product does not fall under the MRP as per Central excise Rule 4A of Central excise Rules, 2002. The sample invoices have been perused as follows: - vide invoice No.SI-GUR-1516-002518 dated 22.12.2015, the Gurgaon branch charged price @66.5% of the MRP and gave further discount of 18.3%; Vide invoice No. SI-RAI-1415-000528 dated 30.06.2014, Raipur branch charged price @68.46% of the MRP and gave further discount of 15.5%. A annexure submitted by the assessee regarding net actual transaction sale value of goods (upto net 10 kgs) cleared from depots & the value considered to be maximum sale value on which excise duty to be discharged for the period from April 2012 to September2016 and on scrutiny of the same annexure along with sample invoices, it is revealed that transaction price considered for excise duty is always higher than the actual transaction price. So the said annexure is being taken for the purpose of charging duty under the current proceedings.

17. The noticee had admitted the duty liability amounting to Rs. 1,30,23,272/- plus + 2% Edu. Cess and 1% Higher education Cess from 2012-13 to Feb.2015 which comes to Rs. 1,64,646/- & Rs. 82,323/- respectively, hence total duty required to be paid comes to Rs. 1,32,70,241/- for the period from April-2012 to Sept.-2016 for the clearance made by them for the goods manufactured and cleared by them classifying the finished goods under CTH 3101@ NIL rate of duty, instead of CTH 3105 @ 1% basic Excise duty, as per condition No. 25 of Notification No. 12/2002-CE dated 17.03.2002, for their owned branded goods "Dhanzyme Granules" and "Dhanzyme Gold Granules". Out of which they paid Central Excise duty and interest thereof for the clearance amounting to Rs. 21,74,256/- and interest amount of Rs. 2,05,579/- a total amount of Rs. 23,79,836/- under protest vide challan No. 01396 dated 24.10.2016 for the period from October-2015 to September-2016 upto weight of 8 kgs clearance of "Dhanzyme Granules" and "Dhanzyme Gold Granules"

18. During 2012-2016 (Up to September-2016), the total clearance (upto 8kg and upto 10 kg separately) value of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' under unit packages upto weight of 10 kgs net weight with effect from 2012-13 upto September 2016,, which are as under-

Sr. No.	F.Y.	clearance value(upto 8 kgs/10 kgs)in Rs.	Total Transaction Value in Rs.	Excise Duty in Rs.@l% + Cess (Where applicable)
1	2012-13	145455889	229250079	2361276
		83794190		
2	2013-14	188448452	277776040	2861093
		89327588		
3	2014-15	220599184	316202492	3256886
		95603308		

4	2015-16	216505367 110271860	326777227	3267772
5	2016- 17(upto Sept. 2016	95149229 57172156	152321385	1523214
	Total	**866158121/436169102**	**1302327223**	**13270241***

(*) plus 2% Edu. Cess and 1% Higher education Cess from 2012-13 to Feb.2015 which comes to Rs. 1,64,646/- & Rs. 82,323/- respectively are to be added thereby **total duty are required to be paid of Rs. 1,32,70,241/-.**

19. The total clearance value in respect of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' upto the weight of 10 kgs net for the financial year 2012-13 to 2016-17(upto Sept'16) is RS. 130,23, 27,223/- and duty liability comes to Rs. 1,32,70,241/- (including 10kg net weight bucket) @1% ad-valorem plus + 2% Edu. Cess and 1% Higher education Cess subject to condition No. 25 of Notification No. 12/2012-CE dated 17.3.2012. Further, Shri Raj Kumar Kanodia, President of the said noticee and Shri. Vinod kumar Bansai, Chief financial officer of the company have accepted that the duty liabilities arises on the finished goods namely 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' which were cleared without payment of duty as of now, would be paid by them the appropriate duty. However, they had paid Rs. 23,79,835/- (Duty@ 1% of Rs. 21,74,256/- + Interest of Rs. 2,05,579/-)under protest vide challan no 01396 dated 24.10.2016 against the duty & Interest for the period October 2015 to September 16 (upto weight of 8 kgs clearance of("Dhanzyme", "Dhanzyme Gold"). Presently they are paying central excise duty @ 1% on removal the above said product (upto 8 kgs) to their branch warehouse on transaction price which had been decided by their branch office.

20. The contention of the noticee that they are not liable to pay duty on retail pack of 10 kg of "Dhanzyme" & "Dhanzyme Gold" because the gross weight of the said retail pack (including bucket) is more than 10 kg but the net weight of the materials inside the bucket is 10 kg weight. It is admitted itself by the noticee that the net weight of the materials / goods inside the package is 10 kg hence the said goods is within the purview of levying duty on it & is in conformity as per the chapter heading under 3105 which read as goods of this chapter in tablets or similar forms or in packages of a gross weight not exceeding 10kg", It is also submitted by the said unit that each unit pack provides the detailed information regarding composition of products, name of the manufacturer, batch no., manufacturing date, expiry date, net weight, maximum retail price and recommendation how to use it & it is in such pack which itself is in readily marketable condition & the said consignment may cleared in unit pack such as 10 kg net weight of goods/materials as per demand of the their customers or in the same pack size supplied by their factory. However they are putting the two 10 kg net weight in the bulk pack (which also provides the similar information as the unit pack provides) for the sake of easy storing & transportation. Hence the contention of the noticee is not reasonable on the ground that spirit & intention of the law is to impose excise duty on goods having net weight of 10 kg or below irrespective of the weight of the packages/ packing materials. The meaning of gross weight is that when goods are clubbed the total weight is gross weight. For example, if two 10kg pack are clubbed, it is 20 kg gross weight. In the instant case the clubbing of 10 kg is not material, because 10 kg packet itself is marketable and contained all the details. Therefore, it appears that 10kg pack is also liable for Central Excise duty in the instant case.

21. The noticee also violated the provisions of Central Excise Rules, 2002 (herein after referred to as the Rules), in as much as, they did not pay the duty as required under Rule 4 of the Rules; did not assess the duty payable on the excisable goods themselves as required under Rule 6 of the Rules; did not pay the duty to the credit of the Central Govt, by due dates as provided under Rule 8 of the Rules; did not maintain the Daily stock Account as provided under Rule 10 of the Rules and failed to correctly disclose the packing and clearance of the product in their statutory ER-1 Returns as provided under Rule 12 of the said Rules. Therefore, the Noticee appears to have rendered themselves liable for penal action under Rule 25 of the Rules for the aforesaid violation of the various Rules of Central Excise Rules, 2002.

22. All the above acts of contravention on the part of the said M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand-Viramgam Road, Village Vasna, Taluka Sanand, Dist. Ahmedabad appears to have been committed by reasons of willful mis-statement, suppression of facts and contravention of various provisions of the said act and rules made there under in as much as (i) the noticee had deliberately cleared their goods without payment of Central excise duty by wrongly classifying their product under CTH 3101, for packing of their products upto 10 kgs of pack and cleared their goods under NIL rate of duty instead of classifying the same under chapter heading 3105 of CET, 1985 payable Central Excise duty 1% plus Cesses as mentioned here in above in detailed, (ii) the noticee had neither differentiated the goods which are packed in tablets or similar forms or in packages of a gross weight not exceeding 10 kg which actually falls under chapter heading 3105 instead of 3101 nor mentioned the same in their Excise returns with the malafide intention to evade the central excise duty payment by wrongly classifying the said goods & availing the benefit of aforementioned exemption notification & suppress the fact from the department despite being aware of the fact that the said goods packed in tablets or similar forms or in packages of a gross weight not exceeding 10 kg actually falls under chapter heading 3105 (iii) in this era of self assessment where onus of revealing the facts regarding the activities related to manufacturing is on the assessee. The assessee is in a position to disclose the facts in the excise returns regarding the manufacturing & clearance of manufactured goods whereas in the instant case, the noticee had deliberately concealed the fact from the department by way of not mentioning separately in the excise returns the fact related to manufacturing of goods packed in tablets or similar forms or in packages of a gross weight not exceeding 10 kg with an intention to wrongly avail the benefit of exemption notification however they were not entitled for the same (iv) It would never have been detected by the department regarding the clearances of goods packed in tablets or similar forms or in packages of a gross weight not exceeding 10 kg without payment of excise duty if the same were not brought to the notice by the central excise, Jammu Commissionerate. Therefore, the proviso to Section 11A (4) of the Central Excise Act, 1944, to be invoked for the extended period of five years on account of willful mis-statement, suppression of facts and contravention of various provisions of Central Excise Act, 1944 as discussed hereinabove and suppressing facts with an intent to take and therefore the noticee appears to be liable for penalty under the provisions of Section 11AC (C) of Central Excise Act, 1944. The noticee also appears to be liable to pay interest on the delayed payment of Central Excise Duty under the provision of Section 11AA of Central Excise Act, 1944.

23. It was, therefore, M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand-Viramgam Road, Village Vasna, Taluka Sanand, Dist. Ahmedabad are issued a notice No.

V.31/15-06/OA/2017 dated 15.03.2017 to show cause to the Joint Commissioner, Central Excise, Ahmedabad-II, having his office at 1st Floor, Custom House, near Akashvani, Opp. old High Court, Navrangpura, Ahmedabad-380 009 as to why

(i) The Central Excise duty amounting to Rs. 1,32,70,241/- (Basic Excise Duty Rs. 1,30,23,272 + Education Cess Rs. 1,64,646/- + Secondary and Higher Education Cess Rs. 82,323/-) should not be recovered from them under Section 11A (4) of the Central Excise Act, 1944; and the Central Excise duty amounting to Rs. 21,74,256/- {Rs, Twenty One Lakhs Seventy Four Thousand Two hundred Fifty Six only) already paid under protest by M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand-Viramgam Road, Village Vasna, Taluka Sanand, Dist. Ahmedabad should not be adjusted against the total duty demanded.

(ii) Interest under Section 11AA of the said Act, on the duty liability as mentioned in (i) above and Interest paid of Rs. 205579/ against the duty paid of Rs. 2174256/- should not be adjusted against the interest liability,

(iii) Penalty under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC(c) of Central Excise Act, 1944 should not be imposed upon them on the duty liability as mentioned in (i) above.

24. However, in pursuance of Notification No. 12/2017 C.Ex (NT) to Notification No. 14/2017-C.Ex (NT) all dated 09.06.2017 issued by the CBEC, the said SCN is to be adjudicated by an Officer in the rank of Additional/Joint Commissioner of Central Goods and Service Tax & C.Excise of Ahmedabad-North Commissionerate and accordingly a corrigendum dated 1.8.2017 is issued to that effect.

Defence Reply:-

25. The noticee filed reply to the show cause notice vide letter dated nil, received on 02.06.2017; wherein after narrating the facts of the case in brief, they stated about the related proceedings at their Udhampur unit where two show cause notices were issued to them by the jurisdictional Central Excise Authority proposing to demand duty with interest on the formulations, namely Dhanzyme and Dhanzyme Gold, cleared by them at nil rate of duty by classifying the same under CETSH 31051000 and these SCNs were adjudicated by the Commissioner of C.Excise and Customs, Jammu by confirming the demand by ordering to classify the said products under CETSH 31051000 and against which appeals are filed by them before Tribunal.

26. They further contended that the activity carried out by them does not amount to manufacture and hence, no duty is payable; that on merits, the activity undertaken by them does not amount to manufacture, hence, no duty is payable. To appreciate their contention that the activity performed by them does not amount to manufacture, they narrated the activity performed by them; that the products in question are the formulations, which are seaweed based vegetable fertilizers; that the formulations are derived from the Bio Extract Organic Fertilizer input concentrate derived from natural vegetable seaweed which has around 42% solid content (hereinafter referred to as 'The seaweed concentrate'"); that the formulations are also derived from seaweed flakes which are first processed to obtain seaweed concentrate and subsequently used to derive the formulations; that the Seaweed concentrate is procured by

them from domestic sellers; that in case of seaweed flakes the same is imported from China; that prior to 18.09.2014, the formulations were derived only from seaweed concentrate and from 18.09.2014 onwards the noticee had stalled deriving the formulations from seaweed concentrates as well as seaweed flakes. They then submitted the various ingredients which are used in the preparation of the formulations; for Dhanzyme Gold Granules, PPT Silica Dhanzyme Gold Granules, Dye Aerosol Yellow BDH, Dhanzyme Gold Bentonite Granules,Seaweed Extract Flake,Pottassium Humate,Pottassium Hydroxide,Emulsifier 1015,Formaldehyde,Borewell water,Di-ethylene Glycol and for Dhanzyme Granules, Dhanzyme Blank Granules, Seaweed Extract Flake, Pottassium Humate, Pottassium Hydroxide, Emulsifier 1015,Borewell water.

27. The noticee further submitted that the application of the formulations enables plants to receive direct benefits from the naturally balanced nutrients and plant growth substances available in the seaweed extract. They also given the different preparatory processes for the formulations with respect to preparation from the seaweed flakes by stating that the raw materials used in the preparation of Dhanzyme from seaweed flakes arc: (i) Seaweed flakes (ii) Potassium Humatc - It is used as a fertilizer additive to increase the efficiency of fertilisers. (iii)Potassium Hydroxide - It is added to achieve the required pH of the formulation (around 8-9) (iv). Emulsifier - Emulsifiers are added to the formulation to enable formation of the emulsion and to stabilize the mixture and (v) Water - The seaweed concentrate is diluted with water, as per requirement. Then they given the the process of preparation of Dhanzyine is Water is taken in the stainless-steel vessel and potassium hydroxide is added to make it alkaline (pH 8-9), Potassium Humatc is slowly added while stirring the mass to ensure that complete dissolution of potassium humatc takes place. The material is stirred for 30 minutes. Seaweed flakes arc slowly added and homogenized by stirring Emulsifiers are added and the mixture is stirred for 30 minutes. Then they given the raw materials used in the preparation of Dhanzyme Gold from seaweed flakes are (i)Seaweed flakes, (ii)Potassium Humate - It is used as a fertilizer additive to increase the efficiency of fertilisers. (iii) Potassium Hydroxide - It is added to achieve the required pH of the formulation (around 8-9). (iv)Emulsifier - Emulsifiers are added to the formulation to enable formation of the emulsion and to stabilize the mixture. (v) Water - The seaweed concentrate is diluted with water, as per requirement. Further the process of preparation of Dhanzyine Gold is given by them that Water is taken in the stainless-steel vessel and potassium hydroxide is added to make it alkaline. Potassium Humate is slowly added while stirring the mass to ensure that complete dissolution of potassium humate takes place. The material is stirred for 30 minutes, Seaweed flakes are slowly added and homogenized by stirring, Emulsifiers arc added and the mixture is stirred for 30 minutes.

28. They further stated that once the Dhanzymc and Dhanzyme Gold are derived by the above process in liquid form, the same are sprayed on granules to convert them into granular form. They further contended that as can be seen from the description given, the activity of preparation of the formulations performed by the noticees, in a nutshell, comprises of dilution of the seaweed concentrate/seaweed flakes with demineralised water and addition of preservative for increased shelf life and addition of chemicals for enhancement of fertilizing capacily/slability to act as a conditioner; that the formulations are derivatives of seaweed extract harvested from naturally occurring seaweed plants, which does not change whether the formulations are prepared from the seaweed concentrate or from seaweed flakes.

29. They then quoted the provisions for "manufacture" as defined under Section 2(f) of the Central Excise Act, 1944. They further relied on the case laws in the case of U.O.I v. Delhi Cloth and General Mills Ltd. - 1977 (1) ELT (J199), in the case of Union of India v. J.G. Glass Industries reported at 1998 (97) ELT 5.

30. They further contended that from a perusal of the definition of the term "manufacture", it is evident that the definition is inclusive and not exhaustive; that in terms of the definition of the term "manufacture" and the interpretation given by the Hon'ble Supreme Court, following shall be "manufacture" if carried out by the assessee:

i) Process that brings into existence a new commercial commodity which is distinct from the starting material having a different name, character or use.

ii) Process that is incidental or ancillary to the completion of a manufactured product.

iii) Process that are specified in relation to any goods in the Section or Chapter Notes of the First Schedule to the Central Excise Tariff Act, 1985.

iv) In relation to the goods specified in the Third Schedule to the Excise Act, the following activities:

- Packing or Re-packing of goods in a unit container;
- Labelling or Re-labelling of containers;
- Declaration or alteration of retail sale price on it; or
- Adoption of any other treatment on the goods to render the product marketable to the consumer.

31. The noticee further submitted that activity does not satisfy the test of change in name, character and use; that the test of a different name, character and use has been laid down by the Hon'bic Supreme Court m the cases of Delhi Cloth & General Mills' & J.G. Glass' case (supra); that It is clear from these cases that any process which results in bringing into existence a new product having a distinct name, character and use, amounts to manufacture. They further relied upon the case laws of Hindustan Polymers v. Collector of Central Excise reported in 1989 (43) ELT 165 (SC) and in the case of CCE, Bombay v. S.D. Fine Chemicals Pvt. Ltd. - 1995 (77) ELT 49 (S.C.).

32. They submitted that applying the ratio laid down by the Hon'ble Supreme Court in various cases, it can be stated that an activity carried on by a person would be termed as 'manufacture if it brings into existence a new substance; that the process in order to amount to manufacture must be one, which brings into existence a new substance known to the market; that there must be transformation and a new article, which so results, must have a distinct name, character or use; that it also follows from that decisions that to determine whether a process amounts to manufacture, it is essential to identify whether the product in question would be commercially useful only after undertaking the said process.

33. They further stated that the Hon'ble Supreme Court has held in the case of Deputy Commissioner Sales Tax (Law), Board of Revenue (Taxes), Ernakulam v. Pio Food Packers - 1980 (06) ELT 343 (SC) that manufacture is the result of one or more processes through which the original commodity is made to pass.

34. They further stated that a process will be deemed to be manufacture when a new commercial article comes into existence and the purpose of final product (output) cannot be served by the raw material (input) on which the process was earned out; that the processes undertaken must result in bringing into existence a product which is completely different in nature, identity and use vis-a-vis the raw materials on which the processes are undertaken and this will amount to manufacture under Section 2(f) of the Central Excise Act, 1944.

35. They further submitted that the process earned out by them does not amount to manufacture as per the tests laid down by the Hon'ble Supreme Court in the aforesaid judgments; that the activity carried out by them comprises of dilution of the seaweed flakes in aqueous solulion/obtaining seaweed concentrate in liquid form, addition of preservative to achieve increased shelf life for the product and addition of chemicals/amino acids for enhancement of fertilizing capacity/stability/to act as a conditioner; that the formulations are sold by the noticees in granular form to be used as a fertilizer; that however, the seaweed concentrate/seawced flakes, which are the main raw material for the noticees, itself possess fertilizing properties.

36. They continued their submissions by stating that Seaweeds belong to a rather ill-defined assemblage of plants known as algae; that according to Chapman VJ and Chapman DJ in Seaweeds and their uses (Chapman and Hall, London), 1980, the term seaweed itself does not have any taxonomic value, but is rather a popular term used to describe the common large attached (benthic) marine algae found in the groups of Chlorophyceae, Rhodophyceae. Phaeophyceae or green, red and brown algae, respectively; that the seaweed concentrate/seaweed flakes arc extracts of naturally occurring sea weed; that the process undertaken by them only results in enhancement of the fertilizing properties inherent in naturally occurring seaweed; that the process undertaken on the extracts of the naturally occurring seaweed does not bestow it with fertilizing properties which were hitherto unknown.

37. They further submitted that the outstanding fertilizing properties of seaweed extracts are well documented. They argued that from the aforesaid scientific studies "Advances in the use of Ascophylhim nodosum Seaplant Extracts for Crop Production" conducted by Linking Laboratory and Field Research and Jeffrey Nome, Ph.D., it is evident that the seaweed extract, which was subjected to dilution and addition of preservative to achieve increased shelf life for the product and addition of chemicals/amino acids for enhancement of fertilizing capacity/stability/ conditioning capacity by them, possessed significant fertilizing powers by itself; that the formulations merely possessed entranced fertilizing capacity and no new fertilizing property was imparted in the formulations.

38. They further deposed that the seaweed concentrate procured by them from domestic manufacturers is classified by these manufacturers under CETSH No. 3101 0099. The notieees are also classifying the formulations under CETSH No. 3101 0099 and thus, the seaweed concentrate (raw material) as well as the prepared formulations are vegetable fertilizers; that even the entity clearing seaweed concentrate to them holds this belief and has accordingly classified seaweed concentrate derived from seaweed extract as under CETSH No. 3101 0099 and thus, there is no significant qualitative difference between seaweed concentrate and the formulation arising out of the same; that even in the case of seaweed flakes which are imported and classified by the respective manufacturer under CETSH No.3808 9340, the same is first

processed to obtain seaweed concentrate classifiable under CETSH No. 3101 0099 before being used for deriving the formulations in question.

39. They further stated that the show cause notice states that classification of the formulations as a vegetable fertilizer under Chapter 31 is not disputed, however, since it is cleared in packages not exceeding 10 kg, the show cause notice proposes to classify the same under tariff heading 3105; that even the show cause notice accepts that the formulations are qualitatively competent to take up residence under CETSH No. 3101 0099 of the First Schedule to the CETA; that the formulations are claimed to be classifiable under CETSH No. 3105 1000 of the First Schedule to the CETA only because the packages in which the formulations are cleared do not exceed 10 kg by weight; that qualitatively and on the basis of its chemical composition and chemical properties, the formulations are fit to be classified under CETSH No. 3101 0099 of the First Schedule to the CETA; that the process in question does not bring into existence a new commercial commodity which is distinct from the starting material, having different name, character or use, which was the test laid down by the Hon'ble Supreme Court in Delhi Cloth and General Mills; that the formulations are derived from sea weed extract which possesses fertilizing properties in itself and thus, the formulations are not distinct from the starting material, i.e. sea weed extract and they do not possess characteristics different from the sea weed extract.

40. They further submitted that in their case, even after undertaking the activity of preparation of the formulations, no new or different commercial commodity comes into existence that the formulations remain and are in fact recognized in the trade as fertilizers only. The noticee further submit that the qualitative identity of the original raw material, i.e. seaweed extract does not cease to exist by mere dilution, addition of chemicals/amino acids, packing & branding and in view of the above, the first test laid down by the Hon'ble Supreme Court in the case of J.G. Glass (supra) is not satisfied in the instant case. In respect of the second test laid down by the Hon'ble Supreme Court in the said case, they stated that whether the commodity which was already in existence will serve no purpose hut for the said process is the second test and in other words, it is to be seen whether the commodity already in existence will be of no commercial use but for the said process; that test obviously in the present case cannot be said to have been satisfied since the items being put together viz., seaweed extract, chemicals, amino acids, etc. were already in existence in their complete form, were fully functional and were bought separately thus, their commercial use has already been in existence and the process has not brought about any change in such commercial use. From the scientific studies referred to in the preceding paragraphs, it is clear that seaweed extract also has commercial use as a fertilizer; that Dilution of the same with addition of chemicals/amino acids merely enhances its inherent fertilizing properties and does not confer upon it any new capability which can be commercially exploited. No substantial change in the properties of seaweed extract is brought about by formulation of its aqueous solution or addition of chemicals/amino acids.

41. They further quoted the judgment of the Hon'blc Supreme Court in the case of Servo-Med Industries Pvt. Ltd. v, CCE, Mumbai - 2015 (319) ELT 578 (SC). They stated that the activities undertaken by the notieee do not amount to manufacture under Section 2(f)(i) of the Central Excise Act, 1944

42. They stated that seaweed extract was received by them in its complete form capable of performing the function of fertilization without preparation of the formulations by them; that the impugned activities have not completed the impugned goods in any respect; that Seaweed extracts are vegetable fertilizers by themselves and the activity of preparation of its formulations cannot be construed to be incidental or ancillary to the completion of manufactured goods.

43. They further argued that, in terms of the test laid down by the H'ble Supreme Court in the case of Servo-Med Industries Pvt.Ltd Vs CCE, Mumbai-2015(319) ELT. 578 (SC) , the process referred to in Section 2(f)(i) must be in relation to manufacture and must be an integral part of manufacture resulting in a finished product, which has to be of a different physical shape, size and use and the said process must impart a change of a lasting character to the original product or raw material; that the product coming into existence must acquire a distinguishable identity; that on application of the aforesaid test laid down by the Hon'ble Apex Court, it cannot be said that the activity undertaken by them amounts to manufacture as no change of a lasting character is imparted to the original product; that no change of a lasting character can be said to be imparted to seaweed extract as the seaweed extract was earlier also a fertilizer and even alter preparation of its formulation, it remains a fertilizer and therefore, the show cause notice demanding duty on the formulations is not sustainable.

44. They further stated that as held by the Hon'ble Supreme Court in the case of Prachi Industries (cited supra), Section 2(f)(i) is applicable where an activity is so integrally important that without such activity manufacture of the product is inconceivable. It is submitted that in the instant case, the seaweed extract procured by them in the form of flakes/concentrate form is complete in itself and capable of performing the desired function of a vegetable fertilizer on its own. even without preparation of its formulation, that preparation of the formulation of seaweed extract is not a pre-requisite for manufacturing vegetable fertilizers or to make them functional and thus the aforesaid activity of preparation of the formulation of the seaweed extract cannot be considered to be incidental or ancillary to the completion of such goods; that thus the provision of Section 2(l)(i) is not applicable in the instant case; that the activity undertaken by them does not amount to manufacture under Section 2(f)(ii) of the Central Excise Act, 1944; that sub-section 2(f)(ii) provides for manufacture in terms of Section Note/Chapter Notes in the First Schedule to the CETA; that if any process is specified under Section Note/ Chapter Notes in the First Schedule to the CETA as amounting to manufacture, it will be deemed to be manufacture.

45. They continued that Section 2(f)(ii) is not applicable in the instant case; that in terms of Section 2(f)(ii) which deems certain processes as amounting to manufacture, there has to be a requirement under a section note or chapter note deeming the specified processes as amounting to manufacture; that neither in Section VI nor in Chapter 31 of the First Schedule to the CETA, is there any note deeming the activity of preparation of formulations of vegetable fertilizers of CETSH No. 3101 0099 as amounting to manufacture and consequently, the provisions of Section 2(f)(ii) are not applicable in the present case and hence, the impugned activities do not amount to manufacture.

46. They further stated that Sub-section 2(i)(m) of the Central Excise Act. 1944 introduces the concept of deemed manufacture as far as the goods listed in the Third Schedule of the Central Excise Act, 1944 are concerned wherein the processes of packing/repacking of the said goods, labelling/relabelling the unit containers, declaration and alteration of retail sale price, or

the adoption of any other treatment on the goods to render the products marketable to the consumer, amounts to manufacture; that with regard to Section 2(f)(iii), they submitted that this sub-section would only apply to the goods specified in the Third Schedule. The noticce submit that the goods falling under Chapter Heading 3101 or 3105 are not specified in the Third Schedule. And hence, the impugned activities of preparation of the formulations from seaweed extract do not amount to manufacture under Section 2(f)(iii) also.

47. The noticee submit that in view of the foregoing, since the various activities undertaken by the noticees do not amount to manufacture under any sub-section of Section 2(f), there is no question of demand of duty on the preparation of the formulations from them and the show cause notice demanding duty liability from the noticees is therefore, liable to be dropped on this ground alone..

48. They further contended that the process undertaken by them results in preparation of seaweed extract derivative which has enhanced fertilizing capacity and longer shelf life than the seaweed extract; that such a process would not amount to manufacture as the process undertaken on seaweed extract by them do not give rise to a new product; that there is no change in the essential character of seaweed extract after preparation of its formulation, even though it may be the result of extensive treatment, addition of various materials, labour and manipulation. Even after employing/adding the same, it has not resulted in the emergence of a new product as the end product continued to retain its original character, i.e. that of a fertilizer.

49. They further relied on the judgment of the Hon'ble Supreme Court in Satnam Overseas Ltd. v. CCE, New Delhi - 2015 (318) E.L.T. 538 (S.C.) and stated that applying the ratio of the aforesaid judgment, they submit that addition of chemicals/amino acids/preservative would not take away the fertilizing capability inherent in the seaweed extract; that the addition of that materials only results in enhancement of the fertilizing power and longer shelf life and hence, no activity of manufacture takes place and no liability to payment of duty arises. They further relied on the case of law in the case of Crane Betel Nut Powder Works v. CCE, Tirupathi - 2007 (210) ELT 171 (SC), the case of Laljee Godhoo & Co. v. CCE, Mumbai - 2001 (132) ELT 287 (Tri. - Mum.).

50. They further submitted that they also add stabilizer/preservative during the preparation of the fertilizers to achieve increased shell life; that the same also does not change the basic character of the product or confer any additional property on the fertilizers which is commercially exploitable; that the preservative is merely added to achieve increased shelf life of their preparations and which does not detract, take away or add anything to the fertilizing properties of the formulations. Hence, they submit that addition of the preservative by it could not be held as evidence that the process undertaken by them amounted to manufacture. The noticee also placed reliance on the judgment of the Hon'ble Supreme Court in the case of CCE v. Amrit Corporation Ltd. - 2015-V1L-99- SC-CIC.

51. The noticee further stated that, without prejudice to the aforesaid submissions, quantification of the duty demand is incorrect; that they are entitled to cum-duty benefit; that the show cause notice, in addition to raising an erroneous and legally unsustainable demand on them, also quantifies the duty demand on the formulations incorrectly; that without prejudice to the various submissions made in the foregoing paragraphs that no duty liability arises on them it is a settled legal position that an assessee is entitled to "cum-duty benefit', and the same is

liable to be extended to them and they quoted the explanation to Section 4 of C.Excise Act, 1944. They further quoted Section 4(3)(d) of the Central Excise Act, 1944 defines 'transaction value' as under and stated that grom a combined reading of the provisions of Section 4(1)(a) of the Central Excise Act, 1944 read with Section 4(3)(d) of the Central Excise Act, 1944 it is evident that the value for the purpose of payment of excise duty is the 'price actually paid or actually payable for the goods when sold; that thus, price alone is; the relevant factor for the purpose of payment of excise duty; that further, as clearly provided in the definition of transaction value, it does not include the amount of duty of excise, sales tax and other taxes, if any. actually paid or actually payable; that the Explanation to Section 4 also provides that die price-cum-duly shall be deemed to include the duty payable on such goods; that therefore they are entitled to get the benefit of cum-duty and the transaction value of the clearances made by them and the liability to duty therefore, needs to be recalculated accordingly. In support of that submission, they rely on the judgment of the Hon'ble Supreme Court in the case of CCE v. Maruti Ldvog Ltd., 2002 (141) ELT 3 (SC). They also relied on case laws of ACCE v. Bata India Ltd.1996 (84) ELT 164 (SC), CC'E, Jaipur v. Dugar Tetenal India Ltd- 2008 (224) ELT 180 (SC) Srichakra Tyres Ltd. v. CCE, Madras 1999 (108) ELI' 361 (Tri.) Affirmed by the Hon'blc Supreme Court at 2002 (142) ELT A279 (SC), Roy Francis v. CCE, Cochin 2002 (142) ELT 112 (Tri.) Maintained by the Ilon'ble Supreme Court at 2008 (232) ELT A27 (SC) and CCE & C, Daman v. Poonam Plastics Industries 2011 (271) ELT 12 (Guj.)

52. The noticee submitted that, therefore, without prejudice to the submissions in the foregoing paragraphs that no duty demand is liable to be made out on them and the duty demand has been quantified incorrectly and the same is liable to be reduced. In respect of extended period of limitation is not invokable, the noticee stated that the demand for the period April 2012 to September 2016 is raised vide show cause notice dated 15.03.2017 by proposing to invoke the extended period of limitation of five years under Section 11A(4) of the Central Excise Act, 1944; that the show cause notice alleges that the noticee have deliberately cleared the goods without payment of appropriate Central Excise duty by wrongly classifying the same under Chapter Heading 3101 instead of Chapter Heading 3105, that the noticee have neither differentiated the goods which are classifiable under Chapter Heading 3105 nor mentioned the same in their excise returns with a mala fide intention to evade Central Excise duty and suppressed such fact from the department; that the show cause notice alleges at Para 24 that the said facts would not have been detected if the same were not brought to the notice of the Central Excise, Jammu Comrmssionerate. They submitted that none of the above allegations in the show cause notice are true and extended period of limitation is not invokablc in the present case; that thus, as per Section 11 A(4), where any duty of excise has not been paid or short-paid by reason of (a) fraud (b) collusion (c) any wilful mis-statement (d) suppression of facts or (c) contravention of any of the provisions of the Act or of the Rules made there under with intent to evade payment of duty, the department can invoke the extended period of limitation of five years; that in their case, the show cause notice has alleged wilful mis-statement and suppression of facts to invoke the provisions of Section 11 A(4); that they submit that suppression or wilful mis-statement as alleged in the show cause notice is not present in their case; that they have regularly filed monthly ER-1 returns in prescribed form with the Department; that the said returns contain all details relating to the clearances of the formulations made by them; that they had provided all the information required to be provided in terms of the said returns; that they submit that the said returns were filed based on self-assessment and it

was the responsibility of the Department to scrutinize the assessments made by them and verify the correctness of the same, in terms of Rule 12(3) of the Central Excise Rules. 2002; that in such a situation, the Department cannot allege suppression against them when they have made all statutory disclosures; that in any case, they had never suppressed any information relating to the activity of preparation of the formulations and clearances of the formulations from the Department; that they had provided complete details of the clearances made by them to the Department; that lacunae in the returns, if any. were on account of the form in which the details are required to be given; that there is no column in the monthly returns which requires packaging-wise declaration of the goods manufactured; that it is settled that information not supplied if not required to be supplied under law does not amount to suppression. On this aspect they placed reliance in the case laws of Apex Electricals Pvt. Ltd. v. UOI 1992 (61) ELT 413 (Guj) and Unique Resin Industries v. CCE 1995 (75) ELT 861 (T), Goran Pharma Pvt. Ltd v. CCE, Bhavnagar - 2010 (250) ELT 57 (Tri. -Ahmd.) The noticee further submitted that the department is well aware of the fact that they were manufacturing animal & vegetable fertilizers classified under CETSH No. 3101 0099.

53. They argued that, at no point of time, the department has ever enquired as to the different unit sizes of packaging in which the animal & vegetable fertilizers were classified by them although all the relevant information was available on records; that it is now well settled by some of the decisions of the Hon'ble Supreme Court that when facts are known to both the parties, allegation of suppression of facts with intent to evade payment of duty cannot be sustained. In this matter, reliance is placed by them on the decisions of Pushpam Pharmaceuticals Company v. CCE 1995 (78) ELT 401 (SC), Anand Nishikawa Co. Ltd. v. CCE (188) ELT 149 (SC), Continental Foundation Jt. Venture v. CCE 2007 (216) EL I 177 (S.C)

54. They continued their arguments by stating that even for the sake of argument it is assumed that they omitted to inform the different sizes of packaging for the product Dhanzyme and Dhanzymc Gold, even then such omission would not amount to suppression of facts with intent to evade payment of excise duty. They further contended that they have been audited from time to time by Department wherein all the statutory records of them were verified, including invoices for clearances of the formulations carrying classification of the formulations adopted by them; however, no dispute was raised by the department on the classification of the formulations in such audits; that in fact, the F.A.R. Audit Report No. 209/2014-15 dated 8.03.201 5 for the period October 2013 to November 2014 has raised Nil objections against them .On the matter of when the audit of the records of the assessee is undertaken by the department from time to time, extended period cannot be invoked and they placed reliance on the decisions of CCE v. Pragathi Concrete Products (P) Lid.(322) ELT 819 (SC) Monarch Catalyst Pvt, Ltd. v. CCE (41) STR 904 (T).

55. They further stated that in the present case, the issue involved is purely interpretational in nature and it is settled law that extended period of limitation is not invokable when the issue is purely interpretational in nature. They stated that decision in the case of Padminit Products (cited supra) would squarely apply to their case of and therefore the entire demand beyond the normal period of limitation, is not sustainable; that similar view has been taken by the Hon'ble Supreme Court in the case of CCE v. Chemphar Drugs - 1989 (40) ELT 276 (SC) and Jai Prakash Industries Limited v. CCE - 2002 (146) ELT 481 (SC). They repeatedly argued that as

there is no suppression of facts by them, the extended period of limitation is not invokable and the demand beyond the normal period of limitation is liable to be dropped on this ground alone.

56. They contended that every omission to disclose certain fact is not sufficient to invoke larger period of limitation on the ground of suppression of fact; that only those omissions to disclose the fact which amounts to wilful suppression with an intention to evade payment of duty will enable the revenue to invoke larger period; that omission which is wilful in nature with an intention to evade payment of duty is alone covered by Section 11A(4) of the Central Excise Act, 1944 and in their case, the wilful nature of the omission is not established.

57. The noticee further placed reliance on the decision of the Ho'ble Supreme Court in the case of Pahwa Chemicals v. CCE - 2005 (189) ELT 257 (SC) wherein the Hon'ble Supreme Court held that mere failure to declare does not amount to mis-declaration or wilful suppression; that there must be some positive act on the part of party to establish either wilful mis-deelaration or wilful suppression; that when all the facts were within the knowledge of department and all the responsibility/duty of the noticecs in any ease does not extend beyond making a time and lull disclosure of primary facts; that once he has done that his duty ends; that it is for the Department to draw the correct inference from the primary facts; that it is no responsibility of them to advise the Department with regard to the inference which it should draw from the primary facts; that hence, once they have disclosed the facts, then Department cannot allege that assessee has suppressed the facts just because some other legal inference can be drawn and this view is held in the case of Maruti Udyog Ltd. v. CCE - 2002 (147) ELT 881 (T) and ITO v. Lakhmani Mcwal Das - 1996 (103) ITR 437 (SC).

58. The noticee further submitted that there is no short payment of Central Excise duty by them, let alone with intent to evade duty and therefore, the extended period of limitation cannot be invoked in the present show cause notice; that extended period of limitation is not invokable when the earlier show cause notice dated 04.02.2015 issued to Udhampur unit did not invoke extended period of limitation

59. They stated further that as admitted in Para 4 of the show cause notice, the present dispute with respect to the Sanand unit of them arises out of investigation conducted at the Udhampur unit of the noticecs falling under the jurisdiction of the Central Excise Commissionerate, Jammu; that the formulations Dhanzyme and Dhanzyme Gold are also sold by the Udhampur unit albeit in liquid form and cleared in packages of 100 ml, 250 ml, 500 ml and 1000 ml; that since the formulations were cleared by the Udhampur unit at nil rate of duty after classifying them under CETSH No. 3101 0099, the same was contended by the Department seeking classification of the formulations under CETS11 No. 3105 1000 instead. As a result of the investigation conducted at the Udhampur unit, a show cause notice dated 04.02.2015 was issued to the Udhampur unit of the noticees, proposing to classify tine formulations Dhanzyme and Dhan/yme Gold cleared in liquid form packaging of 100 ml. 250 ml, 500 ml and 1000 ml under CHI SH No. 3 105 1000 and demanding differential duty along with interest and penalty.

60. They further submitted that the show cause notice dated 04.02.2015 issued to the Udhampur unit covers the period January 2014 to December 2014 and did not propose to invoke extended period of limitation. A further periodical show cause notice dated 27.01.2016 proposing to demand duty of Rs.3,34,78,050/- along with interest and penalty was also issued

to the Udhampur unit covering the period January 2015 to September 2015; that the present show cause notice dated 15.03.2017 is similar to the show cause notices dated 04.02.2015 and 27.01.2016 issued to the Udhampur unit of the noticee in as much as the present show cause notice also seeks to re-classify the products Dhanzyme and Dhanzyme Gold under CETSH No. 3105 1000 instead of the classification under CETSH No. 3101 0099 adopted by them; that since the issue and the product involved in the show cause notices dated 04.02.2015 and 27.01.2016 and the present show cause notice dated 15.03.2017 are the same, there is no question of invoking extended period of limitation in the present show cause notice dated 15.03.2017 when the original show cause notice dated 04.02.2015 issued to the Udhampur unit of the same assessee on the same grounds did not raise the extended period of limitation.

61. The noticee further argued that in the present dispute, even the first show cause notice dated 04.02.2015 issued to the Udhampur unit did not invoke the extended period of limitation which goes to show that even the department was of the opinion that the issue is one of interpretation and it is not a case of wilful suppression or misstatement by the noticee; that therefore, in the subsequent show cause notice dated 15.03.2017 issued to their Sanand unit on the same grounds and for the same product, extended period of limitation cannot be invoked; that the fact that the Sanand unit is also clearing the formulations Dhanxyme and Dhanzyme Gold at nil rate of duty under CETSH No. 3101 0099 was also informed to the department during the course of the recording of the statement of Shri Vijay Kapoor, Deputy General Manager of the Udhampur unit on 15.01.2015; that however, investigation at the Sanand unit was conducted by the Preventive Wing of the Centra] Excise Commissioneratc. Ahmedabad-II only on 17.10.201 6 i.e. after a gap of more than one and a half year and suppression is alleged against them to demand duty for a period of five years and in view of the above submissions, the demand beyond the normal period of limitation is not sustainable.

62. They further stated that the show cause notice proposes imposition of penalty upon them under Rule 25 of the Central Excise Rules, 2002 read with Section 11 AC(l)(c) of the Central Excise Act, 1944 and argued that no penalty is imposable under Section llAC(l)(c) of the Act; that penalty under Section llAC(l)(c) of the Act is not imposable in the facts of the present case. They stated that fom a bare reading of the above provisions of Section 11 AC it is evident that the said provision contemplates imposition of penalty when the ingredients such as suppression, fraud, misstatement etc. are established on the part of the assessee. They quoted the judgment of Hon'ble Supreme Court in the case of Rajasthan Spinning and Weaving Mills Ltd. - 2009 (238) EL I 3 (SC); that the ingredients required for imposing penalty under Section llAC(l)(c) of the Act are the same as those required for invoking extended period of limitation under Section 11A(4) of the Act i.e. penalty under Section llAC(l)(c) is not imposable when the extended period of limitation cannot be invoked; that the extended period of limitation cannot be invoked in the present case as none of the ingredients required under Section 11A(4)/11AC(l)(c) are present in the instant case and therefore, penalty under Section 11 AC(l)(c) is also not imposable in the present case.

63. They further argued that no penalty is imposable under Rule 25 of the Central Excise Rules, 2002 and penalty under Rule 25 is subject to provisions of Section 11 AC of the Act; that the show cause notice proposes to impose penalty upon them under Rule 25 of the Central Excise Rules, 2002 for alleged contravention of various provisions of the Central Excise Rules,

2002; that that such an allegation is baseless, erroneous and legally unsustainable and no penalty is liable to be imposed upon them.

64. They further contended that it is evident that the provisions of Rule 25 are subject to the provisions of Section 11 AC and therefore, for invoking the provisions of Rule 25, the ingredients of Section 11 AC are required to be satisfied and therefore, as already submitted, since the ingredients of Section 11 AC are not satisfied in their case, the proposal or imposition of penalty under Rule 25, which is subject to the provisions the Section I1 AC, is also not sustainable. In this regard, they rely upon the judgment of the Hon'ble High Court of Gujarat in the case of CCE v. Saurashtra Cement Ltd. - 2010 (260) ELT 71 (Guj.), the case of CCE v. Tripura Containers Pvt. Ltd. - 2011 (264) ELT 339 (Gu j.) and the judgment of the Hon'ble Allahabad High Court in the case of CC & CE, Hyderabad v. Mahalakshmi Profiles Ltd. - 2012 (279) ELT 355 (All.). They argued that since the ingredients of Section 11 AC are not satisfied in their case, the proposal for imposition of penalty under Rule 25 of the Central Excise Rules, 2002 is also not sustainable; that penalty not imposable in the absence of mention of specific clause of Rule 25(1) under which penalty is proposed to be imposed.

65. They further stated that the show cause notice does not indicate as to which of the clauses has been invoked in the present case for proposing to impose penalty upon the noticees. In the case of Amrit Foods v. CCF - 2005 (190) ELI' 433 (SC), the Honble Supreme Court upheld the order of the Tribunal setting aside penalty on the ground of non-mention of the specific sub-¬rule. They further argued that none of the provisions of Rule 25 are applicable to their case and hence, the proposal for imposition of penalty under Rule 25 is not sustainable.

66. They further argued that that they always acted in good faith and in bona fide belief that no duty was payable on the clearances of the formulations made by them and there was no intention to evade the payment of duty. They further argued that once the demand is found to be non-sustainable, the question of imposition of penalty does not arise.

67. They further contended that the penalty cannot exceed 50% of the duty demand; that in terms of the Section IIAC(I)(b) of the Central Excise Act, 1944 even if there was fraud, suppression, wilful misstatement etc. but transactions were recorded in the specified records, penalty will be equal to 50% of the duty demanded and hence, assuming without admitting, if at all penalty has to be imposed on the them, it should not be more than 50% of the demand confirmed as all the transactions were duly reflected in the records of them.

68. The noticee further submitted that since demand of duty or penalty against them is not sustainable there is no question of charging interest when the demand itself is not sustainable. They finally prayed that the duty demand is to be dropped entirely with consequential relief. They also sought to grant opportunity of personal hearing before adjudicating the matter. Accordingly, hearing took place on 22/09/2017 which was attended by Shri. Pawan Kumar Gopalka of M/s. Dhanuka Agritech Limited and he reiterated the contents of the earlier written submissions filed on 02.06.2017and requested to drop the SCN.

Personal Hearing:-

69. Accordingly, hearing took place on 22/09/2017 which was attended by Shri. Pawan Kumar Gopalka of M/s. Dhanuka Agritech Limited and he reiterated the contents of the earlier written submissions filed on 02.06.2017and requested to drop the SCN.

Discussions and findings:-

70. I have carefully gone through the Show Cause Notice, case records and the submissions made by the noticee in writing and during the time of hearing.

71. Main issue for determination in the present case is the determination of the correct classification of the products, the animal or vegetable fertilizers of Chapter 31, manufactured and cleared by the noticee, under the brand names 'Dhanzyme granules', and 'Dhanzyme Gold granules', manufactured and cleared in unit packages of gross weight not exceeding 10 kg, whether under Tariff sub-heading 31010099 as claimed by the noticee at Nil rate of duty or under Tariff sub-heading 31051000 as proposed by the department with duty @ 1% as per Notification No. 12/2012-CE dated 17/3/2012.

For the sake of convenience, entries relating to Chapter SH 31051000 and 31010099, as per Central Excise Tariff Act, 1985, are reproduced below-

Heading No.	Description of Goods	Unit	Rate of Duty
(1)	(2)	(3)	(4)
3101	**Animal or vegetable fertilisers, whether or not mixed together or chemically treated; fertilizers produced by the mixing or chemical treatment of animal or vegetable products**		Nil
3101 00	Animal or vegetable fertilizers, whether or no mixed together or chemically treated; fertilisers produced by the mixing or chemical treatment of animal or vegetable products:		
3101 00 10	Guano	kg-	Nil
3101 00 91	Animal dung	kg.	Nil
310100 92	Animal excreta	kg.	Nil
310100 99	Other	kg.	Nil

3105	**Mineral or chemical fertilizers containing two or three of the fertilizing elements nitrogen, phosphorus and potassium; other fertilizers; goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg**		
3105 10 00	Goods of this Chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg.	kg.	12%
3105 20 00	Mineral or chemical fertilizers containing the three fertilizing elements nitrogen, phosphorus and potassium	kg.	12%
3105 30 00	Diammonium Hydrogen orthophosphate (diammonium phosphate)	kg.	12%
3105 40 00	Ammonium Dihydrogen orthophosphate (monoammonium phosphate) and mixtures thereof with Diammonium hydrogen orthophosphate(diammonium phosphate)	kg.	12%

	Other mineral or chemical fertilisers containing the two fertilising elements nitrogen and phosphorus		
3105 51 00	Containing nitrates and phosphates	kg.	12%
3105 59 00	Other	kg.	12%
3105 60 00	Mineral or chemical fertilisers containing the two fertilising elements phosphorus and potassium	kg.	12%
3105 90	Others		
3105 90 10	Mineral or chemical fertilisers containing two fertilising elements namely nitrogen and potassium	kg.	12%
3105 90 90	Others	kg.	12%

It would be seen from above that Tariff Item 3105 specifically covers the goods of Chapter 31 in tablets or similar forms or in packages of a gross weight not exceeding 10 kg. Thus it is seen that if the goods falling under Chapter 31 of C.Excise Tariff are cleared or marketed in tablets or similar forms or in packages of a gross weight not exceeding 10 kg, such goods would be classified under chapter heading 3105.

72. In the case before me, the packings of the liquid/granules of animal or vegetable fertilizer under brand names of 'Dhanzyme Granules' & 'Dhanzyme Gold Granules' manufactured and cleared by M/s Dhanuka Agritech Limited, Sanand, Ahmedabad were in unit packs of 1 kg, 4 kg, 5 kg, 8 kg, 10 kg, and were equal or below 10 kg by weight; its classification under Tariff Heading 31010099 claimed by the Noticee does not appear to be correct, in as much as, Tariff Heading 31051000 of Chapter 31 covers **"Mineral or Chemical Fertilizer containing two or three of the fertilizing elements nitrogen, phosphorus and potassium; other fertilizers; Goods of this chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg"** whereas, Tariff Heading 3101 reads **'Animal or vegetable fertilizers, whether or not mixed together or chemically treated; fertilizers produced by mixing or chemical treatment of animal or vegetable products.** Further, the subheadings of Chapter Heading 3101 namely 31010010 covers guano; 31010091 covers animal dung; 31010092 covers animal excreta and 31010099 cover 'others'. Therefore, from a careful reading of the heading 3101, it is seen that animal or vegetable fertilizers whether or not mixed together and whether or not chemically treated would be covered under this heading, however, when these animal or vegetable fertilizers are manufactured in tablets or similar forms or **in packages of a weight not exceeding 10 kg**, these products are to be classifiable under Tariff sub-heading 31051000 which is more specific than sub-heading 31010099. Rule 3(a) of the **'General Rules for the Interpretation of this Schedule'** also provides that 'the heading which provides the most specific description shall be preferred to the heading providing a more general description'. The Hon'ble Supreme Court, in the case of **Speedways Rubber Co. V/s. CCE 2002(143) ELT 8** has held that the heading which provides the most specific description shall be preferred to heading providing a more general description. Therefore, it is clear that the classification of the animal or vegetable fertilizers claimed by the Noticee under sub-heading 31010099 is not correct and it appropriately classifiable under sub-heading 31051000, being the most specific description of the goods of the Noticee.

73. In the case before me, it is seen that ' Dhanzyme Granules' and 'Dhanzyme Gold Granules' cleared by the noticee in the unit packs of 1 kg, 4 kg, 5 kg, 8 kg and 10 kg and all of which are packages of gross weight not exceeding 10 Kgs. This fact is confirmed by Shri. Raj Kumar Kanodia, President of M/s. Dhanuka Agritech Limited, Sanand and Shri. Vinod Kumar, Bansal, Chief Financial Officer of M/s. Dhanuka Agritech Limited, Sanand in their statements recorded under Section 14 of the C.Excise Act, 1944. It is also pertinent to note here that Shri. Raj Kumar Kanonia and Shri. Vinod Kumar Bansal admitted through their statements that 'Dhanzyme Granules' and 'Dhanzyme Gold Granules', cleared in 1 kg, 4 kg, 5 kg, 8 kg and 10 kg are appropriately classifiable under Tariff sub heading 31051000 of C.Excise Tariff instead of 31010099. Shri. Raj Kumar Kanolia is found to have admitted their duty liability on the said finished goods before the investigative officers and accordingly paid duty amounting to Rs. 23,79,835/ towards duty and interest for the period October, 2015 to September, 2016 in respect of the said goods cleared in unit packs upto weight of 8 kg, under protest. It is also seen from his statement that they started paying duty on the said products being cleared in unit packs upto weight of 8 kgs. Thus it is seen that the correct classification of 'Dhanzyme Granules' and 'Dhanzyme Gold Granules' cleared in unit packs upto weight of 10 kgs under Tariff heading 3105 is accepted by Shri. Raj Kumar Kanonia, President and Shri. Vinod Kumar Bansal, Chief Financial Officer and paid duty accordingly on the said products cleared in unit packings upto 8 kg.

74. The reason for not paying duty on unit packs of said products of 10 kgs, according to Shri. Raj Kumar Kanolia, was attributed to the gross weight of said pack (including bucket) which is more than 10 kgs but the gross weight of the material inside the bucket is 10 kgs. In fact, Shri. Raj Kumar Kanolia had admitted in his statement that the net weight of the materials inside the bucket is 10 kg. It is also clearly stated in the statement that detailed information regarding composition of products, name of the manufacturer, batch number, manufacturing date, expiry date, maximum retail price and net weight of the product contained therein is also provided in each pack which clearly indicates that such pack itself in readily marketable condition in unit pack of net weight of 10 kg of materials contained as per the requirement of customers. The noticee is found to have been putting the two 10 kg net weight in the bucket for the sake of easy storing and transportation. It is therefore I do not find any merits in the contention of the noticee. It is the intention of the government to levy duty on the goods in packing form falling under Chapter 31 having weight of 10 kg or below irrespective of the weight of the packages/packing materials. The meaning of gross weight is that when goods are clubbed the total weight is gross weight, for example, if two 10kg packs are clubbed; it is 20 kg gross weight. It is worthwhile to say that 10 kg packet contain detailed information of the product contained therein, including the net weight which leads to conclude that the 10 kg pack alone itself is marketable. However, I find that written reply to the subject show cause notice is totally silent on the point of the dutiability of 10 kg packing of the said goods. Thus, it is to conclude that 10 kg pack is also coming under Tariff heading 3105 and appropriate duty of excise is to be levied on it as in the case of other packs having weight upto 8 kg; duty liability on which is already accepted by the noticee.

75. On a careful examination of the lengthy written reply to the show cause notice, submitted on 02/06/2017, it is found that the noticee rebutted the charges leveled against in the show cause notice i.e duty liability of their products, 'Dhanzyme Granules' and 'Dhanzyme Gold

Granules' cleared in unit packs upto weight of 10 kgs, by proposing to classifying them under Chapter SH 31051000 instead of under Chapter SH 31010099, is solely on the ground that the activity performed by them for preparation of their products namely Dhanzyme granules and Dhanzyme Gold Granules, does not amount to manufacture as per Section 2(f) of Central Excise Act, 1944 and hence no duty is payable on such products. I find that the contention that the activity carried out to make the said products is non-qualifying as manufacture under central excise law was never raised by the noticee at the detection and investigation stage of the case. Pertinent to note here that the President and CEO of the company in their statements recorded under Section 14 of the C.Excise Act, 1944 admitted the correct classification of the products namely 'Dhanzyme Granules' and 'Dhanzyme Gold Granules' cleared in unit packs upto weight of 10 kgs is under chapter sub heading 31051000 and accepted the duty liability accordingly . They even paid duty on the said products in packings upto 8 kg, cleared during certain period of time. Only dispute at the time of the investigation with them was the duty liability on the said goods cleared in 10 Kg packings. It is also seen from records that at their another unit at Udhampur in Jammu & Kashmir, from where the products namely Dhanzyme and Dhanzyme Gold are cleared in unit packages of volume of 10 kg or less, similar proceedings were initiated against them to recover the duty by classifying them under tariff heading 31051000. Nothing on records to suggest that the present argument that the process carried out to get the said products do not amount to manufacture was pointed out by the noticee before the jurisdictional central excise officers at Udhampur in Jammu & Kashmir. It is thus apparent that the present stand taken by the noticee is after thought for diverting the main issue of classification of the products in question under proper C.Excise Tariff heading and the subsequent duty liability.

76. Coming to the contents of the arguments of the noticee that the process does not amount to manufacture as per section 2(f) of C.Excise Act, 1944, it is seen that they tried strongly to defend this argument by narrating the process carried out in detail, ingredients of the products, quoting many case laws in their favour, making reference to various research study/papers related to 'seaweed'. Since the proposal of the present show cause notice to recover the duty on the clearance of said products by classifying them under chapter sub heading 31051000 is rebutted by the noticee with a sole point that operations carried out to get the products in dispute do not amount to manufacture and hence no duty liability, the said point is required a depth examination.

Section 2(f) of Central Excise reads as follows:

2(f) "manufacture" includes any process,-

i. incidental or ancillary to the completion of a manufactured product;

ii. which is specified in relation to any goods in the Section or Chapter notes of the First Schedule to the Central Excise Tariff Act, 1985 (5 of 1986) as amounting to manufacture; or

iii. which, in relation to the goods specified in Third Schedule involves packing or re-packing of such goods in a unit container or labeling or re-labeling of containers including the declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer, and the word "manufacturer" shall be construed accordingly and shall include not

only a person who employs hired labor in the production or manufacture of excisable goods, but also any person who engages in their production or manufacture on his own account;

77. It would be seen from the above definition that if a process that brings into existence a new commodity, and if a process that is incidental or ancillary to the completion of a manufactured product, such process are to be treated as manufacture. Process which are specified in relation to any goods in the Section or Chapter Notes of the first schedule to the C.Excise Tariff Act, 1985 are also to be considered as manufacture. Activities of packing or re-packing of goods in a unit container, labeling or re-labeling of containers, declaration or alteration of retail sale price on it or adoption of any other treatment on the goods to render the product marketable to the consumer in relation to the goods specified to the goods specified in the third schedule to the C.Excise Act, 1944 are also to be termed as manufacture.

78. Products falling under Chapter 31 of C.Excise Tariff are not among the goods specified in the Third schedule to the C.Excise Act. Similarly, no Note is specified in Chapter 31 of C.Excise Tariff for the purpose of considering as manufacture. Thus, the remaining ingredients of Section 2(f), that process incidental or ancillary to the completion of a manufactured product or a process which brings into existence of a new commodity, are to be examined in order to ascertain as to whether the process/activities which make the disputed products i.e. Dhanzyme and Dhanzyme Gold, does amount to manufacture or otherwise.

79. Noticee is vehemently arguing that the said products, namely Dhanzyme and Dhanzyme Gold, are not distinct from the starting material i.e. sea weed extract and they do not poseess characteristics different from the sea weed extract or after the activity of preparation of the said products, no new or different commercial commodity comes into existence and accordingly the said process does not qualify as 'manufacture' as per Section 2(f) of C.Excise Act. At this stage, an analysis of the process carried out by the noticee to make the goods, Dhanzyme and Dhanzyme Gold, is required to find out the required answer i.e. whether amounts to manufacture or not.

80. Various ingredients which are used in the preparation of the said products namely Dhanzyme and Dhanzyme Gold are mentioned in the written submissions of the noticee. These are, for making the Dhanzyme Granules, are Dhanzyme Blank Granules, Seaweed Extract Flake, Potassium Humate, Potassium Hydroxide, Emulsifier 1015 and Borewell water. For the preparation of Dhanzyme Gold Granules, they are found to have been using PPT Silica Dhanzyme Gold Granules, Dye Aerosol Yellow BDH, Dhanzyme Gold Bentonite Granules, Seaweed Extract Flake, Potassium Humate, Potassium Hydroxide, Emulsifier 1015, Formaldehyde, Borewell Water and Di-ethylene Glycol. On perusal of the detailed description of the process undertaken, given in the reply to SCN received on 2/6/2017, it is seen that the said both products are derived from seaweed flakes which are first processed to obtain seaweed concentrate and subsequently used to derive the formulations. As per the submission made by the noticee it is seen that for the preparation of Dhanzyme, firstly water is to be taken in a stainless steel vessel in which potassium hydroxide is to be added to make it Alkaline (pH 8-9); then potassium Humate is to be slowly added while stirring the mass; then the material is to be stirred for 30 minutes and then seaweed flakes are to be slowly added and homogenized by stirring and emulsifiers to be added and the mixture is stirred for 30 minutes, then to be packed

in unit containers. Similarly, Dhanzyme Gold is found to have been prepared firstly adding potassium hydroxide into the water stored in a stainless vessel and then potassium Humate is slowly added while stirring the mass and then seaweed flakes are slowly added and homogenized by stirring and emulsifiers are added and the mixture is stirred for some time.

81. Noticees' contentions that the activity of preparation of the said products does not amount to manufacture as per Section 2(f) of C.Excise Act, 1944 are to be examined in light of the above narrated process and various ingredients of the products. Noticee is found to have been contending that Dhanzyme and Dhanzyme Gold are not distinct from the starting material i.e. sea weed extract and they do not possess characteristics different from the sea weed extract or after the activity of preparation of the said products, no new or different commercial commodity comes into existence and accordingly the said process does not qualify as 'manufacture' as per Section 2(f) of C.Excise Act. It would be evident from the manufacturing process of the said products that seaweed extract is only one ingredient of the products. It appears from the preparation process of the both the products that apart from the main ingredient, Seaweed extract, other ingredients like potassium Humate, Potassium Hydroxide, emulsifiers etc are also used in making of the products in question. "*Manufacture*", as defined under Section 2(f) of the Act takes within its fold any process incidental or ancillary to the completion of a manufactured product. Section 2(f) uses the term any process "*incidental or ancillary to the completion*". The broader meaning that can be attributed to the term "incidental" or "ancillary" is that it is happening which is subsidiary or subordinate to something more important. From the usage of the terms associated with manufacture, it would be evident that it considers any happening towards the achievement of a manufactured product as incidental or ancillary, which is an event in the manufacturing activity. There is no dispute that the main raw material in making of their products in question is seaweed extract. Apart from the seaweed extract, other raw materials are also used to get the said products. The input namely seaweed extract and the finished products are clearly distinct products and are commercially known in the market as such i.e. Dhanzyme and Dhanzyme Gold. It would not require much imagination to show that process of making of Dhanzyme and Dhanzyme Gold from the main raw material of seaweed extract is a process resulting in a different product and thus, of course, amounting to manufacture. Manufacture is complete as soon as raw materials undergo some change by application of one or more process. It is a Settled law that if a new or different article with distinct name, character and use comes into existence by a particular process, such process amounts to manufacture. Transformation of raw material into a new commodity commercially known distinctly is manufacture as per Section 2(f) of Central Excise Act, 1944. In the case before me, after the process of raw materials, including seaweed extract, a new and different product with distinct name, character and use come into existence, i.e. Dhanzyme and Dhanzyme Gold and the process of preparation of the said products would come under the category of manufacturing activity as per the provisions contained in Section 2(f) of the Central Excise Act, 1944.

82. Noticee is found to have pointed out some case laws in support of their claim that the process of making the said products does not come under manufacture as per Section 2(f) of the Act. In the case of U.O.I. V. Delhi Cloth and General Mills Ltd as reported in 1977 (1) ELT. (J199) Hon'ble Apex Court laid down the test for determining the process as manufacture or not is whether the process brings into existence a new commercial commodity which is distinct from

the starting material having different name, character or use. In the case before me, it is already concluded that new commercial products, namely Dhanzyme and Dhanzyme Gold, which is distinct from the starting material i.e. seaweed extract, came into existence. Thus, although the noticee claimed the benefit of this judgment in their favour, in fact the case law would strengthen the stand of the department that the said process does amount to manufacture. Noticee is found to have relied on the judgment of Hon'ble Apex Court's another judgment in the case of U.O.I. v. J.G. Glass Industries reported at 1998 (97) ELT.5. On a perusal of this judgment it is seen that vide the said judgment, Hon'ble Court held that to determine whether a process amounts to manufacture or not, two fold test is to be examined and the first one is whether by the said process, a different commercial commodity comes in to existence or whether the identity of the original commodity ceases to exist and the second is whether the commodity already in existence will serve no purpose but for the purpose. It is very clear in the present case that different commercial commodity comes into existence after the process and the same is cleared/marketed in unit packaging as fertilizers and the identity of the original commodity, i.e. seaweed extract, ceases to exist. Thus ratio of this case law is in fact underlines the stand taken by me that the process of making the products in question does amount to manufacture.

83. Hon'ble Apex Court's another judgments on the matter of determination of manufacture under Section 2(f) of the Act are also quoted by the noticee and it is seen that in all these cases it is held that an activity carried on by a person would be termed as 'manufacture' if it brings into existence a new substance and the process in order to amount to manufacture must be one, which brings into existence a new substance known to the market. Thus noticee is not in a position to get any benefit of these judgments.

84. Noticee has also tried to get support of their said contention by making reference to some notes/paras of certain research/scientific studies related to seaweed extracts and on examination of the same it is found that these documents merely mention about the nature, benefits etc of the seaweed extracts and nothing is in it about the process undertaken to make the products in question by adding certain chemicals and amino acids on the seaweed extracts. Thus, I do not find any relevancy on such notes of such research/scientific studies pointed out by the noticee.

85. It would be evident from the above facts that the activity carried out by the noticee to make Dhanzyme and Dhanzyme Gold does amount to manufacture as per Section 2(f) of the Act as a new commercial product is emerged out after the process which is distinct from the prime material, seaweed extract, used for making the said products in as much as the contents, shape, name etc. Seaweed extract is only one of the ingredients of the products in question. The process to prepare the said products involves the dilution of the seaweed extracts with addition of certain chemicals and amino acids. Thus, it is very clear that new and different commercial product coming out after the process which can surely be termed as manufacture as per Section 2(f) of the Act. Moreover, it is obvious that, the present stand taken by the noticee is just to divert the main issue of the proper classification and subsequent duty liability on the said products as at any stage of investigation the said contention is not raised by them. Even in their factory in Jammu & Kashmir, when the issue of classification and duty liability on the said products was come up the said contention was never raised by them either before the investigative officers and the adjudicating officer. The President and CEO of the unit in their statements recorded under the Section 14 of the Act clearly admitted the duty liability on the

said products by accepting the proper classification of the products is under Tariff heading 31051000. It is also worth to point out here that by accepting the duty liability, they paid part of the non paid duty at the time of investigation.

86. Thus I do not find any substance in the contention of the noticee that the process making the disputed goods does not amount to manufacturing as per Section 2(f) of the Act.

87. I accordingly find that animal or vegetable fertilizers manufactured and cleared by the noticee i.e. Dhanzyme and Dhanzyme Gold are appropriately classifiable under tariff sub-heading 31051000 of the C.Excise Tariff Act and the noticee is liable to discharge appropriate duty as per the effective rate of duty specified in C.Excise Tariff with interest.

88. Even though the noticee strongly defends that there is no duty liability on their products namely Dhanzyme and Dhanzyme Gold, by arguing that the process of making them does not amount to manufacture, without prejudice to their submissions made, they stated that it is a settled legal position that an assessee is entitled to 'cum duty benefit' and claimed the same to be extended to them. It is seen that the benefit of cum-duty can be given to the noticee only when there is evidence to show that neither the excise duty has been recovered nor there is any scope for recovering the same. In the present case, on the contrary impugned goods were cleared at nil rate of duty, and hence whatever price was collected from their buyers was on the footing that no duty was payable because of the nil tariff rate, wrongly claimed by them. Such price can never include any duty amount because goods in question were cleared at nil rate of duty and no question of recovering any cum-duty price on such goods from the customers is found. Accordingly, benefit of cum-duty price cannot be extended to the noticee. This view also get support from the decision of the Hon'ble Tribunal in the case of Asian Alloys Ltd. Vs CCE, Delhi-III reported at 2005 (203) ELT 252 (Tri.) which is affirmed in Supreme Court (2012 (278)ELT.A.143 (SC) wherein it is observed that when exemption from duty claimed and such a price can never include any duty amount because when appellant-company itself proceeded on footing that no duty was payable, no question of its having recovered any cum-duty price from customers in DTA and there is no scope in the case to treat the sale price worked out for assessment as "cum-duty" price.

89. When coming to the another contention of the noticee that the extended period of limitation is not invokable in their case, I find that the present show cause notice dated 15.3.2017 raised a demand of duty on the goods cleared during the period 2012-13 to 2016-17 under the provisions of Section 11 A (4) of the C.Excise Act, 1944 by invoking the extended period of five years. Provisions of Section 11A(4) can be invoked in the cases of fraud or collusion or any willful mis-statement or suppression of facts or contravention of various provisions of central excise Act and Rules with intention to evade payment of duty. Noticee's main argument is that they are regularly filing ER-1 returns and hence no suppression of facts from the department. It is a fact that the noticee deliberately concealed the fact of clearing their products in question in specific unit packaging although they knew that clearance of goods falling under Chapter 31 of C.Excise Tariff in unit packaging of a gross weight not exceeding 10 kgs will change the tariff subheading of the product for their classification in central excise tariff and accordingly attract duty thereon. They intentionally shown total quantity of manufacture and clearance of the said items in their periodical returns i.e. ER-1 returns in unit quantity of Kgs instead of showing separately for the goods having weight upto 10 kgs. Another contention of

the noticee is that there is no column in the monthly returns which requires packaging-wise declaration of the goods manufactured and hence no suppression can be alleged on their part. Noticee could have informed the department through other modes of communication about the packaging wise clearance of said goods as the clearance of goods falling under Chapter 31 in unit packages upto weight of 10 Kg is dutiable. Under self assessment system the noticee was supposed to ascertain their duty liability properly and to discharge the same within the specified time. The case laws referred by the noticee on the matter of limitation are not found to have been applicable to the present one as the facts involved in the present one is different from the facts of that cases. By pointing out that initially SCNs were issued to their unit in Jammu & Kashmir on the same issue, they contended that it is settled law that extended period of limitation cannot be invoked in subsequent show cause notices on the same issue to the same assessee as the department is already aware of the relevant facts at the time of issuing the first show cause notice. Based on the intelligence received from the C.Excise officers of Jammu & Kashmir that the same practice of non-payment of duty on the said products by mis-classifying, as was doing at the unit in Udhampur in Jammu, is being doing at the Sanand unit of the noticee company, investigation was initiated by the preventive officers of C.Excise, Ahmedabad-II Commissionerate which culminated in issuing of the present show cause notice. Thus, this is the first show cause notice issued to their Sanand Unit. Issuance of SCN on same ground to other units by the jurisdictional central excise authority will not take away the right of issuing SCN by invoking the extended period of limitation on the same ground to other units of same company by their jurisdictional central excise officer. The case laws pointed out by the noticee on this ground is related to issuing subsequent SCN to same unit of a company and hence not applicable in this case.It is thus seen that the extended period of limitation under Section 11A(4) of the C.Excise Act, 1944 is correctly invoked in the present SCN.

90. Coming to the proposal made in the subject show cause notice to impose penalty on the notice under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC (c) of Central Excise Act, 1944, it is seen that the noticee contended that such penalty cannot be invoked as extended period of limitation cannot be invoked in the case as none of the ingredients required under section 11A(4)/11AC(1)(c) are present in the instant case. If ingredients such as suppression, fraud, misstatement etc. are established on the part of assessee only, provisions of Section 11AC(1)(c) of the Act can be applicable to the assessee. In the present case before me it is already concluded in previous paragraphs that due to suppression of facts on the part of the noticee, non-payment of duty was happened. Hence suppression on the part of noticee is established in this case, which invite penalty under Section 11AC(1)(c) of the Act. With reference to the proposal for imposing penalty under Rule 25 of the C.Excise Rules, 2002 it is argued by the noticee that provisions of Rule 25 of the Rules are subject to the provisions of Section 11AC and therefore for invoking the provisions of Rule 25, ingredients of Section 11AC are required to be satisfied; that ingredients of Section 11AC are not satisfied in the present case, the proposal to impose penalty under Rule 25 is also not sustainable. Noticee's this contention is not based on facts as it is a fact that noticee suppressed material facts from the department with an intention to evade duty and in such situation, the proposal made in the notice to impose penalty under Rule 25 is proper. Other contentions are that penalty not imposable as noticee acted in good faith and when demand is not sustainable. It is a fact that noticee had not acted in good faith as they suppressed the material facts from the department with an intention to evade duty and hence penalty under rule 25 of the rules read with Section

11AC is liable to be invoked against them. The noticee had violated provisions of various rules of the Central Excise Rules, 2002 as by misclassifying the products, they did not pay duty on the impugned goods as required under Rule 4; they did not assess duty payable on the said products as required under Rule 6; they did not pay the duty to the credit of the central government by due dates as provided under Rule 8; they did not maintain the daily stock account as provided under Rule 10; they failed to correctly disclose the nature of packing and clearance of the products in their statutory returns viz ER-1, as provided under Rule 12. All violations of these Rules invite penal provisions under Rule 25 of the C.Excise Rules, 2002 read with Section 11AC of the C.Excise Act, 1944.

91. Notice also proposes to recover the duty with interest under Section 11AA of the C.Excise Act, 1944. Noticee contends that they are not liable to pay interest. This contention is not proper. The Apex Court in the case of CCE v. International Auto Ltd, reported at 2010 (250)ELT. 3(SC) observed that the interest is charged to compensate the department for loss of revenue. Relying upon this judgment of Hon'ble Supreme Court, Tribunal in the case of EMCO Ltd v. Commissioner of C.Excise, Mumbai, reported in 2011 (272) ELT. 136 (Tri.-Mumbai) held that the interest liability is a consequential liability whenever there is delayed payment of duty. Accordingly, the noticee is liable to pay interest under Section 11AA of the Act on the duty which is either late paid or not paid.

92. In view of above discussions and findings, I pass following order-

ORDER

(I) I confirm the demand of central excise duty amounting to Rs. 1,32,70,241/- (Rupees One crore thirty two lakh seventy thousand two hundred and forty one only) against M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand- Viramgam Road, Village Vasna, Taluka Sanand, Dist. Ahmedabad under Section 11A(4) of the Central Excise Act, 1944 and order for the recovery of the same.

(II) The amount of Rs.21,74,256/- (Rupees twenty one lakh seventy four thousand two hundred and fifty six only) paid vide challans as mentioned at para 17 of this order under protest by the noticee is appropriated towards the amount of duty, confirmed above, by vacating the protest.

(III) I also order for the recovery of the interest on the duty amount, mentioned at Sl.No (I) above under the provisions of Section 11AA of the C.Excise Act, 1944.

(IV) The amount Rs. 2,05,579/ (Rupees two lakh five thousand five hundred and seventy nine only) paid against the interest on the duty amount of Rs. 21,74,256/- (Rupees twenty one lakh seventy four thousand two hundred and fifty six only) is appropriated towards the interest amount confirmed at Sl.No.(III) above.

(V) I impose a penalty of Rs. 1,32,70,241/- (Rupees One crore thirty two lakh seventy thousand two hundred and forty one only) upon M/s. M/s. Dhanuka Agritech Ltd., D-I/A-B, Ajanta Industrial Estate, Sanand- Viramgam Road, Village

Vasna, Taluka Sanand, Dist. Ahmedabad under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC (1) (c) of the Central Excise Act, 1944.

However, if they pay the amount determined under (i) above along with interest payable thereon as ordered under (iii) above within thirty days from the date of communication of this order, the amount of penalty shall be twenty-five percent of the penalty imposed. The benefit of reduced penalty shall be available if the amount of penalty so determined is also paid within the aforesaid period of thirty days.

93. Proceedings under the above mentioned provisions are saved by Section 174 of the Central Goods and Service Act, 2017.

(G.C. Jain)
Joint Commissioner
Central Goods & Service Tax & C.Excise
Ahmedabad-North.

FNo. V.31/15-06/OA/2017 Dated 17.10.2017

To
M/s. Dhanuka Agritech Ltd.,
D-I/A-B, Ajanta Industrial Estate,
Sanand- Viramgam Road, Village Vasna,
Taluka Sanand, Dist. Ahmedabad

Copy to:

1. The Commissioner, CGST & Central Excise, Ahmedabad-North. (Attn- RRA)
2. The Assistant Commissioner, CGST & Central Excise, Div-III, Ahmedabad-North.
3. The Superintendent, CGST & Central Excise, AR-I, Div-III, Ahmedabad-North.
4. Guard File.