


<p>आयुक्त का कार्यालय केंद्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क ,अहमदाबाद उत्तर, कस्टम हाँउस(तल प्रथम) नवरंगपुरा- अहमदाबाद ,380009</p>		<p>Office of the Commissioner of Central Goods & Services Tax & Central Excise, Ahmedabad North, Custom House(1st Floor) Navrangpura, Ahmedabad-380009</p>
<p>फ़ोन नंबर./ PHONE No.: 079-2754 4599 फ़ैक्स/ FAX : 079-2754 4463 E-mail:- oaahmedabad2@gmail.com</p>		

निबन्धित पावती डाक द्वारा / By REGISTERED POST AD

फा .सं/. F.NO. V.24/15-29/OA/Denovo/2023

DIN: 20240264WT0000414635

आदेश की तारीख / Date of Order: 14.02.2024

जारी करने की तारीख / Date of Issue: 14.02.2024

द्वारा पारित/Passed by -

उपेन्द्र सिंह यादव / UPENDRA SINGH YADAV
आयुक्त / COMMISSIONER

मूल आदेश संख्या /

ORDER-IN-ORIGINAL No. AHM-EXCUS-002-COMMR-06/2023-24

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

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2. इस आदेश से असंतुष्ट कोई भी व्यक्ति इस आदेश की प्राप्ति से तीन माह के भीतर सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण ,अहमदाबाद पीठ को इस आदेश के विरुद्ध अपील कर सकता है। अपील सहायक रजिस्ट्रार ,सीमा शुल्क ,उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण , द्वितीय तल, बाहुमली भवन असरवा, गिरधर नगर पुल के पास, गिरधर नगर, अहमदाबाद, गुजरात 380004 को संबोधित होनी चाहिए।

Any person deeming himself aggrieved by this Order may appeal against this Order to the Customs, Excise and Service Tax Appellate Tribunal, Ahmedabad Bench within three months from the date of its communication. The appeal must be addressed to the Assistant Registrar, Customs, Excise and Service Tax Appellate Tribunal, 2nd Floor, Bahumali Bhavan Asarwa, Near Girdhar Nagar Bridge, Girdhar Nagar, Ahmedabad, Gujarat 380004.

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

An appeal against this order shall lie before the Tribunal 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)

3. उक्त अपील प्रारूप सं .इ.ए 3.में दाखिल की जानी चाहिए। उसपर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 ,के नियम 3 के उप नियम (2)में विनिर्दिष्ट व्यक्तियों द्वारा

हस्ताक्षर किए जाएंगे। उक्त अपील को चार प्रतियाँ में दाखिल किया जाए तथा जिस आदेश के विरुद्ध अपील की गई हो, उसकी भी उतनी ही प्रतियाँ संलग्न की जाएँ (उनमें से कम से कम एक प्रति प्रमाणित होनी चाहिए। अपील से संबन्धित सभी दस्तावेज भी चार प्रतियाँ में अग्रेषित किए जाने चाहिए।

The Appeal should be filed in Form No. E.A.3. It shall be signed by the persons specified in sub-rule (2) of Rule 3 of the Central Excise (Appeals) Rules, 2001. It shall be filed in quadruplicate and shall be accompanied by an equal number of copies of the order appealed against (one of which at least shall be certified copy). All supporting documents of the appeal should be forwarded in quadruplicate.

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

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

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

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

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

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

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

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

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

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

विषय: -कारण बताओ सूचना:

Subject- Denovo Proceedings initiated vide the Hon'ble CESTAT vide it's Order No. A/10030-10032/2023 dated 10.01.2023, arising OIO No. AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015 issued by the then Commissioner, Central Excise, Ahmedabad-II in case of Show Cause Notice No. F.No. MP/PI-V/Inq-2/05-06/Pt-I dated 08.07.2009 issued to 1) M/s Leamak Healthcare Pvt. Ltd., Sarkhej-Bavla Highway, Gam: Matoda, Ahmedabad. 2) M/s ITC Ltd., Food Division, Pulkeshinagar P.O. Bangalore.

ORDER-IN-ORIGINAL No. AHM-EXCUS-02-COMMR-06/2023-24

A. M/s Leamak Healthcare Pvt. Ltd., Sarkhej Bavla Highway, Matoda Gam Ahmedabad -382213 (hereinafter referred to as "the assessee" or "the said assessee" for the sake of brevity) were issued Show Cause Notice F.No. MP/PI-V/Inq-20/05-06/Pt-I dated 08.07.2009 by the then Commissioner, Ahmedabad-II, Ahmedabad (hereinafter referred to as "the SCN" or "the said SCN" for the sake of brevity), wherein, Central Excise Duty of Rs.3,70,31,551/- was proposed to be demanded from the assessee. In the said SCN, M/s. ITC Ltd., Food Division, Bangalore were also asked to show cause as to why penalty should not be imposed on them under Rule 26(1) of the Central Excise Rules, 2002. After considering submission of the assessee and the co-noticee, the said SCN was adjudicated vide OIO No. 26/Commr/HKJ/AHD-II/2010 dated 10.08.2010, wherein, Central Excise Duty of Rs.3,70,31,551/- was confirmed, penalty of Rs.3,70,31,551/- was also imposed on the assessee under Section 11AC of the Central Excise Act, 1944 and penalty of Rs.90,00,000/- was imposed on M/s. ITC Ltd. Aggrieved by the said order, the assessee and M/s. ITC Ltd. had preferred an appeal before Hon'ble CESTAT. Hon'ble CESTAT had remanded back the case to adjudicating authority vide Order No. A/100002-10003/2014 dated 01.01.2014 with a direction to determine the value of goods as per the provisions of Rule 11 of the Valuation Rule, 2004 and giving the appellants an opportunity to present their case before taking a final view.

B. In view of the directions given by Hon'ble CESTAT vide Order No. A/100002-10003/2014 dated 01.01.2014, the case was taken up for de-novo adjudication and personal hearing was given to the assessee. After considering the submission of the assessee, fresh Order-in-Original No. AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015 was passed by the then Commissioner, Central Excise, Ahmedabad-II, wherein:-

- a) Demand of Rs.2,48,06,064/- was confirmed under Section 11A(2) of the Central Excise Act, 1944;
- b) Interest at applicable rate was ordered to be recovered from the assessee under Section 11AB of the Central Excise Act, 1944;
- c) Penalty of Rs.2,48,06,064/- was imposed on the assessee under Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002;
- d) Penalty of Rs.60,00,000/- was imposed on M/s. ITC Ltd. under Rule 26(1) of the Central Excise Rules, 2002.

C. Aggrieved by the aforesaid order No. AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015, the Department, the assessee and M/s. ITC Ltd. had preferred an appeal before Hon'ble CESTAT. After considering submissions made by the Department, the assessee and M/s. ITC Ltd., Hon'ble CESTAT set aside the above referred order and the matter has been remanded back for fresh adjudication vide Order No. A/10030-10032/2023 dated 11.01.2023. The said order of Hon'ble CESTAT has been accepted by the department.

BRIEF FACTS OF THE CASE:

M/s Leamak Healthcare Pvt. Ltd., Sarkhej Bavla Highway, Matoda Gam Ahmedabad -382213 (hereinafter referred to as "the assessee" or "the said assessee" for the sake of brevity) were engaged in manufacture of confectionary items and pharmaceuticals products falling under chapter 17 and 30 of the First Schedule to the Central Excise Tariff Act, 1985 and were having Central Excise Registration No. AAACL6538KXM001. The assessee was also undertaking manufacturing for others on job work basis and were discharging the applicable duty liability.

2. The assessee was engaged in manufacture of confectionery items on behalf of M/s. ITC Ltd. at their factory premise on job work basis. As per the agreement entered into between M/s. ITC Ltd. and the assessee, the packing material and raw materials were being supplied by M/s. ITC Ltd. and the manufactured finished goods were handed over to M/s. ITC Ltd at factory gate. The assessee had been paying Central Excise Duty on the value arrived at on the basis of raw material cost plus packing material cost plus conversion cost. Prior to June 2005, the assessee was discharging duty on MRP basis under Section 4A of the Central Excise Act; 1944.

3. Inquiry by preventive wing of the department revealed that both M/s. ITC Ltd. and the assessee had interest directly or indirectly in the business of each other on the following grounds:-

- a) M/s. ITC Ltd. had all the rights of inspection in respect of the manufacturing premises in order to verify the standards etc. with respect to know-how provided by them for manufacturing and packaging of finished goods.
- b) M/s. ITC Ltd. had their own people to supervise the manufacturing activities at the factory premises of the assessee right from receipt of raw materials till the dispatch of finished goods.
- c) M/s. ITC Ltd. had provided machinery worth Rs.7.38 crores to the assessee for manufacturing confectionery. M/s. ITC Ltd. had incurred all

the expenses with respect to cost of machinery, its installation, freight and other expenses and depreciation of such machinery were claimed by M/s. ITC Ltd. Only a nominal rent of Rs.12,000/- per annum was being paid by the assessee for the said machinery worth Rs.7.38 crores. This machinery was not permitted for manufacture of goods other than for M/s. ITC Ltd.

- d) M/s. ITC Ltd. had provided interest free loan of Rs.25,86,257/- and Rs.49 Lakhs in the year 2002-03 and 2005-06 respectively to the assessee and no interest had been paid by the assessee.
- e) After receipt of machinery from M/s. ITC Ltd., the job work charges payable to the assessee were reduced from Rs.13.50 per kg to Rs.9.00 per kg for the confectionery manufactured by assessee in excess of 412 MT.
- f) There was no sale of confectionery manufactured by the assessee to M/s. ITC Ltd. because the entire goods manufactured in the factory were handed over to the representative of M/s. ITC Ltd. at the factory gate and M/s. ITC Ltd. prepared invoices of the manufactured goods as stock transfer for further dispatching to M/s. ITC Ltd. hubs.
- g) The assessee was not permitted to manufacture confectionery for supply to any other party.
- h) M/s. ITC Ltd. was also supplying items to the assessee for packing along with finished confectionery which were to be supplied free as incentive/gift for sale promotion of confectionery products.

4. In view of the above, it appeared that the assessee and M/s. ITC Ltd. were related as per Section 4(3)(b) of the Central Excise Act, 1944 and the assessable value should have been governed by Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with Section 4(1)(b) of the Central Excise Act, 1944. Accordingly, Show Cause Notice was issued to the assessee to show cause as to why:-

- a) the relation between M/s. Leamak Healthcare Pvt. Ltd. and M/s. ITC Ltd. should not be considered under the ambit of related person under Section 4 of the Central Excise Act, 1944, consequently, the transaction value under Section 4(1)(a) of the Central Excise Act, 1944, should not be rejected and the transaction value be arrived on the basis of Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with Section 4(1)(b) of the Central Excise Act, 1944, i.e. on the basis of price at which the goods manufactured by M/s. Leamak Healthcare Pvt. Ltd. were finally sold by M/s. ITC Ltd. in the market;

- b) the Central Excise Duty amounting to Rs.3,70,31,551/- for the period from September 2005 to March 2007 on the difference of their sale value and the sale value of M/s. ITC Ltd. should not be demanded under the proviso to Section 11A of the Central Excise Act, 1944;
- c) penalty in terms of Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002 should not be imposed; and
- d) interest at prescribed rate should not be recovered from them under Section 11AB of the Central Excise Act, 1944.

5. M/s. ITC Ltd., Food Division, Pulikeshinagar P.O., Bangalore were also issued the said Show Cause Notice asking them to show cause as to why penalty in terms of provisions of Rule 26(1) of the Central Excise Rules, 2002 should not be imposed on them.

6. After considering the written and oral submissions of the assessee, the notice was decided by the then Commissioner of Central Excise, Ahmedabad-II, vide his Order-in-Original No. 26/HKJ/AHD—II/2010 dated 10.08.2010. In the said Order-in-Original, it was held that M/s. Leamak Healthcare Pvt. Ltd. and M/s. ITC Ltd. were related persons in terms of Section 4(3)(b)(iv) of the Central Excise Act, 1944. Accordingly, duty of Rs.3,70,31,551/- was confirmed by calculating duty on the value arrived at on the basis of Rule 9 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 read with Section 4(1)(b) of the Central Excise Act, 1944. Besides, penalty of Rs.3,70,31,551/- was imposed under Section 11AC of the Central Excise Act, 1944 on the assessee and penalty of Rs.90,00,000/- was imposed on M/s. ITC Ltd under Rule 26(1) of the Central Excise Rules, 2002.

7. The assessee being aggrieved, had filed appeal before Hon'ble CESTAT and the Hon'ble CESTAT had remanded back the case vide Order No. A/100002-100003/2014 dated 01.01.2014 with the following observations:-

"11. In my view the above facts though mutuality of interest is not established but it has been correctly held by the adjudicating authority that the judgement of Hon'ble Supreme Court in the case of M/s. Ujagar Prints (Supra) cannot be made applicable to the present proceedings because the present case is clearly distinguishable from the facts and the principles laid down by Apex Court for valuation of the goods in case of manufacture of goods on job work basis. In the case of M/s. Ujagar Prints only one of the several materials i.e., grey fabrics was supplied to the job worker whereas in the present case all the raw materials and packaging

materials were supplied by ITC. Various gift articles were also supplied by ITC for packaging, the machinery worth more than Rs. 7 crore required for manufacturing of confectionery was supplied by ITC on rent of Rs.12,000/- per annum in the present proceedings whereas the machinery belong to M/s. Ujagar Prints in the case before Apex Court. In the case of M/s. Ujagar Prints, the job works was at liberty to manufacture goods for any client on job work and was not restricted to as particular client as is the case in the present proceedings. As already held, the revenue is not able to establish that there is mutuality of interest in view of the monetary gain and flow back to both the appellant and M/s. ITC. One way interest has been held by various pronouncements as not the conclusive proof of two individuals being related. In the present proceedings before us appellant will be interest in getting work from M/s. ITC as he is getting more financial gains from M/s. ITC but it is not coming out anywhere in the case records as to how M/s. ITC has financially gained from the appellant in the transactions. There is a clause in the agreement that M/s. ITC at any time can get the work entrusted to the appellant, done from others. Therefore, the provisions of Rule 9 cannot be pressed into service in the present proceedings. However, at the same time, for reasons recorded above in the present case valuation of confectionery manufactured by M/s. Leamak cannot be resorted to as per the principles laid down by Apex Court's decision in the case of M/s. Ujagar Prints (supra). In this case, the valuation of goods is required to be decided by the adjudicating authority under provisions of Rule 11 of the Central Excise (Determination of Price of Excisable Goods) Rules, 2000 applicable at the relevant time. We accordingly remand the case back to the adjudicating authority to determine the value of the goods as per the provisions of Rule 11 of the Valuation Rule, 2000. Needless to say that appellants should be given an opportunity to present their case in de-novo proceedings before taking a final view on the issue."

8. During de-novo adjudication proceedings, Shri B. V. Kumar, Advocate and Shri Tushar Patel, Managing Director of the assessee appeared for personal hearing and also gave written submissions.

9. After considering submission made by the assessee, the then Commissioner of Central Excise, Ahmedabad-II passed a fresh Order-in-Original No. AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015, wherein:-

- a) Demand of Rs.2,48,06,064/- was confirmed against M/s. Leamak Healthcare Pvt. Ltd. under Section 11A(2) of the Central Excise Act, 1944.
- b) Interest was ordered to be recovered at the applicable rate from M/s. Leamak Healthcare Pvt. Ltd. under Section 11AB of the Central Excise Act, 1944.
- c) Penalty of Rs.2,48,06,064/- was imposed on M/s. Leamak Healthcare Pvt. Ltd. under Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002.
- d) Penalty of Rs.60,00,000/- was imposed on M/s. ITC Ltd., Food Division, Pulikeshinagar, P.O. Bangalore, under Rule 26(1) of the Central Excise Rules, 2002.

10. The Central Excise Duty confirmed in the aforesaid Order was calculated as follows:-

Particulars	Amount
Cost of production not included by Leamak	1,72,69,155
O/w freight from Leamak to ITC	4,95,03,710
Marketing Spends by ITC	16,87,21,542
Fixed Costs of ITC	6,82,86,233
Total Differential Value	30,37,80,640
Differential Duty	2,43,02,451
E. Cess @ 2%	4,86,049
SHE Cess @ 1% (for March 07)	17,564
Total Duty Payable	2,48,06,064

11. Aggrieved by the aforesaid Order-in-Original No. AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015 passed by the then Commissioner of Central Excise, Ahmedabad-II, the department, the assessee and M/s. ITC Ltd. all had filed appeals before Hon'ble CESTAT. Hon'ble CESTAT, vide its order No. A/10030-10032/2023 dated 10.01.2023 has set aside the aforesaid Order-in-Original No. AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015 passed by the then Commissioner of Central Excise, Ahmedabad-II.

12. On going through the aforesaid order of Hon'ble CESTAT, the following observations/aspects emerge:-

- a) The order was set aside as far as it sought to include (i) outward freight from the assessee to M/s. ITC Ltd's godown (ii) marketing spends and (iii) fixed cost of ITC in total, to the assessable value for charging excise duty;

- b) Hon'ble CESTAT directed that the cost of M/s. ITC Ltd. insofar as it related to provision of mould on discounted rate to the assessee needs to be apportioned to the value of goods depending on the actual period of use of the said mould and total production; and
- c) Hon'ble CESTAT also directed that the fact regarding payment of duty under the head "Cost of production not included by the Leamak" needs to be ascertained and if the duty has already been paid, duty may not be demanded again.

DEFENCE REPLY :-

13. The assessee and M/s. ITC submitted their written reply. Gist of the reply is given in following paras.

14. They have stated that amount of Rs.25,88,257/- was paid by M/s. ITC Ltd. being 50 % of the cost of moulds during the year 2002-2003 and the said moulds were exclusively used in the manufacture of confectionary. The said transaction took place much before the period covered by SCN, i.e. 2005-2007 and has no bearing on the present case. They have also relied upon case laws in respect of (1) Mutual Industries Ltd., vs. CCE – 2000 (117) ELT 578 (T-LB), wherein it was held that if advance was received against moulds and dies, notional interest on such advance is not includable in Assessable Value and (ii) Denso Kirloskar Industries Pvt. Ltd. vs. Commr. of C. Ex., Bangalore 2005(190) ELT 204 (Tri. – Bang.).

15. The assessee has stated that they have paid differential Excise Duty of Rs. 13,81,532/- + Cess of Rs. 30,113/- (Total Rs. 14,11,645/-) on the goods valued at Rs. 1,72,69,155/-, which has been validated in Cost Audit Report submitted by the Special Cost Accountant appointed by the Department. They have also stated that the documents submitted by them would clearly establish the fact of payment of the differential duty and differential Cess by them on Cost of Production on which differential ED was paid @ 8% on goods valued at Rs. 1,72,69,155/.

16. M/s. ITC Ltd. have relied upon various judicial decisions wherein it has been held that when goods are delivered by the Assessee to the buyer at the factory gate after assessment and delivered to the transporters nominated by the buyer and the right to use the goods passes on to the buyer, the goods are deemed to have been sold at the factory gate and post manufacturing cost such as outward freight, marketing spends by the buyer and fixed cost of the buyer are not includable in the Assessable Value. M/s. ITC Ltd. further stated that

transactions between the assessee and M/s. ITC Ltd. were on "Buy - Sell" Model and M/s. ITC Ltd. had no liability either for payment of any duty or differential duty payable by the assessee. M/s. ITC Ltd are not liable for any penalty in this case and no penalty may be imposed on them.

17. The assessee has also stated that when the demand for duty is not sustainable in law, no penalty can be imposed on the assessee and they have relied upon various decisions in this regard. They have further stated that they are not liable to pay any further liability towards duty and interest thereon and they are not liable for any penalty since the issue involved in this case is the valuation of the impugned goods under the Central Excise Valuation Rules, 2000. They have relied upon the following decisions in this regard:-

- Godrej Soaps v Commissioner of Central Excise, Mumbai - 2004 (174) E.L.T. 25 (Tri. - LB)
- Gujrat Sidhee Cement Ltd. v Commissioner of Central Excise, Rajkot - 2007 (216) E.L.T. 56 (Tri. - Ahmd.)
- Jayshri Impex v Commissioner of Cus, & C. Ex., Rajkot - 2007 (216) E.L.T. 723 (Tri. - Ahmd.)
- Menon Piston Rings Pvt. Ltd., v Commissioner of C. Ex., Pune-II - 2007 (211) E.L.T. 394 (Tri. - Mumbai)

PERSONAL HEARING:-

18. Personal Hearing in the matter was granted to the assessee and M/s. ITC Ltd. on 05.12.2023. Shri B. V. Kumar and Shri P. P. Jadeja, Authorised Representative of M/s. ITC Ltd. and the assessee appeared on behalf of them. They submitted that the case has already been remanded back two times by the Hon'ble Tribunal and many of the issues pertaining to the case have already been settled and the last remand was with the specific direction to verify certain facts etc. They also submitted a written brief dated 05.12.2023 buttressing their arguments. They requested to decide the issue keeping in view the directions issued by Hon'ble CESTAT while remanding the case.

DISCUSSION AND FINDINGS :-

19. I have carefully gone through the records of the case, defence reply and submission made during the course of personal hearing.

20. I find that in the present case Hon'ble CESTAT has set aside the OIO AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015 with the following observations:-

- a) The order was set aside as far as it sought to include (i) outward freight from the assessee to M/s. ITC Ltd.'s godown (ii) marketing spends and (iii) fixed cost of M/s. ITC in total, to the assessable value for charging excise duty;
- b) Hon'ble CESTAT directed that the cost of M/s. ITC Ltd. insofar as it related to provision of moulds on discounted rate to the assessee needs to be apportioned to the value of goods depending on the actual period of use of the said mould and total production; and
- c) Hon'ble CESTAT also directed that the fact regarding payment of duty under the head "Cost of production not included by the Leamak" needs to be ascertained and if the duty has already been paid, duty may not be demanded again.

21. I find that in OIO AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015, differential duty of Rs. 2,48,06,064/- was confirmed. The same was calculated as follows:-

Sr. No.	Particulars	Amount
1	Cost of production not included by Leamak	1,72,69,155
2	O/w freight from Leamak to ITC	4,95,03,710
3	Marketing Spends by ITC	16,87,21,542
4	Fixed Costs of ITC	6,82,86,233
5	Total Differential Value	30,37,80,640
6	Differential Duty	2,43,02,451
7	E. Cess @ 2%	4,86,049
8	SHE Cess @ 1% (for March 07)	17,564
9	Total Duty Payable	2,48,06,064

22. Hon'ble CESTAT has set aside the aforesaid order insofar as it sought to include (i) outward freight from the assessee to M/s. ITC Ltd.'s godown (ii) marketing spends and (iii) fixed cost of ITC in total, to the assessable value for charging excise duty. Accordingly, in view of the directions given by Hon'ble CESTAT, (i) outward freight from the assessee to M/s. ITC Ltd.'s godown (ii) marketing spends and (iii) fixed cost of ITC, are not includible in determining the assessable value.

23. Further, Hon'ble CESTAT also directed that the fact regarding payment of duty under the head "Cost of production not included by the Leamak" needs to be ascertained and if the duty has already been paid, duty may not be demanded again. On going through OIO AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015, I find that the differential duty has been calculated on the

basis of details provided by M/s. ITC Ltd. vide their letter dated 18.03.2015, wherein, apart from other details, the following details were provided:-

- a) Assessable Value on which Excise Duty was paid by the assessee and Excise Duty paid thereon.
- b) Cost of Production on which differential Excise Duty was paid and differential Excise Duty paid.
- c) Outward Freight from Leamak to ITC Godowns.
- d) Marketing Spends.
- e) Fixed Costs.
- f) Profit Margins.
- g) ITC Net Selling Margins.

24. The above details were considered by the then Commissioner, Central Excise, Ahmedabad-II for calculation of differential Central Excise Duty. I find that in calculation of differential duty, amount of Rs.1,72,69,155/- is taken as Cost of Production which was not included by the assessee in calculation of differential duty. Differential Central Excise Duty on the differential value of Rs.1,72,69,155/- comes to Rs.14,11,645/- (Basic Duty Rs.13,81,532/-, E.Cess, Rs.27,630/- and SHEC Rs.2,483/-).

25. The assessee in their reply have stated that they have paid the differential Central Excise Duty of Rs. 13,81,532/- + Cess of Rs. 30,113/- (Total Rs. 14,11,645/-) on the goods valued at Rs. 1,72.69,155/-. They have also referred to their letter dated 10.10.2014 from M/s. Leamak Healthcare Pvt. Ltd., vide which certain documents were submitted to the then Commissioner of Central Excise, Ahmedabad II, which included the following:-

- a) Inv No. Job/22/2006-07 dtd. 31.10.2006 for the month of Oct 2006.
- b) Inv No. Job/32/2006-07 dtd. 30.11.2006 for the month of Nov 2006.
- c) Inv No., Job/39/2006-07 dtd. 31.12.2006 for the month of Dec 2006.
- d) Inv No. Job/52/2006-07 dtd. 31.03.2007 for the month of Mar 2007.
- e) Letter Dtd. 12th June, 2006 informing the Department that Cost Audit Certificates will be obtained by them once in six months and differential duty if any, will be paid.
- f) Letter Dtd. 01st July, 2006 for payment of differential duty for the period Sept. 2005 to March 2006 based on Cost Audit Certificates.
- g) Letter Dtd. 30th May, 2007 for payment of differential duty for the period Apr. 2006 to Sept. 2006 based on Cost Audit Certificates.
- h) Letter Dtd. 28th June, 2007 for payment of differential duty for the period Oct. 2006 to March 2007 based on Cost Audit Certificates.

26. I find that the assessee's letter dated 08.10.2014 is available on record vide which the above documents were submitted. I also find that vide the above letters, the assessee had provided details of differential Central Excise Duty paid by them:-

Letter dated	Period	Basic	EC	SHEC	Total
12-Jun-06	Sep 2005 to March 2006	19,619	392		20,011
30-May-07	Apr 2006 to Sept 2006	71,019	1,420		72,439
28-Jun-07	Oct 2006 to Mar 2007	12,90,894	25,818	2,483	13,19,195
	Total	13,81,532	27,630	2,483	14,11,645

27. I also find that the assessee had also provided copies of Cenvat Register maintained by them wherein duty payment is reflected. Accordingly, I find that the assessee has discharged applicable Central Excise Duty of Rs.14,11,645/- on the differential amount of Rs. 1,72.69,155/-. I also find that these payments were made by the assessee only after search had been carried out at their premises, i.e. after 24.05.2006. Accordingly, I find that the above amount of Rs.14,11,645/- is required to be appropriated against the duty payable by the assessee.

28. Hon'ble CESTAT had also directed to apportion cost of ITC in relation to provision of mould at discounted rate to the assessee. I find that in the present case, M/s. ITC have not provided moulds at discounted rate but they had paid an amount of Rs. 25,88,257/- being 50% of cost of moulds during the year 2002-2003. The assessee has argued that this transaction took place much before the impugned period, viz., 2005-2007 and as such has no bearing to the present case. I find that though the amount for moulds was paid by M/s. ITC Ltd. in 2002-2003, the same was required to be apportioned during the useful life of moulds. I consider 5 years to be useful life of the moulds and accordingly the amount of Rs. 25,88,257/- is required to be apportioned during the useful life of 5 years. I find that the SCN covers period from September 2005 to March 2007, i.e. 19 months. Accordingly, the Central Excise Duty is required to be determined on apportioned amount for the period from September 2005 to March 2007. Apportioned value for one month comes to Rs.43,138. Excise Duty on apportioned value is calculated as per calculation given on the next page:-

Period	Apportioned Value	Ex. Duty	EC	SHEC	Total Duty
September 2005 to February 2007	7,76,477	62,118	1,242	-	63,360
March 2007	43,138	3,451	69	35	3,555
Total	8,19,615	65,569	1,311	35	66,915

29. Accordingly, Central Excise Duty of Rs.66,915/- needs to be demanded from the assessee.

30. Now proceeding with the issue of question of interest liability under Section 11AB of the Central Excise Act, 1944, I find that in the present case, the assessee has paid differential duty after due dates applicable for respective period. Further, Central Excise Duty in respect of apportioned amount of moulds is yet to be paid by the assessee. Accordingly, interest is payable in accordance with the provisions of Section 11AB of the Central Excise Act, 1944. In their reply, the assessee have stated that they are not liable to pay any further liability towards duty and interest thereon, however, they have not provided any legal backing for non-payment of interest. Accordingly, I find that they are liable to pay interest for delay in payment of Central Excise Duty in accordance with the provisions of the Section 11AB of the Central Excise Act, 1944.

31. As far as the question of penalty under Section 11AC of the Central Excise Act, 1944 is concerned, the assessee have contended that when duty is not sustainable in law, no penalty can be imposed on the assessee. I, however, find that there was conscious attempt on the part of the assessee and M/s. ITC Ltd. to evade payment of Central Excise Duty by adopting lower valuation for payment of Central Excise Duty. Under self-assessment procedure, the assessment of the duty and the payment thereof is the responsibility of the assessee. No assessee can change the method of valuation or manner of goods manufactured on job work basis at his own volition. However, in case where the assessee is not able to correctly determine the assessable value or rate of duty, there is provision for payment of duty on provisional basis under Rule 7 of the Central Excise Rules, 2007. As per the provisions of the said rule, the assessee can request the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, in writing giving reasons for payment of duty on provisional basis and the Assistant Commissioner of Central Excise or the Deputy Commissioner of Central Excise, may order allowing payment of duty on provisional basis at such rate or on such value as may be specified by

him. I find that the assessee did not follow the mechanism of provisional assessment, which is clearly given in the law in case the assessee had any issues or difficulties in ascertaining correct assessable value or rate of duty. Accordingly, I find that there was a clear motive of evasion of Central Excise Duty on the part of the assessee and M/s. ITC Ltd. In this regard, I find that the assessee made payment of differential duty amounting to Rs. 14,11,645/- only after the search by the department at their premises. Had the search not been conducted by the department, this evasion would not have come to the fore and the assessee would not have made payment of the differential duty amount. In view of the foregoing discussions, I find that evasion of Central Excise Duty in this case is by way of mis-statement of correct assessable value with intent to evade payment of Central Excise Duty. Accordingly, clause (a) and clause (d) of the Rule 25(1) of the Central Excise Rules, 2002 are attracted in this case. I hold that the assessee is liable to penalty under the provisions of Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2004.

32. In this regard, I rely upon the decision of Larger Bench of Hon'ble Supreme Court in the case of UIO Vs Dharmendra Textile Processors -2008 (231)ELT 3(SC), which has been further clarified in the case of M/s Rajasthan Spinning & Weaving Mills [2009 (238) E.L.T. 3 (S.C) wherein, it was, inter alia held that:

"23. The decision in Dharmendra Textile must, therefore, be understood to mean that though the application of Section 11AC would depend upon the existence or otherwise of the conditions expressly stated in the section, once the section is applicable in a case the concerned authority would have no jurisdiction in quantifying the amount and penalty must be imposed equal to the duty determined under sub section (2) of Section 11, A. that is what Dharmendra Textile decides". With the above observation, the Hon'ble Apex court held that mens rea is not an essential ingredient to impose penalty under Section 11AC of the Central Excise Act, 1944 and there is no discretion available on quantum of penalty imposable under that section. As penal provisions of Section 78 of the Finance Act, 1944 and Section 11 AC of Central Excise Act, 1944 are pari materia, the ratio of decision of the Apex court is applicable to Service Tax matters also.

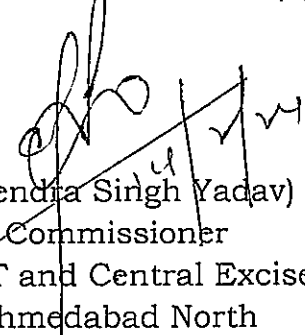
33. The Show Cause Notice had also proposed to levy penalty under Rule 26 of the Central Excise Rules, 2004 on M/s. ITC Ltd. Accordingly, penalty was

levied on M/s. ITC Ltd. in OIO No. 26/Commr/HKJ/AHD-II/2010 dated 10.08.2010 and OIO No. AHM-EXCUS-002-COMMR-24-14-15 dated 30.03.2015. In appeal before Hon'ble CESTAT, M/s. ITC Ltd. had contended that penalty was imposed on them without following principles of natural justice and Hon'ble CESTAT had observed that they should have been granted an opportunity to defend themselves in order No. A/10030-10032/2023 dated 11.01.2023. Accordingly, opportunity of personal hearing was given to M/s. ITC Ltd. Their authorised representative appeared and submitted written reply during the course of personal hearing on 05.12.2023. In their written reply, it has been stated that the transactions between the assessee and M/s. ITC Ltd. were on "Buy - Sell" Model, M/s. ITC Ltd. had no liability either for payment of any duty or differential duty payable by the assessee and hence, M/s. ITC Ltd. is not liable for any penalty in this case. They have also contended that when the demand for duty is not sustainable in law, no penalty can be imposed on the assessee. I find that during the course of investigation by the department, statement of Shri Nitin Vijaywargia, then Commercial in-charge of M/s. ITC Ltd. was recorded on 25.05.2006, wherein, he inter alia stated that the assessable value of the finished goods manufactured and cleared by the assessee to M/s. ITC Ltd. was decided by M/s. ITC Ltd. in consultation with the assessee. Accordingly, it is quite clear that M/s. ITC Ltd. had active role in determination of value of excisable goods which were cleared to them by the assessee. Accordingly, I find that M/s. ITC Ltd. are as responsible as the assessee for undervaluation done in clearance of goods, which has resulted into evasion of Central Excise Duty. I find that M/s. ITC Ltd. had knowingly determined lower assessable value in consultation with the assessee which is in violation of the provisions of the Central Excise Act, 1994 read with provisions of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. Accordingly, they had dealt with goods which were liable to confiscation under the provisions of the Central Excise Act, 1994 as the goods were cleared at value determined in contravention of provisions of valuation contained in law. They had dealt with goods which were liable to confiscation and hence they have rendered themselves liable to penalty under the provisions of Rule 26(1) of the Central Excise Rules, 2002. Accordingly, I hold that M/s. ITC Ltd. are liable to penalty under provisions of 26(1) of the Central Excise Rules, 2002.

34. In view of the above discussions, I pass the following order:-

O R D E R

- i. I confirm demand of Central Excise Duty amounting to Rs.14,78,560/- (Rupees Fourteen Lakh Seventy Eight Thousand Five Hundred Sixty only) (Rs.14,11,645 on differential value of Rs. 1,72,69,155/- + Rs. 66,915/- on the apportioned value of moulds) against M/s. Leamak Healthcare Pvt. Ltd. under Section 11A(2) of the Central Excise Act, 1944;
- ii. I order to appropriate Central Excise Duty of Rs.14,11,645/- paid by them against the demand of Central Excise Duty confirmed at (i) above;
- iii. I order to recover interest at applicable rate from M/s. Leamak Healthcare Pvt. Ltd. under Section 11AB of the Central Excise Act, 1944;
- iv. I impose penalty of Rs.14,78,560/- (Rupees Fourteen Lakh Seventy Eight Thousand Five Hundred Sixty only) on M/s. Leamak Healthcare Pvt. Ltd. under Section 11AC of the Central Excise Act, 1944 read with Rule 25(1) of the Central Excise Rules, 2002. However, if the demand of duty confirmed above and interest payable thereon under Section 11AB is paid within 30 days from the communication of this order, the penalty shall be reduced to 25% of the duty confirmed, provided that 25% is also paid within 30 days of communication of this order;
- v. I impose penalty of Rs.5,00,000/- (Rupees Five Lakh Only) on M/s. ITC Ltd., Food Division, Pulikeshinagar, P.O. Bangalore under Rule 26(1) of the Central Excise Rules, 2002.


 (Upendra Singh Yadav)
 Commissioner
 CGST and Central Excise
 Ahmedabad North

F.No.V.24/15-29/OA/Denovo/2023

Date: 14.02.2024

To,

1. M/s Leamak Healthcare Pvt. Ltd.,
Sarkhej Bavla Highway, Matoda Gam,
Ahmedabad -382213
2. M/s. ITC Ltd., Food Division,
Pulikeshinagar P.O., Bangalore - 560005

Copy to:

1. The Chief Commissioner of CGST & C. Ex., Ahmedabad Zone.
2. The Deputy/Assistant Commissioner, CGST & C.Ex., Division-IV, Ahmedabad North.
3. The Superintendent, Range-IV, Division-IV, Ahmedabad North.
4. The Superintendent (System), CGST, Ahmedabad North for uploading on website.
5. Guard File

