::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/144, 145, 227/BVR/2017	**50/AC/Rural/BVR/RR/2016-17**	**28.02.2017**

ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-139-TO-141-2017-18

आदेश का दिनांक / Date of Order: **19.02.2018** जारी करने की तारीख / Date of issue: **27.02.2018**

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants &** Respondent :-

1.M/s Madhav Industrial Corporation, Plot No. 34 Ship Breaking Yard, Alang / Sosiya Dist : Bhavnagar.
2. Shri Jivrajbhai R. Patel, C/o Madhav Industrial Corporation
3. Shri Vinodbhai Amarsinhbhai Patel, Plot No. 102 Escon Mega City, Opp. Victoria Park, Bhavnagar

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमे से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सैनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

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

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

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलो मे, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले मे, जहा नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण मे माल के प्रसस्करण के दौरान, किसी कारखाने या किसी भंडार गृह मे माल के नुकसान के मामले मे।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण मे प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले मे, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो इयूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा सेमायाविधि पर या बाद मे पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र सख्या EA-8 मे, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतिया संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश मे कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रूपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 मे वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER -IN –APPEAL ::

Sr. No.	Name of the Appellant	Address	Appellant No.	Appeal No.
01	M/s. Madhav Industrial Corporation	Plot No. 34, Ship Breaking Yard, Alang/Sosiya, Dist.: Bhavnagar	No. 1	144/BVR/2017
02	Shri Jivrajbhai R. Patel, C/o Madhav Industrial Corporation	Plot No. 34, Ship Breaking Yard, Alang/Sosiya, Dist.: Bhavnagar	No. 2	145/BVR/2017
03	Shri Vindobhai Amarsinhbhai Patel,	Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar.	No. 3	227/BVR/2017

The above three appeals have been preferred by the above unit and person (hereinafter referred to as "**the appellant no.1" "the appellant no.2" and "the appellant no. 3"** respectively) against the Order-In-Original No. 50/AC/Rural/BVR/RR/2016-17 dated 28.02.2017 (hereinafter referred to as "**the impugned order"**) passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar (hereinafter referred to as "**the Adjudicating authority"**). The appellant No.1 is engaged in manufacturing of excisable goods and is registered with the Central Excise Department and availing Cenvat credit under the provisions of Cenvat Credit Rules, 2004 (hereinafter referred to as "the CCR").

2. Directorate General of Central Excise Intelligence (now Directorate General of Goods and Service Tax Intelligence) (hereinafter referred to as DGCEI) gathered an intelligence that most of the ship breaking units in Alang are engaged in large scale evasion of Central Excise duty by way of clandestine removal of plates and scraps to rolling mills and traders, undervaluation of plates and scraps obtained out of ship breaking by issuing invoices by declaring only about 75% of the actual value and transfer of fraudulent Cenvat credit by issuing sales invoices to furnace units, without actual delivery of excisable goods. Therefore, investigation was carried out at brokers, transporters, angadias and ship breaking units which culminated into issuance of a show cause notice No. DGCEI/AZU/36-43/2013-14 dated 28.05.2013 to all three appellant, demanding Central Excise duty Rs. 38,34,615/- by invoking extended period of limitation alongwith interest and also proposing penalties under section 11AC of the Central Excise Act, 1944 and rule 25 of the Central Excise Rules, 2002 from appellant No. 1 and

proposing penalties on appellant no. 2 & 3 under rule 26 of the Central Excise Rules, 2002. The said SCN was adjudicated by the adjudicating authority vide the impugned order, in which duty was confirmed along with interest, imposed penalties as proposed in the SCN.

3. Appellant No. 1 & 2 have preferred the present appeal mainly on the following grounds:

(i) The adjudicating authority has passed the impugned order without granting cross examination of transporters and brokers whose statements have been relied upon in the SCN and OIO, without following the provisions of Section 9D of the Central Excise Act, 1944. They relied upon the case laws of (i) G. Tech Industries V UOI – 2016 (339) ELT 209 (P&H), (ii) Jindal Drugs P. Ltd. V UOI – 2016)340) ELT 67 (P&H), (iii) J & K Cigarettes Ltd V CCE – 2009 (242) ELT 189 (Del), and (iv) Basudev Garg V CCE – 2013 (294) ELT 353.

(ii) Demand of Central Excise duty Rs. 2,87,518/- is based on booking register of the transporter. Booking register of transporter cannot be evidence of alleged clandestine removal as there is no evidence that the goods were loaded from their plot and no evidence that such goods were supplied to any buyer and they have received any payment against such supply. Also there is no statement of broker in support of the allegation. The charge of clandestine removal cannot be established based on third party documents as laid down in judgment – (i) Sulekhram Steels P. Ltd. V CCE – 2011 (273) ELT 140, (ii) Charminar Bottling Co. P. Ltd. V CCE – 2005 (192) ELT 1057, and (iii) Rama Shyam Papers Ltd. V CCE – 2004 (168) ELT 494.

(iii) Similarly demand of Central Excise duty Rs. 10,97,0853/- is based on Diaries/loose papers recovered from the premises of Mr. Vinod Patel is not tenable as there is no evidence of transport of the goods or no statement of any buyer confirming supply of goods.

(iv) Demand of Central Excise duty of Rs. 24,49,243/- is on the ground of undervaluation based on comparison of their sale price with rates published by M/s. Major and Minor is untenable in law as it is contrary to provisions of Section 4 of the Central Excise Act, 1944. There is not even a single statement of any buyer to the effect that the price paid by the buyer to them was over and above the price mentioned in the Central Excise invoice issued by them. They relied upon the case law of M/s. Sterlite Industries Ltd. V CCE – 2005 (189) ELT 329.

(v) The notice is barred by time as the same was issued on 28.05.2013 and demanded duty for the years 2009 and 2010. Larger period of 5 years is inapplicable in the present case. It is clear from the statements of the authorized person that they have not cleared any goods without Central Excise invoice and hence no willful misstatement or suppression of facts of contravention with intent to evade payment of duty.

(vi) Since demand of duty is liable to be set aside, the interest and penalties are also liable to be set aside.

4. Appellant No. 3 has preferred the present appeal mainly on the following grounds:

(i) They had requested for copies of relied upon documents which were not provided to them and adjudicating authority imposed penalty without following the procedure of principles of natural justice. Adjudicating authority has not granted effective personal hearing and OIO is vitiated; the impugned order was passed *ex parte* and also the adjudicating authority failed to consider their request to file reply before them.

(ii) They had promptly responded to all notices of personal hearing by filing a request for adjournment and also asked for copies of relied upon documents during course of personal hearing. The adjudicating authority remained in a peaceful slumber for more than there and half years to issue the SCN and after search and resumption of documents also for more than three years to adjudicate the case. The time allowed to them for submitting reply and defending the case is very less.

(iii) During the course of personal hearing, they had asked for cross examination of Shri Mahendra Rana, Partner of M/s. Maruti Metal Industries. However, the same has not been allowed by the adjudicating authority.

(iv) Penalty can be imposed under rule 26 of the Central Excise Rules, 2002 only if a person knowingly deals with any goods which he knows are liable for confiscation; that they had neither purchased nor dealt with the goods knowingly that these were liable to confiscation and as such no penalty is imposable under rule 26 of the Rules as imposed vide the impugned order.

(v) They had never acquired possession of the goods as alleged in the SCN and had nothing to do with the sale of excisable goods i.e.,

Stainless Steel Scrap or the payment or evasion of duty. In absence of any contrary evidence to suggest that they in any way conspired or colluded the ship breaker to facilitate the evasion of excise duty, they cannot be penalized.

(vi) Entries made in data which was retrieved from pendrive was mostly made by him on Sundays for practice of account and that can be verified from the report of Directorate of Forensic Science, GOG, Gandhinagar. Hence, it cannot be concluded that entries retrieved from pendrive are of clandestine removal. There is no evidence except these entries.

(vii) The *sine qua non* for a penalty under rule 26 on any person is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Central Excise Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief. Acquisition of possession of oogds is, indisputable, a physical act, and so is each of the various ways of dealing with goods, specifically mentioned in the rule. The expression "any other manner" should be understood in accordance with the principle of *ejusdem generis* and would, then, mean "any other mode of physically dealing with the goods". This position has been recognized in Godrej Boyce & Mfg. Co. – 2001 (148) ELT 161 (T), which has been followed in A. M. Kulkarni – 2003 (56) RLT 573 (CEGAT – Mum.). The decision in Ram Nath Singh – 2003 (151) ELT 451 (Tri-Del.) is also to the same effect. Any person to be penalized under the above rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act/Rules. He should have don the act with *mens rea*.

(viii) From above, he is not liable for penalty under rule 26(1) of the Rules, as he has not involved in possession of the excisable goods removed clandestinely. The decisions relied upon by the adjudicating authority are not relevant to the case.

5. Shri J. C. Patel and Shri Rahul Gajera, advocates appeared for personal hearing on behalf of appellants No. 1 & 2 on 18.12.2017 and reiterated the submission of appeal memo and submitted sets of judgments in their favour requesting that the same may be considered for deciding the case.

6. Shri Madhavkumar N. Vadodariya, C.A. and authorized representative of appellant No. 3 attended personal hearing on 31.01.2018 and reiterated submission of appeal memo and filed the written additional submission dated 31.01.2018 for consideration.

7. I have carefully gone through appeal memorandum, case records, written and oral submission made by the three appellants at the time of personal hearing.

8. Regarding the plea of the appellant No. 1 that cross examination was requested by them but not granted by the adjudicating authority, I find that the appellant No. 1 had asked for cross examination of Shri Vinod Amarshibhai Patel, Shri Kishor Amarsinhbhai Patel, Shri Bharat Seth and few truck owners as referred in the SCN. However, it was found by the adjudicating authority that such request for cross examination was a delay tactics and that there are certain case laws which says that it is not necessary to grant cross examination in each and every case; that granting cross examination depends upon the facts and circumstances of each case. On the other hand, the appellant have cited four different case laws and contended that since witnesses are not examined by adjudicating authority as per Section 9D of the Central Excise Act, 1944, such statement cannot be relied upon and that adjudicating authority was required to grant them cross examination before admitting such statements as evidence. On going through the SCN and OIO, I find that no statement of truck owner is relied upon in the case. Further, I find that as described in the SCN itself, the partner of the appellant No. 1 (i.e. appellant No. 2) was confronted with the statements recorded during investigation and ample opportunity was granted to him to put forth his version against the statements recorded and documents collected during investigation. However, he has never challenged any of the statements recorded or put forth his version against such statements and documents collected during investigation. Regarding 40 entries found in booking register of transporter wherein invoices were issued in 26 cases and in remaining cases no invoices were issued, he stated that the truck might have come to his premise but due to some dispute with driver, the truck might have gone to some other plot for loading. Regarding diaries recovered from the broker, he stated that he cannot explain what is written by the broker in his diary, though he agreed that plot number mentioned in the diary belonged to them. Thus, he was not able to provide any tenable reasons/explanation. Further, I find that

such statements were never retracted. Further, it is not a case where the case of the department is solely based on the statements recorded. On the contrary, I find that Shri Vinod Patel, in his various statements, on being shown the diary/papers recovered from his residence, stated that all the figures and data therein were imaginary. Thus, the statements of the two brokers, i.e., Shri Vinod Patel and Shri Kishor Patel, in no way alleges anything against the appellant No. 1. It was the diary which was recovered from their premises which showed the whole transaction of the appellant No. 1. It is also not forthcoming from records, as to what the appellant No. 1 wanted to prove by cross examining such persons. Similarly, in case of transport booking agents, they have only explained the entries made in their register and their business style. It is not forthcoming from records as to what the appellant No. 1 wanted to prove by cross examining such transporters who have simply described their business and entries in the register. I agree with the finding of the adjudicating authority that cross examination is not required to be granted in routine manner. It should be decided by the adjudicating authority on case to case basis, looking to the peculiar facts of each case. I also find that during investigation as well as at the time of SCN, appellant No. 1 was provided copies of statements recorded as well as documents collected during investigation. Thus, I find that the principles of natural justice have been followed in the case. I also find that neither during original adjudication process nor during appeal stage, the appellant No. 1 has shown their doubt about credibility of statements recorded and documents collected. It is not argued that the transporter was making entries in his register on his own and that they or commission agent have not called for the trucks for loading goods from their premises. They cannot argue on this point because out of 40 entries in transporter's register, in 26 cases, relative invoices were found to be issued by the appellant No. 1. Therefore, I agree with the findings of the adjudicating authority that asking for cross examination by appellant No. 1 was nothing but delay tactics. My above view are supported by judgment of Hon. High Court in the case of M/s. Patel Engineering Ltd. V UOI – 2014 (307) ELT 862 (Bom), wherein it was held that:

> ***21.*** *Thus, the consistent view is that may be and only in case of want of Notice to the affected party in all other cases it is not enough to allege breach of principles of natural justice but also demonstrate that prejudice is caused by such breach. This is for the simple reason that any departure or every breach does not necessarily result in miscarriage of justice or gross failure of justice. Further, the principles of natural*

justice are not a strait-jacket formula. Which principles of natural justice or which facet of the same is applicable, depends upon the nature of the lis, the statute under which an adjudication is undertaken and several other factors.

I have also gone through the case laws cited by appellant No. 1. I find that the facts and circumstances in those cases were different from the facts of the present case, for example, in case of M/s. Jindal Drugs P. Ltd. V UOI – 2016 (340) ELT 67 (P&H), it was held by the Hon. High Court that statements recorded behind back of assessee cannot be relied upon in adjudication proceedings without allowing assessee an opportunity to test evidence by cross-examining makers of said statements. However, in the present case, it is clearly mentioned in the SCN that statements of various persons recorded were shown to partner of the appellant No. 1 (appellant No. 2) and he was asked to comment on the same and such comments were duly recorded in his statement under Section 14 of the Central Excise Act, 1944. Therefore, it cannot be said that the statements were recorded behind the back of the appellant.

9. Another plea of the appellant No. 1 is that no demand can be raised on the basis of booking register of the transport company as there is no proof that the goods were actually loaded and sent and that there is no confirmation from buyers or brokers. In this regard, I find that out of 40 entries in the booking register of the transporter, 26 matched with the invoices issued by the appellant No. 1. In case of remaining 14 entries, it was found that no invoice was issued by the appellant No. 1. Further, from register maintained by GMB, it was found that on the date mentioned in the booking register of the transporter, such truck had entered the premises of the ship breaking yard. Thus, both entries tally with each other. However, the partner of appellant No. 1 (appellant No. 2), during his statement, failed to provide proper justification and stated that due to disagreement with the driver, the goods might not have been loaded from their premises and that the truck might have gone to some other plot for loading the goods. However, no evidence has been placed by appellant No. 1 that there was any cancellation of supply order or there was any dispute, due to which the truck mentioned in the booking register was diverted to some other plot. It is confirmed by the transporters and brokers in their respective statements that they enter the details of the truck and plot number etc in their register only after the deal is finalized and they were confident that whenever there is entry in booking register, the truck had loaded scrap from the plot number mentioned in the register. Therefore, the

explanation put forth by the partner of the appellant No. 1 (appellant No. 2) cannot be accepted. Regarding confirmation from buyer end, it is seen that the booking register only shows destination and not the name of the buyer. Therefore, such confirmation from buyer end is not possible in the present case. I find that in cases of clandestine removal, it is obvious that the party/person engaged in such illicit activities would try his best not to leave any evidence behind and therefore, such cases are to be proved on the basis of evidences available. It is settled legal position that it is not necessary to prove the same with mathematical or clinical precision. I rely upon the following case-law:

COLLECTOR OF CUSTOMS, MADRAS AND OTHERS Vs D. BHOORMULL - 1983 (13) E.L.T. 1546 (S.C.)

30. *It cannot be disputed that in proceedings for imposing penalties under clause (8) of Section 167, to which Section 178A does not apply, the burden of proving that the goods are smuggled goods, is on the Department. This is a fundamental rule relating to proof in all criminal or quasi-criminal proceedings, where there is no statutory provision to the contrary. But in appreciating its scope and the nature of the onus cast by it, we must pay due regard to other kindred principles, no less fundamental, or universal application.* ***One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and as Prof. Brett felicitously puts it-"all exactness is a fake". El Dorado of absolute Proof being unattainable, the law, accepts for it, probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus legal proof is not necessarily perfect proof often it is nothing more than a prudent man's estimate as to the probabilities of the case.***

31. *The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in Blatch v. Archar (1774) 1 Cowp. 63 at p. 65 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted".* ***Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially***

within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

10. It is also pleaded by the appellant No. 1 that charge of clandestine removal cannot be said to be established on third party records as laid down in case laws cited. In this regard, I find that a portion of demand raised against the appellant is based on diary/private record/computer data recovered from broker Shri Vindod Patel and Kishor Patel. Though Shri Vinod Patel did not co-operate with the investigation, which is clear from the replies given by him during recording of his various statements, the investigation has been able to decipher the data recorded in coded language. On comparison of the said data with clearances shown by the appellant No. 1, some official clearances made by appellant No. 1 are found to be recorded in such private record/diary of the broker. Appellant No. 1 or appellant No. 2 were not in a position to explain as to how their official transactions were found in the diary of the broker, when confronted with such records. It is clear that the diary maintained by Shri Vindo Patel (broker) contained licit as well as illicit clearances of the appellant No. 1. The modus operandi adopted by the appellant No. 1 is further evidenced from statement of Shri Mahendra Rana, who has categorically admitted that Shri Vinod Patel used to supply goods from one firm and invoice from another firm. Thus, I find that authenticity of the diary maintained by Shri Vinod Patel is established. Since, it is not only the diary upon which the whole case of the department is made out but also the fact that the diary contained some transactions which matched with the official transactions of the appellant No. 1 read with the statement of Shri Mahendra Rana, the case laws cited by appellant No. 1 to argue that demand cannot be raised based on third party data is not acceptable. I find that on this count also the clandestine clearance by appellant No. 1 is established.

11. Regarding allegation of undervaluation in the SCN, it is contended by the appellant No. 1 that after introduction of transaction value concept, department cannot raise the issue unless it is proved that buyer has paid over and above the price mentioned in the Central Excise invoice issued by them. In this regard, I find that the diary seized from the broker, Shri Vinod Patel contains details about cash amounts transferred from various buyers to ship breaking units through angadia. Further, the price adopted by DGCEI is also relied upon by most of the ship breaking yards of alang and the goods emerging out of breaking up of ship is sold at or about the same

rate. I find that in order to be just and fair, the investigation has also allowed variation upto 2% in the price published by Major and Minors. Thus, I find that it is not a case where flow back of money or receipt of consideration over and above invoice value is not established. It is but natural that in a case where assessee is engaged in clandestine clearance as well as undervaluation of goods produced by them, no one can establish one-to-one correlation of goods sold and payments received in cash or through angadia. In my view, it is sufficient evidence that as per the dairies recovered from broker Shri Vinod Patel and Shri Kishor Patel, cash transactions took place between various rolling mills/furnace units and the appellant No. 1 through the brokers and hence it can be said that the appellant No. 1 received some payment in cash over and above invoice value through illegal channels. Therefore, I find that the rejection of transaction value and replacement of the same by the price prevailing is correct in view of Valuation Rules as well as section 4 of the Central Excise Act, 1944.

12. Regarding the plea that the notice is barred by limitation, I find that the investigation is successful in proving that the appellant No. 1 was engaged in illicit removal of their goods and also evasion of duty by way of undervaluation. This is nothing but suppression of facts with intent to evade payment of duty and therefore, I find that extended period of limitation is correctly invoked in the case. Thus, the demand of duty alongwith interest, as confirmed by the adjudicating authority is required to be upheld and appeal filed by the appellant No. 1 is required to be rejected.

13. Coming to the personal penalty imposed upon appellant No. 2 and 3, I find that appellant No. 2, being partner of the appellant No. 1 was involved in day to day business of the appellant No. 1 and he was the person who did not account for the goods manufactured, cleared the same without issue of invoices, received payments against such clearances in cash and also key person in undervaluation of the goods manufactured by the appellant No. 1. Thus, he is the person who dealt with the goods with knowledge that the goods were liable for confiscation. Thus, imposition of penalty upon him by the adjudicating authority is proper. Appellant No. 3 being broker, has contended that he has not dealt with the goods in the manner prescribed under rule 26 of the Central Excise Rules, 2002 and in support some case laws have also been cited by him. In this regard, I find that Shri Vinod Patel (appellant No. 3) was the person who procured goods

from appellant No. 1 and whenever invoice was to be provided to the buyer, the name of M/s. Krishna was utilized but where no invoice was to be given, he just used to send the same without invoice by making entries in his private diary. His diary contains all the details of goods procured without invoice and sold without invoice as well as goods sent to one party and invoice provided to some other party, in order to fraudulently passing of Cenvat credit. His diary also contains details of cash transactions made with buyers as well as with appellant No. 1 for such clandestine clearances. Therefore, the plea that he had not dealt with the offended goods is ridiculous and he is certainly liable for penal action under rule 26 of the Central Excise Rules, 2002. Further, the plea of making available relied upon documents is already dealt with by the adjudicating authority and I fully agree with the findings of the adjudicating authority. Regarding, providing cross examination, the matter is already discussed in foregoing paragraph and hence the same is not repeated here. Therefore, I find that there is no need to interfere with the order of the adjudicating authority in this regard.

14. In view of the above, appeals filed by all the three appellants are hereby rejected and the order passed by the adjudicating authority is upheld.

19/12/18

(Gopi Nath)
Commissioner (Appeals)/
Additional Director General (Audit)

F. No. V2/144, 145, 227/BVR/2017

By R.P.A.D.

To,

(i) M/s. Madhav Industrial Corporation
Plot No. 34, Ship Breaking Yard, Alang/Sosiya,
Dist.: Bhavnagar.

(ii) Shri Jivrajbhai R. Patel, C/o Madhav Industrial Corporation,
Plot No. 34, Ship Breaking Yard, Alang/Sosiya,
Dist.: Bhavnagar.

(iii) Shri Vindobhai Amarsinhbhai Patel,
Plot No. 102, Escon Mega City,
Opp. Victoria Park,
Bhavnagar.

Copy to:

1) The Chief Commissioner, CGST, Ahmedabad.
2) The Commissioner, CGST, Bhavnagar.