



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.
V2/39 to 41/BVR/2017

मूल आदेश सं /
O.L.O. No.
BHV-EXCUS-000-JC-63-
2016-17

दिनांक /
Date
11.01.2017

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

BHV-EXCUS-000-APP-163-TO-165-2017-18

आदेश का दिनांक /
Date of Order: 28.02.2018

जारी करने की तारीख /
Date of issue: 12.03.2018

Passed by **Dr. Balbir Singh, Additional Director General (Taxpayer Services), 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, डॉ. बलबीर सिंह, अपर महानिदेशक करदाता सेवाएँ, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९५४ की धारा ३७ के अंतर्गत दर्जे 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 17.10.2017 read with Board's Order No. 05/2017-ST dated 16.11.2017, Dr. Balbir Singh, Additional Director General of Taxpayer Services, 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 Shri Hari Steel Industries, Plot No. 70/71, GIDC, Vartej, Bhavnagar,**
2. **Shri Nagjibhai Jivrajbhai Dodiya, Partner of M/s Shri Hari Steel Industries**
3. **Shri Hiteshbhai Shantilal Dodiya Partner of M/s Shri Hari Steel Industries**

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, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 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 मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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 के 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 इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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 प्रतियों 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 अपील 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, बशर्त 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 हैं

- धारा 11 डी के अंतर्गत रकम
- सेनवेट जमा की ली गई गलत राशि
- सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्त 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 होगा।

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 :

- amount determined under Section 11 D;
- amount of erroneous Cenvat Credit taken;
- 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 मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 में, जहां 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 में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /

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 में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, 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 an 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 क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा संमयाविधि पर या बाद में पारित किए गए हैं। /

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 संख्या EA-8 में, 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 प्रतियां 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 रुपये या उससे कम हो तो रुपये 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 में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपरोक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पेटी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय 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, notwithstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

- (E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट लगा होना चाहिए। /

One copy of application or O.I.O. as the case may be, and the order of the 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 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और 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 हैं। /

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

The present three appeals have been filed by M/s. Shree Hari Steel Industries, Plot No. 70/71, GIDC, Vartej, Bhavnagar (hereinafter referred to as the "appellant") (ii) Shri Nagjibhai Dodiya (hereinafter referred to as the "appellant-1") (iii) Shri Hiteshbhai S. Dodiya (hereinafter referred to as the "appellant-2"), both partner of M/s. Shree Hari Steel Industries against Order-in-Original No. BHV-EXCUS-000-JC-63-2016-17 dated 11.01.2017 passed by the Joint Commissioner, Central Excise and Service Tax, Bhavnagar. Since all the appeals are against the common order, the same are taken up together for consideration.

2. Brief facts of the case are that Central Excise case was booked against the appellant who is engaged in the manufacturing of MS round / CTD bars falling under Chapter-72 of the Schedule to the Central Excise Tariff Act, 1985 holding Central Excise Registration No. **ALLFS4655CXM001** under Rule 9 of the Central Excise Rules, 2002 (hereinafter referred to as the "CER-2002"). During the course of search physical quantity of finished goods was found short by 5.500 MTs in the factory premises as compared to the stock shown in the Daily Stock Account.

3. The Show Cause Notice proposed to recover Central Excise Duty of Rs 42,45,369/- on removal of excisable goods i.e. 1500.016 MTs. of Steel Bars clandestinely valued at Rs. 5,15,21,475/- and not accounted for in their daily stock account register during the period from July-2008 to March-2009 and not accounted for in their daily stock account register during the period from July-2008 to March-2009. The SCN also proposed for contravention of the various provisions of the Act or of the Rules made there under with willful intention to evade the payment of CENVAT invoking extended period under the proviso to Sub-Section (1) of Section 11 A of the Central Excise Act, 1944 along with penalty under Section 11AC of the Central Excise Act, 1944 on appellant, proposed penalty on the appellant-1 Shri Nagjibhai Dodiya, and Shri Hiteshbhai Shantilal Dodiya, both the partner of M/s. Shree Hari Steel Industries, under Rule 26 of the Central Excise Rules, 2002 for their active involvement in the evasion of duty and carrying out the modus operandi.

The said Show Cause Notice was adjudicated vide Order in Original No. BHV-EXCUS-000-JC-63-2016-17 dated 11.01.2017 by the Joint Commissioner, Central Excise and Service Tax, Bhavnagar and has confirmed.

(i) the demand amounting to Rs 42,45,369/- under the provisions of section 11A of Central Excise Act, 1944 along with interest at the appropriate rate under the provisions of erstwhile Section 11AB (Now Section 11AA) of Central Excise Act, 1944.

(ii) imposed penalty amounting to Rs 42,45,369/- on appellant under the provisions of Rule 25 of the Central Excise Rules, 2002 read with Section 11AC of the Central Excise Act, 1944.

(iii) penalty imposed under the provision of Rule 26 of the Central Excise Rules, 2002 amounting to Rs 5,00,000/- on appellant-1 Shri Nagjibhai Jivrajbhai Dodiya, a partner of M/s. Shree Hari Steel Industries, Bhavnagar.

(iv) penalty imposed under the provision of Rule 26 of the Central Excise Rules, 2002 amounting to Rs 2,50,000/- on appellant-2 Shri Hiteshbhai Shantilal Dodiya, a partner of M/s. Shree Hari Steel Industries, Bhavnagar.

4. Being aggrieved with the impugned order, the **appellant** have filed the appeal on the following grounds:

- The adjudicating authority has erred in confirming the demand of Rs.42,45,369.00 on the ground as mentioned in the order and on the ground as mentioned in para 25 onwards of the Order in Original on basis of presumption and assumption based on the documents maintained by 3rd party.
- Also erred in confirming the demand on the ground of statement of Shri Bhola Mahto, that during the period July-2008 to December-2008 the applicant had received 1784.654 MTs of raw material where as he cleared only 140.79 MTs. Of finished product. The demand confirmed on the allegation of so called manipulation in generation of invoice through CPU is also without any base and is liable to be set aside. In any case, the documentary evidences relied upon reveals that the so called clandestine removal is not of final product but represents some other material which is not chargeable to duty.
- That confirming the demand on the ground mentioned in the order and ignoring the fact that the so called evidence does not support the contention of the department and represents not only the so called clearance of non excisable goods but also the trading activity of the applicant which is liable to be excluded from the so called clandestine clearance worked out by the department.
- That erred in imposing the penalty of Rs.42,45,369/- and confirming the interest. The ground raised for setting aside the demand may also be treated as ground raised for setting aside the penalty.

4.1 Being aggrieved with the impugned order, the **appellant-1 and appellant-2** have filed the appeal on the following grounds

- The adjudicating authority has erred in imposing the penalty of Rs 5,00,000/- and Rs.2,50,000/-, respectively on the ground as mentioned in the order, that once the firm is penalized the partner shall not be penalized.
- The learned Additional Commissioner of Central Excise has erred in imposing the penalty without considering the fact that the department has not produced any positive evidence to prove so called clandestine removal of the goods and merely because the are confessional statements the duty could not have been imposed.

5. The appeal was filed before the Commissioner (Appeals), Rajkot. The undersigned has been nominated as Commissioner (Appeals) / Appellate Authority as regards to the case of appellant vide Board's Order No 05/2017-Service Tax dated 16.11.2017 issued by the Under Secretary (Service Tax), G.O.I, M.O.F, Deptt of Revenue, CBEC, Service Tax Wing on the basis of **Board's Circular No. 208/6/2017-Service Tax dated 17.10.2017.**

6. Personal hearing was held on 19.02.2018 and on behalf of the appellant Shri Paresh Sheth, Advocate attended the hearing and reiterated the grounds of appeal and submitted that the department has demanded duty on the items which are not excisable and referred to as Mitti, Koyla etc. He also submitted that the balance quantity is nothing but the legal clearance of the company which has not been denied by the department. He also referred to the decisions reported in 332(ELT)416 and 357(ELT)481 with a request to drop the proceedings. Shri Paresh Sheth, Advocate has also submitted the same things in respect of **appellant-1 and appellant-2.**



Discussion and Findings:

7. I have carefully gone through the records of the case, the appellant's submission in memorandum and at the time of personal hearing. My findings are as under.

8. The prime issue for consideration is (i) whether the appellant is liable to pay Central Excise duty of Rs.42,45,369/- with interest & penalty under the provisions of Central Excise and Rules made there under in respect of excisable goods manufactured by the appellant which has not been accounted for in the daily stock account register to avoid the payment of Central Excise Duty on goods manufactured and cleared by them during the period from July-2008 to March-2009 (ii) Whether appellant-1 and appellant-2 are liable for personal penalty imposed upon them.

9. For conclusion, I will deal with facts and law both simultaneously. I find that the SCN issued to appellant proposing recovery of Central Excise duty of Rs.42,45,369/- under section 11A of Central Excise Act, 1944 for removal of excisable goods i.e. 1500.016 MTs of Steel Bars clandestinely valued at Rs. 5,15,21,475/- and not accounted for in their daily stock account register during the period from July-2008 to March-2009 without payment of excise duty, without issuance of proper invoices and without assessment and filing of returns. The said SCN also proposes imposition of penalty on appellant under the provision of Rule 25 of Central Excise Rules, 2002 read with Section 11AC of Central Excise Act, 1944 and penalty on two partners of the appellant i.e. appellant-1 and appellant-2 under provisions of Rule 26 of Central Excise Rules, 2002.

10. The adjudicating authority has observed the records produced under the statements of Shri Bhola Mahto, contractor of scrap cutting, working with the appellant has revealed that the receipt of raw materials during July-2008 to December-2008 was 1784.654 MTs while it was declared only 140.790 MTs in statutory records. The CPU / Computer was so manipulated that once an invoice was generated, another invoice of the same number could be generated showing another party and quantity, this modus operandi was also confirmed by partners of the appellant and its computer operator. It was also revealed that the goods after reaching its destination, the invoice was returned or destroyed. From such unaccounted receipt of 1643.374 MTs of raw materials 1479.034 MTs of steel bars was manufactured that was not available in the factory. The statement of both partners of the appellant have confirmed that they were aware of the receipt of raw material and removal of finished goods without accounting for the same in their statutory records and without payment of central excise duty, without issue of sales invoices.

11. The adjudicating authority also found that Shri Bhola Mahto is a contractor of cutting of scrap materials engaged by the appellant @ of Rs 150 per Metric Ton of raw material dealt with by the appellant. It was also observed that the records maintained and produced by the said contractor under the statement are related only the raw material i.e. MS Plates / Scrap received in the factory premises, which has revealed receipt of 1784.654 MTs of raw materials during July-2008 to December-2008, no concern with other items i.e. soil etc. received, if any, in the factory premises. The adjudicating authority has also observed that Annexure-I of the SCN has been prepared on the basis of unaccounted receipt quantity of raw material i.e. MS Plates / Scrap and quantity of finished goods sold illicitly to M/s. A. C. Enterprise and M/s. Laxmi Steel.

12. The adjudicating authority also observed that as per the statement of Shri Banwanilal Chaudhari, labour contractor, Shri Nagjibhai Jivabhai Dodiya (appellant-1), Shri Hiteshbhai Shantilal Dodia, (appellant-2) both partner of Shree Hari Steel Industries and electricity consumption of the Mill, that there was manufacture of finished goods, which was not accounted for in statutory records. The adjudicating authority also



observed that both the partners of the appellant under their statements admitted that they had purchased raw materials without entering in their books of account and manufactured and cleared finished goods clandestinely without accounting for the same in statutory, without preparation of central excise invoice with intent to evade payment of central excise duty. Further, Shri Yogeshbhai Chandulal, proprietor of M/s. A. C. Enterprise, Sihor under his statement accepted that they had purchased total 8.630 MTs of steel bars valued at Rs 2,05,230/- on cash basis under the Central Excise invoice no. 64/21.03.2009 from the appellant on 21.03.2009 and also 24.03.2009, thereafter they returned said invoice to the appellant in bona-fide belief that such corrections / amendments were to be made in the said returned invoice which was subsequently sold to their customers in cash.

13. The adjudicating authority further observed that the appellant has not maintained the statutory records, not paid due Central Excise Duty on the removal of finished goods, therefore they have contravened Rule 4 read with Rule 8 of CER-2002. It has also observed that the appellant failed to prepare proper central excise invoices for clearance of finished goods i.e. 1500.016 MTs of MS Bars as required under Rule 11 of the CER-2002; that they failed to assess the due central excise duty on the finished goods removed by them thereby they have contravened Rule 6 of the CER-2002; that they have not properly maintained daily stock register in form RG-1 register in respect of production of 1500.016 MTs of finished excisable goods thereby they have contravened Rule 10 of the CER-2002; that also contravened the provision of Rule 12 of the CER-2002 by not showing the correct removal of finished goods in monthly / quarterly returns. Therefore, for all the acts of omission and commission, the appellant is liable for penal action under Rule 25(1) of the CER-2002 and read with section 11AC of the CEA, 1944.

14. The adjudicating authority has also observed Shri Nagjibhai Jivrajbhai Dodiya (appellant-1) and Shri Hiteshbhai Shantilal Dodiya (appellant-2), both partners of the appellant in their statements have confessed that they were fully aware of the fact that they had purchased raw materials without entering in their books of account and had manufactured and cleared the finished excisable goods clandestinely without accounting for the same in statutory records, without preparation of Central Excise invoices with an intent to evade payment of Central Excise duty and had collected payment thereof in cash, therefore, both are liable for penal action under the provisions of Rule 26 of CER-2002.

15. The adjudicating authority has observed that the statement of Shri Bhola Mahto, raw material cutting contractor was recorded on 24.03.2009 under section 14 of the Central Excise Act, 1944, wherein he inter alia stated that he was having contract with appellant for cleaning and cutting of raw materials i.e. Iron Scrap in desired size depending upon the size of finished goods required under machine or by using a gas cutter and to stack the pieces near the furnace, that for this contract the charges were Rs 150/- PMT; that the raw materials used in the rolling mill was MS Plates, angles, procured from ship breaking yard Alang / Sosiya, locally purchased HMS, unused Iron ingots or Runners / risers produced from other furnace units.

16. Shri Bhola Mahto has also produced (i) two notebooks maintained by Supervisor in which the accounts for the period July-2008 to December-2008 were recorded which included date, vehicle no. and weight, muster of laborers, wages paid to the laborers, expenditure etc. (ii) one muster book maintained by supervisor in which there are details of the muster for the period 18.07.2008 to March-2009. (iii) One pocket book maintained by the Supervisor in which there were details of the vehicle no. and weight for the period from 01.11.2008 to 11.12.2008.



21. I also find that there is no specific clarification about vehicle no. and weight of Mitti, Koyla and Sarriya(Bars), as detailed in the note book produced by Shri Bhola Mahto, raw material cutting contractor. It is based on assumption and presumption that details mentioned in the note book are pertaining to the raw material as well as of finished goods which is manufactured in the factory premises of the appellant. Further, the SCN proposes for the clandestine removal of finished goods, but no copies of sample invoices have been attached with the SCN and no verification of any invoice has been done with the concerned suppliers of the raw material procured. I also find that there is no discussion about weighment of the raw material as well as finished goods carried out at which weighbridge. Further, random verification has also been not carried out in respect of raw material received from the ship breaking yard Alang / Sosiya, locally purchased HMS, unused Iron ingots or Runners / Risers produced from other furnace units for justification that the raw material has been received in the factory premises or otherwise. In this regard, no invoices of raw material have been considered in the investigation. The plea of the appellant with regard to demand considered simply based on the record maintained by the contractor (who is not an employee of the appellant) is proper as relied documents i.e. agreement between contractor and appellant has also not been incorporated. Even there is no investigation about the verification of payment particulars.
22. Further, I find that though demand is confirmed simply by alleging that there is manipulation in the generation of invoices through computer software, no such documentary evidences have been gathered and incorporated in the SCN. Thus, I find that no corroborative documentary evidence was brought on record during the investigation which the sole ingredient to arrive at any conclusion to prove clandestine removal. There is no evidence of transportation of finished goods, payment made by the buyers to the appellant as well as verification of vehicle in which the finished goods had been removed clandestinely. Furthermore, there is not any concrete evidence that the appellant had purchased raw material like unused Iron ingots or Runners / risers produced from other furnace units, from ship breaking yard Alang / Sosiya and locally for manufacturing of finished goods and removed it without preparation of excisable invoices to evade the payment of central excise duty. Further, allegation of electrical consumption has also not been justified incorporating the documentary evidence in the investigation. Thus, the charge of clandestine clearance does not stand without any documentary corroborative evidence, which proves that the appellant had purchased raw materials and manufactured finished goods.
23. In addition to this, it is observed that there is no signature of the authorised person of the appellant as well as of the designated authority of the department on the work-sheet prepared for calculation of duty evasion and also on the documents on which the said work sheet has been prepared.
24. In this regard, I find following judgements squarely applicable in the instant case.

(i) **M/s. Chemco Steels Pvt. Ltd., - reported - 2005 (191) ELT 0856 (Tri. Bangalore)**

4. On a careful consideration and perusal of records, we find that the Revenue has proceeded solely on the basis of certain private registers and packing slips maintained in the factory by the shift supervisors / operators. There is no evidence with regard to the purchase of raw materials by the appellants. It is the submission of the appellant that the raw material viz. steel has to be purchased only from the SAIL who are the only sole suppliers. They have contended that they cannot manufacture and clear by clandestine removal without the use of excess electricity and the other raw materials. We have examined this point and find that Revenue has failed to gather evidence with regard to the receipt of the inputs and also with

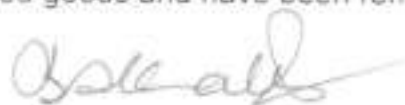


17. The adjudicating authority has also observed statement of Shri Banwarilal Chowdhry, a labour contractor working with appellant recorded on 24.03.2009 under section 14 of the Central Excise Act 1944, where he interalia stated that he was working as a laborers' supplier in the re-rolling mills for the last seven-eight years and providing labors to feed the raw materials in the furnace, rolling of the hot materials and to stack finished goods; that he paid the labour charges to his laborers on the basis of their work hours and received payment from the owner of the factory on monthly basis as per the work done; that he earned labour contract with the appellant since 09.10.2008; that since commencement of labour contract, the manufacturing has been carried out on all days except on weekly off. Shri Banwarilal Chowdhry also produced attendance register of the labourers.

18. The adjudicating authority has also observed statement of appellant-1 Shri Nagjibhai Jivrajbhai Dodiya, partner of the appellant recorded on 24.03.2009, wherein he interalia, stated that he looked after all the dealings regarding purchase of raw materials as well as selling of the manufacturing goods of their manufacturing unit since last eleven years with two other partners. Appellant-1 agreed with the facts mentioned in the panchanama dated 24.03.2009, statement of Shri Bhola Mahto, raw material cutting contractor and Shri Banwarilal Chowdhry, labour contractor; that they generate invoices and maintain statutory records in the computer which was seized on 24.03.2009.

19. I have observed that a search was conducted in the factory premises of M/s. Shree Hari Steel Industries, Vartej, Bhavnagar on 24.03.2009 and many documents were recovered under panchnama from Shri Bhola Mahto, raw material cutting contractor of the said factory. During panchnama 5,500 MTs was found short the factory premises as compared to the stock shown in the Daily Stock Account. During investigation statement of two partners viz. Shri Nagjibhai Jivabhai Dodiya and Shri Hiteshbhai Shantilal Dodiya, Shri Bhola Mahta, raw material cutting contractor, Shri Banwarilal Chowdhary, labour contractor, Shri Yogeshbhai Chandulal, proprietor of M/s. A. C. Enterprise, Sihor and Shri Popatbhai Karshanbhai Zinzala, Proprietor of M/s. Laxmi Steel, Bhavnagar were recorded and statement of Shri Rameshbhai Amardan Gadhvi, Clerk of the appellant was also recorded. The case of clandestine removal is mainly based on the (i) two notebooks maintained by Supervisor in which the accounts for the period July-2008 to December-2008 were recorded which included date, vehicle no. and weight, muster of laborers, wages paid to the laborers, expenditure etc. (ii) one muster book maintained by supervisor in which there are details of the muster for the period 18.07.2008 to March-2009. (iii) One pocket book maintained by the Supervisor in which there were details of the vehicle no. and weight for the period from 01.11.2008 to 11.12.2008. As per Show cause notice M/s. Shree Hari Steel Industries has cleared excisable goods i.e. 1500.016 MTs of Steel Bars clandestinely valued at Rs.5,15,21,475/- involving Central Excise duty of Rs.42,45,369/- during the period from July-2008 to March-2009 without payment of excise duty.

20. The instant case has been booked on the basis of records maintained by 3rd party mainly a notebook containing the details of the date, vehicle no. and weight, muster of laborers, wages paid to the laborers, expenditure etc. as detailed in the Annexure-I to the Show Cause Notice and on the basis of the confessional statement of partners viz. Shri Nagjibhai Jivabhai Dodiya and Shri Hiteshbhai Shantilal Dodiya, Shri Bhola Mahta, raw material cutting contractor, Shri Banwarilal Chowdhary, labour contractor and Shri Rameshbhai Amardan Gadhvi, Clerk of the appellant. On the basis of the details of the said notebook it has been confirmed that the excisable goods i.e. 1500.016 MTs of Steel Bars clandestinely removed are valued at Rs.5,15,21,475/- involving central excise duty of Rs.42,45,369/-. I also find that on the basis of notebook only, the adjudicating authority has confirmed that the raw material received in factory premises for manufacturing of finished goods and have been removed clandestinely.



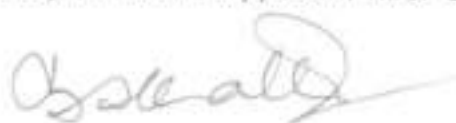
regard to the excess use of electricity, which are the primary factors for the purpose of confirming demands on clandestine manufacture and clearance of final goods. The Revenue has not examined any purchasers of these goods nor they have examined the shift supervisor / operators who are said to have maintained private records and cleared the clandestinely manufactured goods. There is no evidence of receipt of funds. It has been held in all the cited cases which are extracted above that for confirming demands of clandestine manufacture and its clearance. The department has to produce corroborative evidence with regards to the purchase of raw material and manufacture of final goods and removal of the same clandestinely. Except the packing slips and the private registers maintained by the shift supervisors / operators, there is no other evidence on record. There are no statements to corroborative the receipt of raw material and manufacture of the goods. The department ought to have examined the use of excess electricity, which would have established to some extent the allegations. The Tribunal, in a large catena of judgements, which are extracted supra has clearly laid down that the department has to establishment the manufacture of goods by clandestine purchase of raw material and clandestine removal of the same. Each link is required to be established. It is well laid down that private registers and slips maintained by the shift supervisors / operators cannot be a basis for confirming the demands. In view of the well laid down judgements and lack of evidence in this case, the impugned order is set aside and the appeal is allowed the consequential relief, if any.

(ii) **M/s. Flevel International reported – 2016 (332) ELT 416 (Del).**

Demands – Clandestine manufacture and removal evidence – No attempt made to undertake any serious investigation – no attempt made by Department to substantiate allegation of manufacture of as many as 606 ACs by appellant – No evidence produced to show that basic raw materials required for manufacture of such a large number of ACs was procured by appellant – impugned order in respect of clandestine manufacture and removal of 606 ACs suffers from serious errors, hence not sustainable.

25 In the show cause notice, it is mentioned that on physical verification, shortage of 5.500 MTs of finished goods in comparison to the stock shown in the Daily Stock Account was noticed. But I do not find any weighment slip duly signed by appellant in the relied documents under Annexure –II pertaining to List of documents relied upon for SCN. In absence of such weighment / physical verification, the shortage of finished goods can't be ascertained. In case of clandestine clearance of goods such lapses cannot be ignored. There should have been proper physical verification of stock. The goods must have been weighed in the presence of panchas and proper weighment slips should have been prepared and total weight must have been compared with the DSA. All such lapses create doubt. Therefore, the allegation of shortage of finished goods cannot be sustained. Even the department has not demanded duty on such alleged clandestine clearance on account of this shortage.

26. Regarding duty demanded on the basis of note book produced by 3rd party i.e. raw material cutting contractor, I find that the department has failed to bring any documentary corroborative evidence of clandestine clearance of goods mentioned in the Annexure –I to the Show Cause notice which is based upon the details mentioned in only in the note book. There is no documentary evidence of unaccounted purchase of raw material, unaccounted manufacture of finished goods, verification of transportation of alleged goods, flow of money from buyers to the Appellant M/s. Shree Hari Steel Industries, Bhavnagar.



27. In view of the above discussion, I find that the demand confirmed under the provision of section 11A of the Central Excise Act, 1944 along with interest at the applicable rate under the provisions of erstwhile section 11AB (now section 11AA) of Central Excise Act, 1944, vide impugned order to the extent of Rs.42,45,369/- is not sustainable. Since demand itself is not sustainable, question of imposing penalty of Rs.42,45,369/- does not arise.

28. Penalty imposed upon Shri Nagjibhai Jivrajbhai Dodiya (appellant-1) and Shri Hiteshbhai Shantilal Dodiya (appellant-2) both partner of M/s. Shree Hari Steel Industries, Bhavnagar on the similar ground is also not sustainable.

29. Therefore, I set aside the impugned order to the extent of confirming the demand of Rs. 42,45,369/-, penalty of Rs 42,45,369/- upon M/s. Shree Hari Steel Industries, Bhavnagar and imposition of penalty upon two partners of the appellant viz. Shri Nagjibhai Jivrajbhai Dodiya (appellant-1) and Shri Hiteshbhai Shantilal Dodiya (appellant-2) and I allow the appeals filed by the appellants to that extent.

30. The appeals filed by the appellants stand disposed off in above terms.


(Dr. Balbir Singh)

Additional Director General (DGTS),

AZU, Ahmedabad

27/02/18

Date : /02/2018

F.No. V2/39/BVR/2017

BY RPAD

To,

- (1) M/s. Shree Hari Steel Industries,
Plot No. 70/71, GIDC, Vartej, Bhavnagar
- (2) Shri Nagjibhai Jivrajbhai Dodiya,
Partner of M/s. Shree Hari Steel Industries,
Bhavnagar
- (3) Shri Hiteshbhai Shantilal Dodiya,
Partner of M/s. Shree Hari Steel Industries,
Bhavnagar

Copy to :

1. The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone,
2. The Commissioner, CGST & Central Excise, Rajkot/ Commissioner (Appeals), Rajkot,
3. The Deputy/Assistant Commissioner, Division-II, Rajkot,
4. The Additional/Joint Commissioner, Systems, CGST, Rajkot,
5. F. No. V2/40/BVR/2017
6. F. No. V2/41/BVR/2017
7. Guard File.