



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 / 2<sup>nd</sup> Floor, GST Bhavan,

रेस कोर्स रिंग रोड, / Race Course Ring Road,

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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No. V2/166,167,265,262,267/BVR/2017	मूल आदेश सं / O.I.O. No. 56/AC/Rural/BVR/RR/2016-17	दिनांक / Date 17.03.2017
ख	अपील आदेश संख्या (Order-In-Appeal No.):		

**BHV-EXCUS-000-APP-185-TO-189-2017-18**

आदेश का दिनांक / Date of Order: **08.03.2018** जारी करने की तारीख / Date of issue: **15.03.2018**

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 अनुसारण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा ८५, केन्द्रीय उत्पाद शुल्क अधिनियम १९५४ की धारा ३५ के अंतर्गत दर्ज की गई अपील 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, 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 Shri Gautam Ship Breaking Industries P. Ltd., Plot No. 11 Ship Breaking Yard, Alang / Sosiya Dist : Bhavnagar.**  
**2. Shri Samirbhai Vinodrai Bhayani Director of M/s Shri Gautam Ship Breaking Industries P. Ltd.,**  
**3. Shri Bharat M Sheth, Broker, Plot No. 61, B-2, Geetha Chowk, Bhavnagar**  
**4. Shri Kishorbhai A. Patel Prop. Of Shree Krishna Enterprises, Bhavnagar**  
**5. Shri. Vinodbhai Amarshibhai Patel, Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar**

इस आदेश(अपील) से व्यक्ति 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 85 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 अपील के अलावा शेष सभी अपीले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असाबा अहमदाबाद- 370016 को की जानी चाहिए। /

सत्यापित,  
प्रयोग पोस्ट  
अधीक्षक (अपील्स)



- (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 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 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 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, 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 है

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेनवेट जमा की ली गई गलत राशि
- (iii) 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 :

- (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.

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(C)

**भारत सरकार को पुनरीक्षण आवेदन :**

**Revision application to Government of India:**

इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामले में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम पैरंतुक 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 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 केंद्रीय 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 (न. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा संभावित विधि 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 केंद्रीय 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 केंद्रीय 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 पट्टी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण 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 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-1 in terms of the Court Fee Act, 1975, as amended.

(F)

सीमा शुल्क, केंद्रीय 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](http://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](http://www.cbec.gov.in)





**ORDER IN APPEAL**

Sr. No.	Name of the Appellant	Address	Appellant No.	Appeal No.
01	M/s. Shri Gautam Ship Breaking Industries P. Ltd.	Plot No. 11, Ship Breaking Yard, Alang/Sosiy	No. 1	166/BVR/2017
02	Shri Samirbhai Vinodrai Bhayani, Director of M/s. Shri Gautam Ship Breaking Ind. P. Ltd.	Plot No. 11, Ship Breaking Yard, Alang/Sosiy	No. 2	167/BVR/2017
03	Shri Bharat Sheth, Broker	Plot No. 61, B-2 Geetha Chowk, Jain Derasar Rad, Bhavnagar	No. 3	265/BVR/2017
04	Shri Kishor Amarshibhai Patel, Proprietor of M/s. Shri Krishna Enterprise	Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar	No. 4	262/BVR/2017
05	Shri Vinod Amarshibhai Patel	Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar	No. 5	267/BVR/2017

The above five appeals have been preferred by the above unit and persons (hereinafter referred to as **"the appellant no.1"** **"the appellant no.2"** **"the appellant no. 3"** **"the appellant No. 4"** and **"the appellant No. 5,** respectively) against the Order-In-Original No. 56/AC/Rural/BVR/RR/2016-17 dated 17.03.2017 (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

*Alam*

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 lesser 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/36-05/2013-14 dated 10.04.2013 to all five appellants, demanding Central Excise duty Rs. 32,09,994/- 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 appellants no. 2, 3, 4 and 5 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. 6,54,549/- 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. 7,59,814/- is based on Diaries/loose papers recovered from the premises of broker, Bharat Sheth is not tenable as there is no evidence of transport of the goods

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- or no statement of any buyer confirming supply of goods. Demand cannot be confirmed based on third party documents.
- (iv) Similarly demand of Central Excise duty Rs. 5,85,456/- 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 or payment received against such supply. Demand cannot be confirmed based on third party documents.
- (v) Demand of Central Excise duty of Rs. 12,10,174/- 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.
- (vi) The adjudicating authority has not appreciated that the alleged entries in the diaries of broker Bharat Seth were not relied upon in the SCN in support of the allegation of undervaluation but had been relied upon in support of the allegation of clandestine removal. As a matter of fact the alleged cash payment based on the diaries of Bharat Seth set out in annexure were of Rs. 99,38,935/- whereas the alleged undervaluation in Annexure is of an altogether different amount.
- (vii) No inquiry was made by the department at the end of the buyers to establish that the goods were not received by them but were diverted elsewhere. As a matter of fact no proceedings have been initiated to deny the Cenvat credit to the said buyers and therefore it cannot be held that the Cenvat credit was wrongly passed on to the buyers on whom the invoices were raised.
- (viii) The notice is barred by time as the same was issued on 10.04.2013 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.
- (ix) Since demand of duty is liable to be set aside, the interest and penalties are also liable to be set aside.

4. The appellant No. 3 has contended mainly on the following grounds:

- (i) That being a 'Middle Man' between buyer and seller, he can not be considered as 'Broker' as per the provisions of the Central Excise Act. No evidences that he had entered into 'Written agreement/condition' and how and under what manner he had dealt with the Appellant No.1 so as to help in evasion of Central Excise Duty as alleged. That being a middle man, he got nominal commission of Rs. 15/- to Rs. 25/- per MT. There was no written contract made / entered into by him for his job.
- (ii) The transportation of the disputed goods was always being managed by the buyers i.e. Re-rolling Mills or Furnace Unit who used to contact the Appellant No.1 over telephone for said sale / purchase. The prices of said goods were fixed by the respective sellers and buyers as per the prevalent market conditions as such Appellant No.2 has no role to play in fixing of price. That the transportation of said traded goods was arranged by the buyers viz. re-rolling units, furnace units etc. Further, loading of goods were done in the presence of persons known as 'Chhathiwala', deployed by the buyers, who segregated the required plates / scrap, in the plots of ship breaking units.
- (iii) The department has not supplied the copies of the relied upon documents with SCN and instead supplied the CD containing copies of relied upon documents, which is not the material evidence and hence, could not make effective reply.
- (iv) The case is based on the statements of various persons recorded on the basis of private records viz. seized diaries ( maintained by him for limited purpose only) , trip registers, private records of Angadias etc. However, all these private records have not been corroborated with the Central Excise Records by the Appellant No.1 and also of Re-Rolling units/ Furnace units.
- (v) The seized Diaries under reference had been written by him only for his purpose only and not for other purpose. If he was involved in illicit removal, then such vehicle numbers and freight charges would have been written therein. The particulars of weighment found in the Diaries were only 'Notes" which were written during reorganisation of the seller and buyers and nowhere it is mentioned that the goods under dispute had been actually sold by the Appellant No.1.
- (vi) The details of the various Annexure to SCN, based on Diaries recovered under Panchnama from the premises of Appellant No.2, are

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not further corroborated and no statements of the concerned mentioned therein have been recorded during the investigation. Hence, it is a case of no corroborative evidences regarding the receipt of the so called clandestine removals.

- (vii) That the OIO passed by the adjudicating authority was not legal and correct, as the same was passed on the basis of third party's evidence, without corroborative evidences. The demand for clandestine removal was determined on the basis of entries made in seized diaries of the appellant and trip registers of the transporters. Statements of drivers were not recorded and inquiry at the end of buyers was not undertaken. Further, the demand for undervaluation was also confirmed on the basis of inquiry conducted at the end of various market research agencies. Therefore, the SCN was decided on assumptions and presumptions and the same was passed by gross violation of Section 33B and 65B of the Indian Evidence Act.
- (viii) He had no concern in transporting, removing (as the removal of disputed goods taken place at place of Appellant No.1 and no proof of his presence at the time of removal), depositing ( he had no place of depositing the disputed goods and no evidence thereto produced), keeping, selling or purchasing ( these words not applicable to him as he had not involved in physical sale and purchase of the disputed goods) or in any other manner as mentioned in Rule-26(1) *ibid*. Further, he was not involved in the matter of issuance of C.Ex. invoices as the same is the responsibility of the Appellant No.1. Hence, penalties wrongly imposed on him under the impugned order.
- (ix) Various case laws relied upon have been ignored by the Adjudicating Authority. The same are once again relied upon by him in the present proceedings.
- (x) Reliance is placed on the OIA dated 10.04.2017, wherein the Appellate Authority had taken lenient view as the charges have been confirmed only on the basis of third party evidences and without corroborative evidences.

5. The appellant No. 4 and 5 have contended mainly on the following grounds:

- (i) They have requested for supply of relied upon documents but the same was not provided by the adjudicating authority, which in violation of principles of natural justice.

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- (ii) Regarding findings recorded at Para 3.4.7 & 3.4.8, he had received many SCNs and due to adjudication drive of the department, he and his consultant were busy and therefore he could not ask for and relied upon documents at the time of personal hearing. They have not received soft copy of RUD. Therefore, the findings recorded are vague. Unless each and every document is supplied, the department cannot expect a reply from him. Once the responsibility is cast upon the department, it cannot be charged by shifting the burden of the appellant by saying that their request for hard copy of documents is only a dilatory tactic.
- (iii) The adjudicating authority has not dealt with the pleas made by him in written reply. Not only this, the judgments referred to and relied upon have been completely ignored by the adjudicating authority and hence the order is non-speaking and non-reasoned one.
- (iv) They always co-operated with the investigation and as per his availability and summons, remained present and he has never provided evasive replies as he never indulged himself in any illicit activities and no such evidence was brought by the investigating officer. The ship breaker from whom it is alleged that he had concealed himself with these goods has not admitted to this fact nor any documentary evidence even remotely suggesting that he was involved in clandestine removal of such goods.
- (v) They have not dealt with the goods in the manner prescribed under rule 26 of the Central Excise Rules, 2002. The *sine qua non* for a penalty on any person under the above rule is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation or he has been 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. They relied upon the case law of *Godrej Boyce & Mfg. Co. - 2002 (148) ELT 161 (T)*. Therefore, he is not liable to a penalty, which is imposed under the impugned order.

6. Hearing in the case of appellants No. 1 & 2 was held on 22.12.2017, which was attended by Shri Rahul Gajera, Advocate. He reiterated the submissions of appeal memo, submitted series of judgments in their favour and requested to decide the case accordingly.





7. Hearing in the case of appellant No. 3 was held on 15.02.2018, which was attended by Shri N. K. Maru and Shri Q. H. Qureshi, representatives of the appellant. They reiterated the submissions of appeal memo and submitted written submission dated 30.01.2018 for consideration and requested for taking lenient view. They also informed that the appellant has not deposited pre-deposit amount.

8. Hearing in the case of appellants No. 4 and 5 was held on 23.02.2018, which was attended by Shri Sarju Mehta, CA. He reiterated the submissions of appeal memo and filed the additional submissions dated 23.02.2018 for consideration. In the submissions dated 23.02.2018, it was contended that-

- (i) The allegation in para 8.4.2 & 8.4.3 of the SCN is that Shri Vinod Patel has written and maintained private records. Whereas in concluding para viz. 8.10.4 of the SCN, it is stated that Shri Vinod Patel & Shri Kishor Patel, brokers dealt with such goods. It is clearly evident that department is not sure whether Shri Vinod Patel was involved in the so called clandestine transaction or both Shri Kishor Patel and Vinod Patel were involved. Ideally, in the adjudication proceedings such aberrations or flaws should have been sorted out or at least for the sake of justice the adjudicating authority should have commented or discussed these matters. However, the adjudicating authority did not even discuss this aspect.
- (ii) The only so called evidence of alleged clandestine removal is seized diaries. The adjudicating authority has failed to appreciate the facts on record. The investigation carried out by DGCEI has not controvert the deposition/explanation given by Shri Vinod Patel. Adjudicating authority has ignored the submission that many entries were estimates/survey of the goods lying at various plots of ship breaking yard. It is not denied that the adjudicating authority has power to not to accept the submission but that can be done through a reasoned and speaking order. The adjudicating authority has considered merely tallying of some date in diaries with those in storage device as corroboration.
- (iii) Removal of goods from a factory involves physical movement involving vehicles and other entities. Neither any investigation was carried out with these entities nor with any entities to whom such so called clandestinely removed goods were sold.



9. I have carefully gone through the entire case records, SCN, OIO and various contentions raised in written submissions of the appellants as well as contentions raised during personal hearing. The issues to be decided in the present appeals are – (a) whether appellant No. 1 was involved in clandestine removal and undervaluation of their goods and consequently whether the appellant is liable for payment of duty with interest and penalty or otherwise, and, (ii) whether appellants No. 2, 3, 4 and 5 are liable for penalty or otherwise.

10. It is seen that appellant No. 3, i.e., Shri Bharat Sheth has not deposited 7.5% amount of penalty imposed upon him, as required under section 35F of the Central Excise Act, 1944. Shri N. K. Maru, representative of the appellant No. 3 appeared for hearing on 15.02.2018 and he also confirmed that they have not deposited pre-deposit amount. Therefore, I find that his appeal is not maintainable and accordingly the same is rejected.

11. The case of the department for clandestine removal is based on various documents like diaries recovered from premises of the brokers Shri Bharat Sheth, Shri Vinod Patel and Shri Kishor Patel as well as booking register of the transporter supported by statements of various persons recorded during investigation. It is contended by the appellant No. 1 that the adjudicating authority has not granted cross examination of witnesses and therefore the proceeding is vitiated. In this regard, I find that on going through the defence put forth by the appellant No. 1 during adjudication, it is nowhere found that they had requested for cross examination of witnesses. The OIO passed by the adjudicating authority also does not mention any such request received from the appellant No. 1. Therefore, I find that this plea is taken by the appellant No. 1 for the first time without requesting for cross examination at the time of adjudication of the case by the adjudicating authority. I find 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. Therefore, it is not

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 necessary that in every case cross examination is to be granted. My above views 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 and 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.

12. 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 130 entries in the booking register of the transporter, 110 matched with the invoices issued by the appellant No. 1. In case of remaining 20 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 Director of appellant No. 1 (appellant No. 2), during his statement, failed to provide proper justification.

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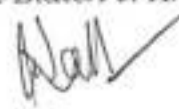
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It is confirmed by the transporters and brokers in their respective statements that they enter the details of the truck and plot number etc in their register only after the deal is finalized and they were confident that whenever there is entry in booking register, the truck had loaded scrap from the plot number mentioned in the register. Therefore, the vague reply of the Director 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. Archer*



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 (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.**

13. 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 Bharat Seth, Shri Vinod 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. Further, in case of data recovered from Shri Bharat Shet, his accountant has very clearly revealed all the transactions recorded, which shows that the appellant No. 1 through brokers, was involved in clandestine removal of goods as well as diversion of goods for passing on the Cenvat credit fraudulently. The diaries also contained entries of Angadias and further investigation at the end of Angadias revealed that cash transactions took place between appellant No. 1, brokers and buyers of the appellant No. 1. Therefore, the third party documents are duly corroborated by other evidences and statements. 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 Bharat Sheth and Shri Vindo Patel (brokers) contained licit as well as illicit clearances of the appellant No. 1. Thus, I find that authenticity of the diaries maintained by Shri Bharat Sheth and 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 diaries contained some transactions which matched with the official transactions of the appellant No. 1, 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.

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14. 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 diaries seized from the brokers, Shri Bharat Sheth and Shri Vinod Patel contain details about cash amounts transferred from various buyers to ship breaking units through angadias. 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 angadias. In my view, it is sufficient evidence that as per the dairies recovered from brokers, 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.

15. 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.

16. Coming to the personal penalty imposed upon appellant No. 2, I find that appellant No. 2, being Director 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

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 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.

17. Appellant No. 4 has contended that the charges in SCN are vague and role of appellant No. 5 is discussed but penalty is proposed on both appellant No. 4 and 5. In this regard, I find that appellant No. 4 was handling trading firm and it has been proved by investigation that the appellant No. 5 was involved in day-to-day work of the dealer firm, though appellant No. 4 denied having any role of appellant No. 5 in his firm. It has been brought on record that the invoices for the goods purchased from appellant No. 1 were issued from the trading firm M/s. Shree Krishna Enterprise and these invoices were used for diversion of the goods for the purpose of fraudulent availment of credit. Therefore, role of the appellant No. 4 is properly discussed in the SCN. I find that appellant No. 4 has involved himself in clandestine purchase and sale of excisable goods and also in unaccounted money transactions against such sale and purchase of goods. Therefore, the plea that he had not dealt with the goods in the manner prescribed under rule 26 of the Central Excise Rules, 2002 is not acceptable. Therefore, the penalty imposed by the adjudicating authority on appellant NO. 4 is proper and justified and there is no need to interfere with the same.

18. Appellant No. 5 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. 5) 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. Shree Krishna Enterprise 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

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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. Therefore, I find that there is no need to interfere with the order of the adjudicating authority in this regard.

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

*Pravin Popat*  
*Pravin Popat*  
 प्रविण पोपट / Pravin Popat  
 अधीक्षक / Superintendent

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

F. No. V2/166, 167, 262, 265, 267/BVR/2017

By R.P.A.D.

To,

- (i) M/s. Shri Gautam Ship Breaking Industries P. Ltd., Plot No. 11, Ship Breaking Yard, Alang/Sosiya.
- (ii) Shri Samirbhai Vinodrai Bhayani, Director of M/s. Shri Gautam Ship Breaking Ind. P. Ltd., Plot No. 11, Ship Breaking Yard, Alang/Sosiya.
- (iii) Shri Bharat Sheth, Plot No. 61, B-2 Geetha Chowk, Jain Derasar Rad, Bhavnagar.
- (iv) Shri Kishor Amarshibhai Patel, Proprietor of M/s. Shri Krishna Enterprise, Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar.
- (v) Shri Vinod Amarshibhai Patel, Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar.

**Copy to:**

- 1) The Chief Commissioner, CGST, Ahmedabad.
- 2) The Commissioner, CGST, Bhavnagar.
- 3) The Assistant Commissioner, CGST, Division-II, Bhavnagar.
- 4) The Assistant Commissioner (Systems), CGST, Bhavnagar.
- 5) The Superintendent, CGST, AR - Alang, Bhavnagar.
- 6) Commissioner (Appeals), CGST, Rajkot.
- 7) Guard File.

सत्यापित,  
 प्रविण पोपट  
 अधीक्षक (अपील्स)