

120



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



सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील संख्या / Appeal / File No.	मूल आदेश सं / O.I.O No.	दिनांक / Date
	V2/272&337/BVR/2017	81/Excise/Demand/16-17	31/03/2017

8/21/10/2126

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

BHV-EXCUS-000-APP-237-TO-238-2017-18

आदेश का दिनांक / Date of Order: 27.03.2018 जारी करने की तारीख / Date of issue: 27.03.2018

कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित / Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

ग अथवा आयुक्त/संयुक्त आयुक्त/उप-आयुक्त/सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, राजकोट / जयनगर / गांधीधाम, द्वारा उपरोक्तित जारी मूल आदेश से सूचित / 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 :-

- M/s Khushi Industries Plot No. 406 GIDC-I, Sihor, Dist ; Bhavnagar
- Shri Himanshu N, Jagani, Bhavnagar

इस आदेश(अपील) से संबंधित 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 अपील न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अपील विभाग, 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) विशेषतः सूचकांक से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं. 2, आर. के. पुरम, नई दिल्ली, को की जाती 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 बतलाए गए अपील के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपील न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठ, द्वितीय तल, भृगुमाली भवन असावा अहमदाबाद-380016 को की जाती चाहिए। / To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhramali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above.

(iii) अपील न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये फॉर्म EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की सीमा, व्याज की सीमा और जरूरत पड़े तो 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सर्वजनिक क्षेत्र के बैंक द्वारा जारी रेकॉजिट बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक अपील (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) अपील न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित फॉर्म S.T.-5 में चार प्रतियों में की जा सकती है एवं उसके साथ डिमांड 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 सीमा, व्याज की सीमा और जरूरत पड़े तो 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/- रुपए, 5,000/- रुपए अथवा 10,000/- रुपए का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपील न्यायाधिकरण की शाखा के सहायक रजिस्ट्रार के नाम से किसी भी सर्वजनिक क्षेत्र के बैंक द्वारा जारी रेकॉजिट बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपील न्यायाधिकरण की शाखा स्थित है। स्वयंसेवक अपील (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 is 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/-.

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 is 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) किले अपिलियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दाने की नयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित धारा S.T.-7 में की जा सकती एवं उसके साथ अनुसूचक, केन्द्रीय उत्पाद शुल्क अध्याय अनुसूचक (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पेशित आदेश की प्रतियाँ संलग्न की (उनमें से एक प्रति पत्राचारित होनी चाहिए) और अनुसूचक द्वारा सहायक अनुसूचक अथवा उपयुक्त, केन्द्रीय उत्पाद शुल्क, सेवाकर, को अपीलार्थि न्यायाधिकरण को आदेश दाने करने का निर्देश देते वाले आदेश की प्रति भी साथ में संलग्न करनी होती है। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in Form 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 अपीलार्थि न्यायाधिकरण (सेस्टाट) के प्रति अपील के मामले में केन्द्रीय उत्पाद शुल्क अपिलियम 1944 की धारा 35एक के अंतर्गत, जो की वित्तीय अपिलियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलार्थि न्यायाधिकरण में अपील करने समय उत्पाद शुल्कांश का भाग के 10 प्रतिशत (10%), जब मात्र एवं जुर्रमान विवादित है, या जुर्रमान, जब केवल जुर्रमान विवादित है, का भुगतान किया जाए, बशर्त कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि इस कार्य रूप से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत 'जाग किए गए शुल्क' में निम्न शामिल है:

- (i) धारा 11 डी के अंतर्गत रकम
- (ii) सेल्वेट जमा की गई राशि
- (iii) सेल्वेट जमा नियमवाली के नियम 6 के अंतर्गत देय रकम

- बशर्त कि इस धारा के प्रावधान वित्तीय (अ. 2) अपिलियम 2014 के अंतर्गत से पूर्व किसी अपीलार्थि न्यायाधिकरण के समक्ष विचारार्थि न्यायन नहीं हो अपील की जा चुकी हो। /

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

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

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

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

(C) भारत सरकार को पुनरीक्षण आवेदन
Revision application to Government of India:
इस आदेश की पुनरीक्षण प्रक्रिया निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अपिलियम, 1994 की धारा 35EE के तहत प्रत्येक के अंतर्गत अर्ज अपील, भारत सरकार, पुनरीक्षण आवेदन (क्यूई), किले न्यायालय, राजस्थान विभाग, चौथी मंजिल, जेवन दीप भवन, सरत जमने, 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 ग्राहक के किसी नुकसान के मामले में, जहां नुकसान किसी ग्राहक को किसी कारखाने में भंडार गृह के परिवहन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह परिवहन के दौरान, या किसी भंडार गृह में या भंडारण में ग्राहक के प्रबंधन के दौरान, किसी कारखाने या किसी भंडार गृह में ग्राहक 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 ग्राहक के विनिर्माण में प्रयुक्त कच्चे ग्राहक पर अपी गई केन्द्रीय उत्पाद शुल्क के छूट (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 (if on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

(iv) सुविधित उत्पाद के उत्पाद शुल्क के अंतर्गत के लिए जो इवूटी कैंसेट इस अपिलियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो अनुसूचक (अपील) के द्वारा वित्त अपिलियम (अ. 2), 1998 की धारा 109 के द्वारा निर्यात की गई तारीख अथवा समाप्तिक्रिया पर या बाद में पेशित किए गये 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 प्रथम संख्या EA-8 में, जो की केन्द्रीय उत्पाद शुल्क (अपील) नियमवाली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के अर्थपूर्ण के 3 महीने 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 अपिलियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अंदाजी के आधार 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 विनिर्दिष्ट निर्धारित शुल्क की अंदाजी 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 इस से किया जाना चाहिए। इस तथ्य के होने पर भी की निम्न चर्ची कार्य में बदले के लिए अनिवार्य अपीलार्थि न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाना 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) महासंशोधित न्यायालय शुल्क अपिलियम, 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 अपीलार्थि न्यायाधिकरण (क्यूई विधि) नियमवाली, 1982 में शामिल एवं अन्य संबंधित मामलों को सम्बन्धित करने वाले विधियों 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 अपीलार्थि न्यायाधिकरण को अपील दर्जित करने से संबंधित विवरण, विवरण और नवीनतम प्रावधानों के लिए, अपीलार्थि 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 appellants may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

The below mentioned two appeals have been filed by the Appellants (*herein after referred to as "Appellant No.1 & Appellant No.2*) as detailed in the Table against Order-in-Original No. 81/Excise/Demand/16-17 dated 31.03.2017 (*hereinafter referred to as 'the impugned order'*) passed by the Assistant Commissioner of Central Excise, City Division, Bhavnagar (*hereinafter referred to as 'the lower adjudicating authority'*):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/272/BVR/2017	Appellant No.1	M/s. Khushi Industries, Plot No. 406, G.I.D.C.-I, Sihor, Dist.:Bhavnagar.
2	V2/337/BVR/2017	Appellant No.2	Shri Himanshu Nandlal Jagani, 38, Vihar Complex, Fourth Floor, Near: Sahkari Hat, Waghawadi Road, Bhavnagar.

2. The officers of Bhavnagar Commissionerate gathered intelligence that some re-rolling units of Sihor, Vartej and Bhavnagar were engaged in large scale evasion of Central Excise Duty by way of clandestine removal of Re-rolled products viz. M. S. Round/ TMT Bars etc. with active support of brokers. The officers conducted a coordinated search operation at the premises of Shri Himanshu Nandlal Jagani, a major broker of Round/CTD Bars at Bhavnagar and incriminating documents were recovered during the search. Thereafter, another round of search operation was conducted at the office premises of Appellant No.2 and at business premises of Appellant No. 1 and incriminating documents were recovered.

2.1 Show Cause Notice No. V/15-18/Demand-Khushi/15-16 dated 29.02.2016 proposing demand of duty of Rs.4,02,451/- under proviso to Section 11A(4) of the Central Excise Act,1944 (*hereinafter referred to as "the Act"*) alongwith interest under Section 11AA of the Act and imposition of penalty under the provisions of Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 (*hereinafter referred to as 'the Rules'*) upon Appellant No.1 and proposing personal penalty under Rule 26(1) of the Rules upon Appellant No.2. The said Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order, in which (i) Central Excise duty of Rs. 4,02,451/- was confirmed under Section 11A(4) of the Act along with interest under Section 11AA of the Act and penalty of Rs. 4,02,451/- was imposed under Section 11AC of the Act read with Rule 25 of the Rules upon appellant No. 1 with benefit of reduced penalty as envisaged under provisions of Section 11AC(1)(b) of the Act

(ii) Imposition of penalty of 1,00,000/- under Rule 26(1) of the Rules upon Appellant No. 2.

3. Being aggrieved with the impugned order, the appellant No.1 and 2 have preferred the appeals on various grounds.

Appellant No. 1:

(i) The allegation of illicit removal of excisable goods on the basis of entries found in the private records/ note books seized under Panchnama dated 12.09.2012 at the premises of the appellant No. 2, under Panchnama dated 06.10.2012 from Shri Yogesh R. Sanghvi and under Panchnama dated 21.03.2013 from Shri Virsingh Bhadoriya; that these seized records had not been proved as 'authenticated documents' to sustain the charge of so called illicit removal as no such direct material evidences have been placed on records viz. Central Excise Records maintained by the appellant No. 1, weightment slips had been taken on record to sustain the entry of weight shown in the said private note book as well as no material evidences had been placed on record regarding means of transport; that such vehicle number had been shown 'in figure only' and not with registration number as "GJ4, GJ1, GJ3 etc."

(ii) The relied upon documents had been provided in the form of "CD" and not in hard form as required to meet with the principle of natural justice read with provisions of Section 33 of the Act; that the private records/ note books were not available for defending the case and they rely on the decision in case of M/s. Shivam Steel Corporation reported as 2016 (339) ELT 310; that when the relied upon documents supplied in form of "CD" not found in accordance with the conditions laid down under Section 36B of the Act read with Section 65B of the Indian Evidence Act, such documents cannot be accepted as 'evidence' to frame a charge against such person of party; that no such evidence has been placed on record that the relied upon documents had been supplied in CD form in accordance with the provisions of Section 36 of the Act and hence the impugned order passed beyond Show Cause Notice is not proper and legal to demand and confirm the Central Excise duty.

(iii) The adjudicating authority failed to establish that they had clandestinely procured the raw materials and manufactured the excisable goods from such illicit procurement of raw material and sold the said excisable goods illicitly; that in absence of clandestine procurement of raw material, manufacture of

excisable goods from such raw material, the charge of clandestine removal of the excisable goods cannot be justified in the eyes of law.

(iv) The case had been made out only on basis of assumption presumption grounds as the adjudicating authority failed to establish that the coding name mentioned in the said seized private diaries was pertaining to Appellant No. 1 and no such question has been asked by the Central Excise officer establishing that the coding name "Kushi/Khushi" was name of Appellant No. 1 in as much as their name start with the wording "Shree"; that without such verification of the genuineness of the name of the re-rolling unit mentioned in the so called seized diaries, it is not justifiable that the so called coding name as deciphered by the broker is the name of appellant No. 1; that quantity of illicit removal had been worked out only on the basis of entries found in the seized private diaries but not established the quantity on the basis of weightment slips etc.

(v) That Shri Hardevsinh B. Gohil, owner of Truck No. GJ-3Y-9044, GJ-4X-9044 & GJ-4W-9404 in his statement dated 01.04.2015 has not stated that all such disputed transactions had been carried out by him through his above truck so far as the charge of illicit removal was framed against the appellant No. 1; he also stated that he received payments of freight for such transportation in cash, sometimes from the appellant No. 2 and sometimes from the purchaser but this fact had not been corroborated by the independence evidences viz. specific recording a statement of the said broker as well purchaser; that no such investigation had been carried out at the end of the buyer/purchaser; that the said truck owner had not stated that such quantities mentioned against such entries found in the said seized private records from Appellant No. 2 had been loaded from the factory premises of Appellant No. 1 and therefore, the statement of the owner of trucks cannot be taken as corroborative evidences to establish the charge of illicit removal of the excisable goods.

(vi) The entries/notes on which basis the Annexure-E was prepared, were not the authenticated one and the same were not got perused by Appellant No. 1; that the comparison of such entries/ notes with the sales summary/ register of Appellant No. 1 is no sufficient without any corroborative evidences viz. daily stock account maintained by them wherein such particular of removal of excisable goods are being shown; that no such records pertaining to receipt and consumption of raw material are taken on record; that the goods removed by

them on payment of Central Excise duty and confession statement of partner is not alone the evidence to prove the charge.

(vii) The so called financial transactions taken place in so called illicit removal had not been proved by providing corroborative evidences on record in much as money flow back of Rs. 32,56,074/- had not been placed on record to charge the illicit removal of Central Excise goods without payment of Central Excise duty; that the so called transactions corroborated by the adjudicating authority on the basis of the private note books/ records seized from the broker cannot be said as corroborative evidences as the said inquiry was not extended to the end of buyer/purchaser and no records were placed on record regarding payment of freight charges.

(viii) That recovery of some documents is not the criteria to establish the charge of clandestine removal unless it is proved with corroborative evidences viz. illicit receipt of raw material and manufacture of excisable goods from such illicit receipt and its illicit removal; that the illicit transaction of Rs. 32,56,074/- is not a small one which would have reflected in any manner; that the department failed to establish the said transaction with evidences viz. money flow back; that in absence of statement/confession of customers/buyers with reference to so called illicit removal of excisable goods, such transaction value cannot be ascertained; that the Central Excise duty had been worked out on the basis of the sale price shown in the said seized private note books/ records of the third party and therefore the duty demanded on the value shown in the said seized private records was not genuine as per Section 4 of the Act.

(ix) The case laws cited by the adjudicating authority are not applicable; the adjudicating authority failed to give due respect to the case laws cited by the appellant No. 1 and thus failed to observe the judicial discipline in as much as he has not proved the clandestine receipt and consumption of raw material, not extended the inquiry at the end of buyers to sustain charge of illicit removal etc.; that they rely on decision of Om Aluminium Pvt. Ltd. reported as 2014 (311) ELT 354 (Tri. Ahd.), Adani Enterprises Ltd reported as 2015 (324) ELT 461 (Mad.) and CESTAT Ahmedabad Order No. A/11033-11034/2015 dated 17.07.2015 in case of M/s. Bajrang Castings Pvt. Ltd. which are applicable in the present case; that the adjudicating authority has wrongly and without authority of law confirmed the duty which they are not required to pay and thus they are not

liable to pay any penalty as well.

(x) The confessional statement dated 30.03.2013 and dated 08.10.2015 of Shri Rajesh Gupta, Power of Attorney holder of the appellant No. 1 was not alone evidence to prove the charge against appellant No. 1; that he simply perused the statements and Panchnama and work sheet pertaining to calculation of Central Excise duty on the basis of entries found in the seized private note books from the brokers; that perusing documents are not direct material evidences unless such entries had not been corroborated with the documents pertaining to the illicit procurement of raw material, illicit manufacture of the goods; that since they had not cleared excisable goods without payment of Central Excise duty, they are not liable to penalty.

Appellant No. 2:

(i) The Appellant No. 2 has stated that the impugned order is non speaking and non reasoned one in as much as the adjudicating authority has not dealt with the pleas made by them in their written submission as well judgments referred by them were completely ignored; that the impugned order is issued in violation of principle of natural justice as during personal hearing they requested to supply relied upon documents to defend their case, which was not entertained by the adjudicating authority; that the appellant No. 2 is not liable to penalty under Section 26 of the Rules as he had not knowingly and intentionally concerned with the clearance of the goods or engaged him in any way; that he discharged his duties by introducing the purchase and therefore the imposition of penalty under Section 26(1) of the Rules does not arise in as much as he being a broker was called in by the purchaser of the M S Bars for purchase of the same; that since being broker had introduced and finalized the deal, it cannot be said that he being a broker had played any role which would render the M. S. Bars liable for confiscation under the provisions of Rule 25(1) of the Rules in order to attract penal provisions of Rule 26(1) of the Rules; that he in any way conspired or colluded the rolling mill to facilitate the evasion of excise duty by them and he never asked the rolling mill to remove the goods clandestinely.

(ii) That he had only brokered the sale and had nothing to do with the sale of the excisable goods; that he had not asked the seller to sale his goods illicitly but only introduced the purchasers to the seller i.e. rolling mill; that in his

statement dated 02.04.2013, he stated that he had neither purchased nor dealt with the alleged goods; that he never contravened the provisions of the Act or the Rules; that he never confessed having purchased M. S. Round/ TMT Bars from the rolling mill as mentioned in the Annexure-E; that even if it is admitted that he had indulged in clandestine removal of goods and whatever written in documents are details of such illicit transactions, then one has to have the evidence from sellers regarding such sale, transport of such goods; that his case is not covered under sub-rule (1) of Rule 26 as he has not dealt with excisable goods in any manner whatsoever and he only introduced the purchaser; that for a penalty on any person under Rule 26(1), it is prime condition that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief; that he rely on the decision in the case of Godrej Boyce & Mfg. Co. reported as 2002 (148) ELT 161 followed in A. M. Kulkarni - 2003 (56) RLT 573 (CEGAT-Mumbai) and decision of Ram Nath Singh - 2003 (151) ELT 451 (Tri.-Del.); that any person to be penalized under the provisions of rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act/ Rules; that he is not liable to penalty as imposed under the impugned order.

4. Personal Hearing in the matter was attended by Shri N. K. Maru, Consultant on behalf of Appellant No. 1 and reiterated the grounds of appeals and submitted case laws reported as 2014 (311) ELT 354 (Tri.-Ahmd.) in the case of Aum Aluminium Pvt. Ltd. and CESTAT's Order No. A/11033-11034/2015 dated 17.07.2015 in the case of M/s. Bajrang Castings Pvt. Ltd. contending evidences of 3rd party can't be considered if not corroborated with evidences with the appellant; that there is no money flow back in this case; that in absence of cross examination, demand can't be upheld specially in absence of evidences to evade payment of duty.

4.1 Personal hearing in the matter was attended by Shri Madhav Vadodariya on behalf of Appellant No. 2 and reiterated grounds of appeals; also submitted written submissions stating that impugned order should be set aside and no penalty imposed on Appellant No. 2 as because there is no corroborative

evidences; that principles of natural justice not followed by the Department in as much as all relied upon documents have not been supplied to them and impugned order passed.

Findings:

5. I have carefully gone through the facts of the case, impugned order and written as well as oral submissions made by the two Appellants. The issue to be decided is whether the impugned order, in the facts of this case, confirming demand and imposing penalty is correct or otherwise.

5.1 Appellant No. 2 filed appeal beyond period of 60 days but within further period of 30 days by stating reason that their consultant was busy with work related to adjudicating proceedings of various authorities; that their consultant being chartered accountant was also busy with work related to migration and consulting of GST work. Since the appeal has been filed within time frame prescribed under the Act, I condone delay in filing appeal.

6. I find that the officers of Central Excise, Bhavnagar conducted a coordinated search at the places of various brokers and transporters, from where incriminating documents like various diaries, files, loose papers etc. were recovered. It is on record in the statements of Appellant No. 2 recorded from time to time, the entries recorded in the notebook/diaries retrieved during the course of investigation revealed the manufacture and clearances of excisable goods viz. M. S. Round/TMT Bars to buyers were made against cash transaction. Appellant No. 2 has in a detailed manner explained the codes used and the transactions recorded in the said notebooks/diaries. However, the lower adjudicating authority has not analysed these evidences properly and has also not recorded detailed/ proper findings in this regard. The statements of power of attorney holder were also not examined and analysed by the lower adjudicating authority, which is required to be done by him.

7. On going through the impugned order of the lower adjudicating authority, I find that even though various case laws on the subject have been referred to, however, detailed analysis of the facts and evidences collected during investigation in the form of statement/documents, particularly, the irrefutable evidences and statement of power of attorney of holder of Appellant No. 1 and Appellant No. 2 have not been analysed and findings not recorded on the


evidentiary value of the documents vis-à-vis statements. In the absence of any proper analysis of the evidences, it is difficult to ascertain the facts alleged in the Show Cause Notice. In these circumstances, it is proper to remand the matter back to the adjudicating authority, to analyse the evidences properly and record findings on the said evidences vis-à-vis submissions of the Appellants.

8. The Commissioner (Appeals) has power to remand as has been decided by the Hon'ble CESTAT in the case of CCE, Meerut Vs. Singh Alloys (P) Ltd. reported as 2012(284) ELT 97 (Tri-Del). I also rely upon decision of the Hon'ble Tribunal in the case of CCE, Meerut-II Vs. Honda Seil Power Products Ltd. reported in 2013 (287) ELT 353 (Tri-Del) wherein the similar views have been expressed in respect of inherent power of Commissioner (Appeals) to remand a case under the provisions of Section 35A of the Act. The Hon'ble Gujarat High Court in Tax Appeal No. 276 of 2014 in respect of Associated Hotels Ltd. has also held that even after the amendment in Section 35A (3) of the Central Excise Act, 1944 after 11.05.2011, the Commissioner (Appeals) would retain the power to remand.

9. In view of above, I remand this case to the lower adjudicating authority to be decided a fresh evaluating evidences in the case vis-à-vis submissions of the Appellants.

९.१ अपीलकर्ताओ द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

9.1 The appeals filed by the Appellants stand disposed off in above terms.


(कुमार संतोष)
आयुक्त (अपील्स)

By RPAD
To

1.	M/s. Khushi Industries, Plot No. 406, G.I.D.C.-I, Sihor, Dist.:Bhavnagar.	मेसर्स खुशी इंडस्ट्रीज़, प्लॉट संख्या ४०६, जी.आई.डी.सी., सिहोर, जिल्ला: भावनगर.
2.	Shri Himanshu Nandlal Jagani, 38, Vihar Complex, Fourth Floor, Near: Sahkari Hat, Waghawadi Road, Bhavnagar.	श्री हिमांशु नंदलाल जागाणी, ३८, विहार कॉम्प्लेक्स, चोथा मजला, सहकारी हाट के बाजुमे, वाघावाडी रोड, भावनगर.

Copy for information and necessary action to:

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
- 3) The Assistant Commissioner, GST & Central Excise Division-II, Bhavnagar.
- 4) The Superintendent, GST & Central Excise, Range: Sihor, Bhavnagar.
- 5) Guard File.
- 6) F No. V2/337/BVR/2017

110