



::आयुक्त (अपील-III) का कार्यालय,केंद्रीय उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS-III), CENTRAL EXCISE,
द्वितीय तल, केन्द्रीय उत्पाद शुल्क भवन / 2nd Floor, Central Excise Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot- 360001
Tele Fax No. : 0281 - 2477952/2441142 Email cexappealsrajkot@gmail.com



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रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.O. No.	दिनांक / Date
	V2/86, 88 & 87/RAJ/2016	16/D/AC/2015-16	29.01.2016

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

RAJ-EXCUS-000-APP-013-2017-18	M/s. Nilesh Industrial Instruments
RAJ-EXCUS-000-APP-014-2017-18	Shri Arjanbhai Popatbhai Lalani
RAJ-EXCUS-000-APP-015-2017-18	Shri Nilesh Arjanbhai Lalani

आदेश दिनांक / Date:	29.05.2017	जारी करने की तारीख / Date of issue:	05.06.2017 06
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**श्री उमा शंकर, आयुक्त (अपील-III) द्वारा पारित /
Passed by Shri Uma Shanker, Commissioner (Appeals-III)**

ग अथवा 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 **Appellant/** Respondent :-

M/s. Nilesh Industrial Instruments, Nilesh Estate, 1-Closed Street Lohanagar, Nr. Rangoli Complex Gondal RoadRajkot
Shri Arjanbhai Popatbhai Lalani, Prop. Of M/s. Nilesh Industrial Instrument, Rajkot
Shri Nilesh Arjanbhai Lalani, Authorise Person of M/s. Nilesh Industrial Instrument, Rajkot

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 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 मूल्यंकन 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 बतलए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, ओ-20, न्यू मेंटल हॉस्पिटल कंपाउंड, मेघानी नगर, अहमदाबाद-380016, को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, 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) नियमवली, 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, इयाज की मांग और लगाया गया जुर्माना, रुपय 5 लाख या उससे कम, 5 लाख रुपय या 50 लाख रुपय तक अथवा 50 लाख रुपय से अधिक है तब 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 भुगतान, बैंक को उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपय 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/-.

- (i) विल अपिनिवम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत टैक्स की नयी अपील सेवाकर नियमावली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित फॉर्म ST-7 में की जा सकने वाली एक या अधिक शर्तों, केंद्रीय उत्पाद शुल्क अध्याय अधुक्त (अपील), केंद्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियों संलग्न करें (उनमें से एक प्रति पेशकश होती चाहिए) और अपील द्वारा साहचर्य अधुक्त अध्याय अधुक्त, केंद्रीय उत्पाद शुल्क सेलक्टर, को अपील 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 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, केंद्रीय उत्पाद शुल्क एवं सेलक्टर अपील न्यायाधिकरण (सेलक्टर) के प्रति अपील के मामले में केंद्रीय उत्पाद शुल्क अपिनिवम 1944 की धारा 35एक के अंतर्गत, जो की विलीय अपिनिवम, 1994 की धारा 73 के अंतर्गत सेलक्टर को भी लागू की गई है, इन आदेश के प्रति अपील न्यायाधिकरण में अपील करने समय उत्पाद शुल्क/सेलक्टर का मूल्य के 10 प्रतिशत (10%), जब मूल्य एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्त कि इन धारा के अंतर्गत जहां कि जहां कोई अपील टैक्स वॉशिंग टैंक से अधिक न हो।

केंद्रीय उत्पाद शुल्क एवं सेलक्टर के अंतर्गत 'मांग किए गए शुल्क' में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत टैक्स
- (ii) सेलक्टर जमा की गई सजावटी
- (iii) सेलक्टर जमा निष्पादन के नियम 6 के अंतर्गत टैक्स

- बशर्त कि इन धारा के प्रावधान विलीय (सं. 2) अपिनिवम 2014 के आदेश से पूर्व किसी अपील न्यायाधिकरण के मामले में विचारणीय स्थिति नहीं है।

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 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, केंद्रीय उत्पाद शुल्क अपिनिवम, 1994 की धारा 35EE के प्रथम पारुक्त के अंतर्गत अथवा सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, विल संसद भवन, चौथी मंजिल, जीवन टॉप अवन, गणतंत्र 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-35 ibid

- (i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी मालखाने में अथवा गृह के परिवहन के दौरान या किसी अन्य मालखाने या फिर किसी एक मालखाने से दूसरे मालखाने में परिवहन के दौरान, या किसी मालखाने से दो मालखानों में माल के परिवहन के दौरान, किसी मालखाने या किसी मालखाने से 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 भी गई केंद्रीय उत्पाद शुल्क के छूट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की जाती 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 वसूली केंद्रित इस अपिनिवम एवं इसके विभिन्न धाराओं के तहत मान्य की गई है और ऐसे आदेश जो अथवा (अपील) के द्वारा विल अपिनिवम (सं. 2), 1998 की धारा 109 के द्वारा निर्यात की गई तरीक अथवा समावृत्ति पर का बट 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 फॉर्म संख्या EA-8 में, जो की केंद्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत निर्दिष्ट है, इस आदेश के संघर्ष के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संसद की जानी चाहिए साथ ही केंद्रीय उत्पाद शुल्क अपिनिवम, 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 Chaffan 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। /
जहां 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 टैक्स में किया जाना चाहिए। इस लक्ष्य के होने हुए भी की निम्नलिखित कार्य से बचने के लिए संबंधित अपील न्यायाधिकरण को एक अपील या केंद्रीय 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, notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scripiona work if excising Rs. 1 lakh fee of Rs. 100/- for each.

- (E) सहायक न्यायालय शुल्क अपिनिवम, 1975, के अनुसूची-1 के अनुसार मूल आदेश एवं स्वयं 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, केंद्रीय उत्पाद शुल्क एवं सेलक्टर अपील न्यायाधिकरण (सर्वे विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को अभिज्ञान 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 अपील न्यायाधिकरण को अपील दाखिल करने में संबंधित व्यवस्था, विस्तृत और नवीनतम धाराओं के लिए, अपील न्यायाधिकरण 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 ::

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The following three appeals have been filed by M/s. Nilesh Industrial Instruments, Nilesh Estate, 1-Closed Street, Loha Nagar, Near Rangoli Complex, Gondal Road, Rajkot (*hereinafter referred to as "the appellant no.1"*), Shri Arjanbhai Popatbhai Lalani, Proprietor of the Appellant No.1 (*hereinafter referred to as "the appellant no.2"*) and Shri Nileshbhai Arjanbhai Lalani, Authorized Representative of the Appellant No.1 (*hereinafter referred to as "the appellant no.3"*), as shown against each appeal no., against Orders-in-Original No.16/D/AC/2015-16 dated 29.01.2016 (*hereinafter referred to as "the impugned order"*) passed by the Assistant Commissioner, Central Excise Division-I, Rajkot (*hereinafter referred to as "the adjudicating authority"*) in the cases of the appellant no.1, 2 & 3 as detailed in the Table at Para 2.

2. Since the issue in the below enumerate appeals is common in nature and connected with each other, the same are taken up together for disposal under this common order.

Table

Sr. No.	Appeal No.	Appellant	Order-in-Original No./Date	Demand involved (Rs.)
1	V2/86/RAJ/2016	The Appellant No.1	16/D/AC/2015-16 dated 29.01.2016	Duty-85,973/- + Interest Redemption Fine- 1,21,168/-, Penalty-85,973/-, with appropriation of 4,50,000/- already paid
2	V2/88/RAJ/2016	The Appellant No.2		Penalty-1,21,168/-
3	V2/87/RAJ/2016	The Appellant No.3		Penalty-20,000/-

3. Briefly stated facts of the case are that the appellant no.1 are engaged in the manufacture and clearance of various type of pressure gauges falling under Chapter 90 of the First Schedule to the Central Excise Tariff Act, 1985. Acting upon intelligence, search carried out by the Officers of the Department recovering incriminating documents containing details of clearance of the said excisable goods without cover of the invoices, resultant into the seizure of 4950 pieces of the finished goods valued at Rs.3,41,695/-, which were subsequently released provisionally. The investigation revealing clandestinely clearance of the said goods by them without obtaining registration, maintaining prescribed records, issuing invoices and without payment of duty, evasion of Central Excise duty of Rs.1,78,036/- (including Ed. Cess & SHE Cess) leviable on such clearance of Rs.17,28,506/- made during the financial year 2011-12 in excess of the threshold limit of Rs.1.5 Crore prescribed under SSI Exemption Notification No. 8/2003-CE dated 01.03.2003, with suppression of the facts, led into issuance of Show Cause Notices No.V.84(4)-09/MP/12-13 dated 23.07.2012 and No.V.90(4)-10/MP/D/2014-15 dated 12.06.2015 by invoking extended period of limitation, which were adjudicated by the adjudicating authority

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vide impugned order wherein he ordered to confiscate the goods with an option to the appellant no.1 to redeem the same on payment of redemption fine of Rs.1,21,168/- under Rule 25 of the Central Excise Rules, 2002, confirming duty of Rs.85,973/- alongwith interest under Section 11A(4) readwith Section 11AA of the Central Excise Act, 1944 and imposed penalty of Rs.85,973/- upon the appellant no.1 under Section 11AC *ibid*, and also, among other, imposed penalty of Rs.1,21,168/- and Rs.20,000/- upon the appellant no.2 and 3 under Rule 25 and Rule 26 of the Central Excise Rules, 2002 respectively.

4. Being aggrieved with the impugned order, the appellant no. 1 filed the present appeal, *interalia*, on the following grounds that:

- (i) They contested the seizure of the goods under reference inasmuch as the same were kept in individual packing without sealing, pending for testing and affixing pre-printed sticker containing details of MFG Date, MRP, Required Brand Name etc. before order for supply thereof, and were undisputedly found in their factory and as such the said goods could not attain its finished stage of being marketable, hence the same could not be regarded as manufactured goods and were then not required to be accounted for in their books of account, for which they placed reliance upon judgments.
- (ii) They contended that the goods alleged to be unaccounted and removed clandestinely were not corroborated with excess/unaccounted quantity of raw-materials lying in their factory or consumed in such finished goods. Hence, there could not be any intention of illicit removal of the goods. Further, they have maintained private records such as purchase register, sale register, sundry debtors/creditors ledgers, fixed & movable assets etc., as required under the Companies Act and these records were establishing purchase, consumption, production, sale and quantity in balance of the goods in their factory, as has been evidenced from the resumption of such records during the search conducted by the department in the present matter, hence they fulfilled such requirement by an SSI Unit availing value based exemption who need not maintain any separate statutory records. Therefore, the said goods could not be confiscated and penalty could not be imposed thereupon, for which they also relied upon some case laws.
- (iii) The department has made allegations of clandestine clearance of the goods based upon details of so called clearances shown through challans, sale entries reflected in private diary and confessional statements of so many persons including proprietor, authorized

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signatory, buyers etc., without establishing sufficient space and sizable labour & machineries, excess consumption of electricity, proportionate purchase and consumption of raw-materials and receipt of sale proceeds thereof, however there was nothing on records to establish the manufacture and such clearance of the subject goods. They have also pleaded for extending cum-duty price for arriving at their duty liability.

- (iv) There was no requirement to prepare invoice and pay Central Excise duty and thus they had followed all the procedures in this regard. Subsequently, the seized goods were provisionally released by the department on furnishing necessary Bond and Bank Guarantee. Thus, seizure and confiscation of the goods was not proper and legal.
- (v) While defending their case before the adjudicating authority, they had relied upon some judgments which completely ignored and no findings were offered thereupon. They requested to take on records the said defence submission for justice.
- (vi) That since there was no *mens rea* on their part, hence penalty under Section 11AC of the Central Excise Act, 1944 and Rule 25 *ibid* could not be imposed. They also contested that simultaneous penalty under the said provisions could not be imposed.

In light of aforesaid submission, they requested to allow their appeal and set aside the impugned order.

5. Further, being aggrieved with the impugned order, the appellant no. 2 & 3 by referring & relying the ground of appeal filed by the appellant no. 1 also preferred the present appeals and contested the penalty imposed upon them under Rule 25 and Rule 26 of the Central Excise Rules, 2002 on the ground that penalty on proprietor concern i.e. the appellant no.1, and proprietor i.e. the appellant no. 2 being sleeping partner and the authorized signatory i.e. the appellant no. 3 being acted as proprietor could not be simultaneously imposed. They placed reliance in the case laws of Jai Timber Company-2009(234)ELT457(Tri.) and Gautam Cables Industries. The appellant no. 2 also contested that penalty under Rule 25 *ibid* could not be imposed upon him as the same was not proposed in the show cause notice, for which he relied upon the cases of Saci Allied Products Ltd.-2005(183)ELT225(SC), Suresh Synthetics-2007(216)ELT662(SC) and Sun Pharmaceuticals Ind. Ltd.-2015(326)ELT3(SC).

6. Personal hearing in the matter was held 14.02.2017 which was attended by Shri Satyen Dave, Advocate on behalf of all the appellants. He reiterated

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the grounds of appeal and also contested the simultaneous fine on proprietor and firm and also claimed to be below threshold limit. Further, the Department has neither submitted any comments on the grounds raised by the appellants in their present appeals nor appeared for the hearing. I therefore proceed to decide the case on merit on the basis of records available on file.

7. I have carefully gone through the facts of the case, impugned order, grounds of appeals and submissions made by all the appellants. The issue to be decided in the present appeal is that whether the impugned orders confiscating the goods, confirming the duty and imposing penalties with regard to the impugned goods i.e. pressure gauges, holding the same to be unaccounted for and cleared clandestinely is proper or otherwise.

8. I observe that the appellants have contested the confiscation of the impugned goods and confirmation of duty alongwith interest and penalties. I observe that the appellant no.1 was engaged in the manufacture and clearance of excisable goods viz. pressure gauges, by availing SSI Exemption Notification No. 8/2003-CE dated 01.03.2003. I find that as per the panchnama drawn during the course of search under reference, the impugned goods found unaccounted for in finished condition and ready for dispatch were seized believing it to be confiscable under the central excise law. I further find that, investigation in the matter clearly reveals clandestine clearance of the impugned goods by the appellant no.1 without obtaining registration, maintaining prescribed records, issuing invoices and without payment of duty with intent to evade the payment of Central Excise duty on such clearance made during the financial year 2011-12 in excess of the threshold limit prescribed under the said Notification dated 01.03.2003, with suppression of the facts, as established from the confessional statements of so many persons including proprietor, authorized signatory, buyers, transporter etc. admitting the clearance so made and also corroborated by the incriminating documents such as files, challans, private diary etc. recovered from the factory premises of the appellant no.1 during the search which contained the details of clandestine clearance of the said excisable goods, sales value thereof, name of the parties to whom such goods were sold etc.. As regards, cum duty benefit, since the appellant no.1 had clandestinely cleared the impugned goods without collecting any amount towards central excise duty, hence consideration is not inclusive of the duty. Further, benefit can not be extended where tax is not paid on account of suppression or willful mis-statement of facts. In the case of M/s. Dhillon Kool Drinks and Beverages Ltd. Vs. CCE, Jalandhar, reported at 2011(263) ELT241(T), it has been held that such benefit is not to be extended in cases where the duty/ tax evasion occurred on account of fraud, collusion, willful mis-statement, suppression of facts or contravention of any of the provisions with intent to

evade payment of duty/ tax. I further find that while giving the said decision, the Tribunal observed that, "since, this is a case of deliberate evasion of duty by depressing the assessable value and not a case where short payment is due to some bona fide misunderstandings on the part of the appellant, the judgment of Hon'ble Supreme Court in case of CCE, Delhi Vs. Maruti Udyog Ltd. reported in 2002(141)ELT3(SC) would not be applicable. Same view has been taken by the Tribunal in the case of M/s. Asian Alloys Ltd. Vs. CCE, Delhi-III reported in 2006(203)ELT252 and M/s. Sarla Polyster Ltd. Vs. CCE, Surat- II reported in 2008(222)ELT376. Moreover, Hon'ble Supreme Court in the case of Amrit Agro Industries Ltd. Vs. CCE, Ghaziabad reported in 2007(210) ELT-183(SC) has held that unless it has been shown by the manufacturer that the price of the goods includes the excise duty payable by him, no question of exclusion of duty element from the price for determination of value under section 4(4)(d)(ii) will arise." Thus, argument for cum-tax-value is not acceptable. I therefore uphold the duty confirmed by the adjudicating authority vide the impugned order.

9. The appellants have argued that the seized goods were not manufactured and further impugned goods alleged to have been clandestinely cleared were not seized and available for confiscation, hence not liable to be confiscated. I find that as per facts of the case, the said goods were seized in finished conditions and the appellants had neither contested these facts during the course of investigation nor had they come up with any evidence in support of their said contention. Since it is not a simple case of non-accountal of excisable goods as the appellant no.1 has been found to have cleared the impugned goods clandestinely, therefore, I am of the considered view that the said seized goods which were found unaccounted for were liable to be confiscated. Hence I find that the adjudicating authority has rightly confiscated the seized goods with option to redeem the said goods by payment of redemption fine. So far as the confiscation of impugned goods removed clandestinely is concerned, I find that since the said goods which had already been cleared clandestinely were not seized, hence not available for confiscation. It is settled that goods not seized could not be confiscated and no fine in lieu of confiscation could be imposed on such clearance in question in view of the judgments in the case of (i) Finese Creation [2009 (248) ELT (0122) Bom] also maintained by the Hon'ble Supreme Court [2010 (255) ELT (A 120) (SC)] and (ii) Shivkripa [2009 (235) ELT (0623) (Tri.LB)]. Therefore, I find that the adjudicating authority has wrongly confiscated the said impugned goods and accordingly his said action could not be sustained and therefore, I quash the same to that extent. At the same time, since the appellant no. 1 is found to have cleared the impugned goods clandestinely with intent to evade the payment of the duty, hence, provisions of Rule 25 *ibid* are called for and thus, seizure of the goods is found to be warranted,

resultantly confiscation and penalty under the said rule is justified. Accordingly, I hold that the redemption fine would be reduced to the proportionate of the value of seized goods only and the corresponding penalty under Rule 25 *ibid* would be stand modified to that extent. As regard the citations relied upon by the appellants, I find that the issue involved in those cases are related to non-accountal of goods within the factory premises and not related to the clandestine removal with intent to evade the payment of duty, hence cannot be made applicable to the present case. Thus, I find that the arguments put forth by the appellants are not acceptable. 30D

10. As regard submission of the appellants contesting the penalty under Section 11AC *ibid*, Rule 25 and Rule 26 *ibid*, I observe that Rule 25 *ibid* provides for confiscation of any excisable goods and imposition of penalty on manufacturer for the contravention of the nature referred in the said rule subject to the provisions of Section 11AC *ibid*. I find that prevalent Section 11AC *ibid* provides for penalty for short-levy or short-paid or non-levy or not paid duty in certain cases by reasons of fraud or collusion or any willful misstatement or suppression of facts or contravention of any of the provisions of this Act or of the rules made thereunder with intent to evade payment of duty. Further, I find that since the appellant no.1 had not accounted for the goods seized and also cleared the impugned goods clandestinely with suppression of the facts with intent to evade the duty, therefore they made themselves liable for penalty under Rule 25 *ibid* and Section 11AC *ibid* respectively and accordingly, I hold so. As regard the contention of the Appellant no. 2 that the penalty under Rule 25 *ibid* could not be imposed upon him as the same was not proposed in the show cause notice, I find that since the appellant no. 1 is a proprietary concern of the appellant no. 2 and the appellant no. 2 has knowingly indulged in above defiant manner, hence the appellant no. 1 is not separate juristic person other than proprietor (i.e. the appellant no. 2) and therefore appellant no. 2 is liable for penalty as imposed vide the impugned order but limited to the reduction of penalty as stated in para *supra*. I further find that as confessed in their statements, the appellant no. 3 has acted as authorized signatory of the appellant no.1 and has actively participated and abated the appellant no. 1 in evasion of the duty, hence the appellant no. 3 is liable for penalty as provided under Rule 26 *ibid* and I uphold the same as imposed. As regard their contention of simultaneous penalty under Section 11AC *ibid* and Rule 25 *ibid*, I find that the penalty imposed under Rule 25 *ibid* is with reference to the confiscation of the goods as provided in the said Rule whereas penalty imposed under Section 11AC *ibid* is related to evasion of duty on clandestine clearance of impugned goods, therefore there was no simultaneous penal action under these provisions. In light of above, the case laws relied upon by them has no relevancy to the facts of the present case. Therefore, in view of above, I uphold the penalties to the above extent. d

11. Therefore, in view of above discussion, I while partially allowing the appeals with reference to the quantum of redemption fine and corresponding penalty in respect of clandestine removal of impugned goods, uphold the impugned order which stands modified to the above extent.

12. अपीलकर्ताओं द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

12. The appeals filed by the appellants stands disposed off in above terms.



(उमा शंकर)

आयुक्त (अपील्स - III)

By Speed Post

To,

1	M/s. Nilesh Industrial Instruments, Nilesh Estate, 1-Closed Street, Loha Nagar, Near Rangoli Complex, Gondal Road, Rajkot	मै. निलेश इन्डुस्ट्रिज इन्स्ट्रुमेंट्स, निलेश एस्टेट, 1-बंद गली, लोहा नगर, रंगोली कोम्प्लेक्स, गोंडल रोड, राजकोट
2	Shri Arjanbhai Popatbhai Lalani, Proprietor of M/s. Nilesh Industrial Instruments, Nilesh Estate, 1-Closed Street, Loha Nagar, Near Rangoli Complex, Gondal Road, Rajkot	श्री अर्जनभाई पोपट लालानी, प्रो. मै. निलेश इन्डुस्ट्रिज इन्स्ट्रुमेंट्स, निलेश एस्टेट, 1-बंद गली, लोहा नगर, रंगोली कोम्प्लेक्स, गोंडल रोड, राजकोट
3	Shri Nileshbhai Arjanbhai Lalani, Authorized Representative of M/s. Nilesh Industrial Instruments, Nilesh Estate, 1-Closed Street, Loha Nagar, Near Rangoli Complex, Gondal Road, Rajkot	श्री निलेशभाई अर्जनभाई लालानी, अधिकृत प्रतिनिधि मै. निलेश इन्डुस्ट्रिज इन्स्ट्रुमेंट्स, निलेश एस्टेट, 1-बंद गली, लोहा नगर, रंगोली कोम्प्लेक्स, गोंडल रोड, राजकोट

Copy to:

1. The Chief Commissioner, Central Excise, Ahmedabad.
2. The Principal Commissioner, Central Excise and Service Tax, Rajkot.
3. The Assistant Commissioner, Central Excise Division-I, Rajkot.
4. The Dy./Assistant Commissioner (Sys.), Central Excise, H. Q., Rajkot – with a request to upload the OIA on website.
5. The Superintendent, Central Excise, AR-II, Rajkot.
6. PA to Commissioner (Appeals-III), Central Excise, Ahmedabad.
7. Guard File.