::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

सत्यमेव जयते

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No	दिनांक / Date
	V2/200 & 201/RAJ/2016	04/ADC/BKS/2016-17	16.05.2016

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

RAJ-EXCUS-000-APP.-011 to 012-2017-18

आदेश का दिनांक / Date of Order: **29.05.2017** जारी करने की तारीख / Date of issue: **05.06.2017**

श्री उमा शंकर, आयुक्त (अपील-III) द्वारा पारित /
Passed by **Shri Uma Shanker**, Commissioner (Appeals-III)

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 **Appellant &** Respondent :-

M/s. Milano Paper Pvt. Ltd., Survey No. 153,Opp. Sartanpar Village,, Sartanpar Road, Wankaner-363622, Morbi
Shri Bachubhai Bhurabhai Agola, Director of M/s. Milano Paper P. Ltd., Wankaner

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

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

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

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अ-20, न्यू मेन्टल हॉस्पिटल कम्पाउंड, मेघाणी 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) 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 रजिस्ट्रार 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 नियमावली, 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 रजिस्ट्रार 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 नियमावली, 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 (उसमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को अपील दायर 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) शीघ्र शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा किये जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवैट जमा की ली गई गलत राशि
(iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।/
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores.
Under Central Excise and Service Tax, "Duty Demanded" shall include :
(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 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 से 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 अदा की 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 of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

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

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रुपये या उससे कम है 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, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी 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-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

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

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

:: ORDER IN APPEAL ::

M/s. Milano Papers Pvt Ltd, Survey No. 153, Opp Sartanpar Village, Sartanpar Road, Wankaner- 363622 and Shri Bachubhai Bhurabhai Agola, Direcor of M/s. Milano Papers Pvt Ltd, Survey No. 153, Opp Sartanpar Village, Sartanpar Road, Wankaner- 363622 (hereinafter referred to as "**the appellant no.1" and "appellant no.2"**) have filed the Two separate appeals bearing NO. V2/200/Raj/2016 and V2/ 201/ Raj/ 2016 against Order-In-Original No. 04/ADC/ BKS/ 2016-17 dated 16.05.2016 (hereinafter referred to as '**the impugned order**') passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as '**the adjudicating authority**'):-

2. Brief facts of the matter is that the officers of the Headquarters Preventive Wing, Central Excise Rajkot, acting on intelligence regarding clandestine manufacture and clearance of excisable goods, carried out a search on 31.10.2013 at the factory premises of the Appellant No1,a manufacturer of Duplex Board and seized various incriminating documents & computer devices like Pen Drive, Hard Disc, Invoice Books and also printout from the computers/ Pen driver were resumed under a Panchnama dated 31.10.2013. A statement of Appellant No.2 was also recorded. Also, un accounted finished goods of 383.128 MT valued at Rs.95,78,450/- was placed under seizer on 31.10.2013 under a reasonable belief that the same were intended to be cleared without payment of duty. This culminated into a show cause notice No. V.48/ AR-Wankaner/ Div-II/ JC(BKS)/ 169/ 2014-15 dated 21.10.2014 to the Appellant No.1 and Appellant No.2 after extending the period of seizure under Section 110(2) of Customs Act, 1962 by the Commissioner, Central Excise, Rajkot proposing confiscation of goods under Rule 25 of Central Excise Rules, 2002 (hereinafter referred to a "the Rules"), proposing penalty under Rule 26 of the Central Excise Rules, 2002 on Appellant No.1 and Appellant No.2. The adjudicating authority vide impugned OIO decided the matter thereby confirming the confiscation under Rule 25 of the Rules, redemption fine of Rs. 2,50,000/- under Section 34 of the Act, penalty of Rs. 5,00,000/- upon Appellant No.1 under Rule 26 and penalty of Rs.5,00,000/- upon on Appellant No.2 under Rules 26 of the Rules.

3. Being aggrieved with the impugned order the appellants have preferred present appeals on the following grounds:

APPELLANT No. 1

(i) That Hon'ble Supreme court's decision in the case of Habnas Lal (1993(67)ELT 20 (SC) relied upon by the Adjudicating authority has not overruled its earlier two decisions in the case of AC Cus & Supdt , Calcutta (1983 (13)ELT 1477 (SC) and I.J.Rao, AC of Cus (1989(42)ELT 338(SC)). They also referred Hon'ble High Court's decision in the case of Rama Overseas reported at 2013(293)ELT 669 (P & H) to contend that the appellant was entitled for return of goods as the extension of seizure was granted without hearing them; that hence once goods are returned un conditionally to the appellant, same is not available for confiscation under Section 124 of the Customs Act, 1962; that therefore, same cannot be confiscated nor can be redeemed in lieu of fine. That even if provisions of Section 124 and Section 110 are considered independent then also seized goods are bound to return to the person from whose possession same were seized; that show cause notice at least for the purpose of confiscation of goods under Section 124 of the Customs Act,1962 does not survive and hence it has to be considered seized goods stand returned to the person from whose possession same were seized, therefore, order confiscating seized goods under Rule 25 is liable to be set aside on this ground alone.

(ii) That no penalty can be imposed under Rule 26 on the Appellant No.1 as penalty under Rule 26 can be imposed upon the person who abetted in dealing the goods in the manner specified in the said rule; that actually appellant has not abetted in any manner not to speak of manner prescribed under Rule 26 ibid but on the contrary allegation of not accounted goods in daily stock account is made against it; that offence by way of not accounting the goods in daily stock accounts attracts penalty under Rule 25 of the Central Excise Rules, 2002 and not under Rule 26 ibid.

(iii) That extension of time limit for further six month to issue show cause notice under sub section (2) of the Section110 of the Customs Act, 1962 without hearing to appellant is legally not correct and hence show cause notice is liable to be quashed. They relied upon the decision of Hon'ble Supreme Court in the case of

Superintendent Preventive Service Customs, Calcuatta Vs Charan Das Malhotra reported at 1983(13)ELT 1477 (SC) and in the case of I J Rao, Assistant Collector of Customs Vs Bibhuti Bhushan Bagh reported at 1989(42) ELT 338(SC).

(iv) That the impugned order was also not maintainable on merits as finding for confiscation of goods an imposition of penalty are imaginary and merely based on assumption and presumptions; that there is nothing or record to even suspect that so called unaccounted stock of the goods was meant for illicit clearance without payment of central excise duty; that it is settled law that no confiscation or penalty be imposed for excess finished goods found unaccounted in statutory records without intention to evade payment of central excise duty. They relied upon the Hon'ble Tribunal's decision in the case of M/s. Steel Complex Ltd reported at 2006(197) ELT 512 (Tri-Bang) and in the case of Industrial Thermopack reported at 2015(329)ELT 500 (Tri- Del), M/s. Resham Petrotech Ltd [2020(258)ELT 60 (Guj)], M/s. Ronak Laminex P Ltd [2008(232)ELT 861(tri Ahmd) and M/s. Jashree Plastics [2003(161) ELT 920 (Tri- Kolkata); that adjudicating authority has placed reliance on the decision in the case of CCE, Visakhapatnam-II Vs Regency Ceramics Ltd (2007)(210) ELT 410(Trib-Bang) which is not applicable in the case and not considered the decisions relied upon by them. They also made a plea that it is on record that the goods found excess in this case were lying in manufacturing department and duly accounted for in the production house records and there is no evidence at all to infer the goods seized were meant for clandestine removal; that it is also a fact that the goods sold during the period for which manufactured goods were not accounted for in DSA were also sold under valid central excise invoices. They further submitted that the adjudicating authority has wrongly imposed the penalty under Rule 26 as penalty for confiscation under Rule 25 can only be imposed under Rule 25; that the adjudicating authority has wrongly relied upon the decision in the case of M/s. Sujana Steel Ltd reported at 2014(209) ELT 565(Tri-Chennai) in as much as the appellant in that case was a co-noticee in a case booked against another manufacturer.

(v) That impugned order is not maintainable for the reason that time of notice was extended by learned Commissioner under Section 110(2) of the Customs Act, 1962 in violation of settled principles of law and hence Show cause notice issued on the strength of such illegal extension cannot be sustained.

APPELLANT No. 2

(i) That his company has already filed a separate appeal against the impugned order wherein it has been elaborately explained that entire order is ex facie illegal and devoid of merits; that his company has elaborated legitimate reasons init appeals for the contentions duly supported by judicial decision and hence grounds of appeal narrated in his company's appeal are also to be considered.

(ii) That no penalty was imposable on him under Rule 26 of the Central Excise Rule, 2002 in as much as ingredients required under the said rule for imposition of penalty are not attracted in this case; that though no clause of Rule 26 is mentioned , it appears on the basis of allegations made against him in the SCN that penalty has been adjudged under Clause (1) of Rule 26 of the Central excise Rules, 2002; that there is nothing on record to suggest that appellant was aware that so called excess stock found by the officers was liable to confiscation; that allegations are nothing else but mechanical reproduction of Rule 26(1); that neither the SCN nor the impugned order narrates anywhere as to how appellant had knowledge or reason to believe that the alleged un accounted stock was liable to confiscation; that the said goods were not liable to confiscation as also explained by his company in its appeal filed against the impugned order; that therefore, since no goods were liable to confiscation, question of having knowledge or reason to believe that any goods were liable to confiscation does not arise at all; that it can be seen from the findings of Para 17.1 of the impugned order that the adjudicating authority has held the appellant liable to penalty on the basis of unfounded and imaginary grounds/ assumption, presumption.

4 Personal Hearing in the matter was held on 24.03.2017 wherein Shri P D Rachchh, Advocate appeared on behalf of the both the Appellant and reiterated the grounds of appeal and submitted that SCN issued after six months and hence confiscation can not be done. They also filed written submission.

5.1 In the additional submission dated 24.03.2017 (date captioned as 09 March, 2017), learned advocate on behalf of the appellant inter-alia submitted that, the show cause notice issued beyond the period of six months from the date

of seizure and proposing confiscation of the seized goods based on ex-pate decision of the learned Commissioner was erroneous; that such extension if any has to be granted after hearing the appellant and not ex-parte. In support of their claim they referred Hon'ble Supreme Court's decision in the case of Charan Das Malhotra 1983(13)ELT 1477(SC), Bibhuti Bhushan Bagh [1989(42)ELT 338)(SC)] and Harbans Las [1983 (67) ELT 20 (SC)]. It is further contended that they do not dispute the power to issue show cause notice under Section 124 of the Customs Act, 1962 and even for the purpose of Central Excise Act, 1944 but by any means once seized goods are returned there cannot be any proposal and order for confiscation of unconditionally released goods; that once goods after seizure is released unconditionally due to non issue of show cause notice within six months, it has to be considered as if goods were never seized; it is settled position of law that once goods are not seized, order of confiscation of the goods with an option to pay fine in lieu of confiscation cannot be made; that even if the order of confiscation is made with an option to pay fine in lieu of confiscation and such option is not exercise, property in such goods lies with the government; that therefore, such goods will not be available to government once it was released unconditionally consequent upon not issuing show cause notice within time limit; that even in the supreme court decision in the case of Harbans Lal supra it was no where held that goods after un conditionally return can be confiscated and fine in lieu of confiscation can be imposed.

5.2 It is further contended that the order imposing penalty of Rs.5 Lacs each on both the appellants under Rule 26 of the Central Excise Rules,2002 *(hereinafter referred to as "the Rules")* is very excessive; that as per the provision of Rule 26 penalty not exceeding the duty on such goods can be imposed; that in the instant case, duty on seized goods valued at Rs.95,78,450/- comes to Rs.6,04,280/-; that if the duty was demanded from main noticee viz. M/s. Milano and if they would have paid within 30 days from the date of receipt of SCN they were required to pay only 15% penalty subject to duty, interest and 15% penalty were paid within 30 days from the date of communication of order as provided under Section 11AC and no penalty upon co-noticee; that however duty etc. if paid within 30 days from the date of order than penalty is reduced to 25% subject to duty, interest and penalty are paid within 30 days from the date of communication of order; that in the instant case though duty was not demanded but goods are

entered into daily stock account and sold (after got released on payment of fine only) on payment of duty only. They further relied upon the decision of Hon'ble Tribunal in the case of CCE Vs M/s. Ess Jay Poly Film (P) Ltd reported at 2010(249)ELT575(tri-Del).

6. I have carefully gone through the facts of the case, the impugned order and the contentions of the appellant's both in written and in person. The issue involved in the matter is whether the impugned order passed by the adjudicating authority confirming confiscation of seized goods, redemption fine and imposition of penalty on both the appellants under Rule 26 of the Rules was justifiable or otherwise.

7.1 The appellant has challenged the order on one of the ground that since the extension of seizure period under Section 110(2) of the Customs Act, 1962 was granted by the Commissioner without hearing them, the said order is bad in law in light of the Supreme Court's decision in the case of Charan Das Malhotra 1983(13)ELT 1477(SC) and in the case of Bibhuti Bhushan Bagh [1989(42)ELT 338)(SC)]. By raising this plea the appellant attempted to invalidate the order of the Commissioner made under Section 110(2) of the Customs Act, 1962 to claim that the seized goods stands returned unconditionally at the time of issuance of Show Cause Notice. In this regard I observe that the appellant was informed extension of seizure vide letter F. No. IV/6-78/CEP/2013-14 dated 29.04.2014 which is not in dispute. The extension is also referred in the show cause notice involved in the present proceedings. I further observe that nothing on record is produced before me that the said order of extension of seizure period was either challenged before the competent authority or the said order has been reversed by the competent authority in absence of which action taken by the Commissioner can not be invalidated. Therefore, challenging the said extension of seizure during the present proceedings is out of the jurisdiction and hence un acceptable. Therefore, appellant's argument that show cause notice be quashed on this ground and to consider the seized goods as returned unconditionally is not tenable. Moreover, I find that the Hon'ble Supreme Court's decision relied upon by the adjudicating authority in the case of Hanbans Lal [1993(67) ELT 20 (SC)] is appropriate as much as the same is latest and decision in Charandas Malhotra's case was also discussed therein. Relevant portion of which reads as under:-

> "8. Then comes.....
>
> .....
>
> .....
>
> In clear terms.....
>
> .....On launching proceedings under Chapter XIV, Section 124 enjoins issuance of a notice for which no period has been fixed within which notice may be given. The difference is obvious because this goes as a step towards trial. The ratio of this Court afore-quoted in *Charandas Malhotra's* case, thus settles the question afore-posed and the answer is that these two Sections 110 and 124 are independent, distinct and exclusive of each other, **resulting in the survival of the proceedings under Section 124, even though the seized goods might have to be returned, or stand returned, in terms of Section 110 of the Act, after the expiry of the permissible period of seizure**.

In view of the above, I do not find merit in appellant's argument with regard to invalidation of seizure and show cause notice issued to them.

7.2 The appellant has on merit challenged the confiscation and redemption fine on the ground that it is not proved that unaccounted stock of finished goods was meant for illicit clearance without payment of central excise duty and intention to evade the duty is not proved with regard to excess quantity found and seized during the search. In this regard I observe that neither adjudicating authority nor appellant has brought on record the outcome of the investigation of case with regard to clandestine clearance of goods and evasion by the appellant no.1. I also find that the appellant No.1 has not accounted for the production of finished goods during the 20.10.2013 to 29.10.2013 and simultaneously cleared the goods from the factory without maintaining the actual stock. Thus, it implies that the clearance remained un accounted too. I further observe that the Panchnama proceedings dated 26.07.2008 which is not challenged by the Appellant reveals that the appellant was not able to justify the un accounted finished goods at the material time. It is obvious and logical question that how a business of manufacturing can be run and manage in absence of daily records of stock, clearances and all other ancillary records unless it is intended not to maintain it. The appellant also made argument that the clearance was made

under invoice. It is the argument in vague until and unless the stock of finished goods is accounted for in the records, especially where duty payment is not stipulated consignment wise and is postponed till the last date of the month for monthly payments. Thus the argument does not hold good to justify any un-accounting (excess stock) of finished goods. The appellant has grossly failed to justify that why the finished goods remained unaccounted for such prolonged period from 20.10.2013 to 29.10.2013 or major part of a month especially when they are also effecting the clearance during the period. I therefore, hold that the ingredients of Section 11AC are there and I find no infirmity in confiscation and redemption fine imposed by the adjudicating authority under Rule 25 of the Rules.

8. As regards penalty on appellant no 1 under Rules 26 of the rules, I observe that penalty under Rule 26 is prescribed for the person who deals with the excisable goods which are liable for confiscation whereas as producer or manufacturer are liable for penalty under Rule 25 when excisable goods are liable for confiscation. Thus, simultaneous reading of these two provisions shows that where Rule 25 attracts penalty on manufacturer or producer, at the same time Rule 26 attracts penalty on any person other than manufacturer or producer which envisages that penalty can not be imposed under both the Rules on single category of person. Thus, legislation has provided two separate rules for imposition of penalty for different class of persons. In this backdrop, manufacturer being a company can not be pulled into the category of "any person" by drawing the provisions of General Clause Act,1897 and hence Appellant No.1 can not be imposed penalty under Rule 26 of the Rules. I therefore hold that no penalty under Rule 26 is imposable on Appellant No.1 and hence I allow the appeal of Appellant No.1 to that extent.

9. As regards, penalty under Rule 26 on the Appellant No.2, I find that the appellant being Director of the assessee company were fully aware of the fact that the goods manufactured in his unit are not accounted for major part of the month and still goods are being cleared. This is in violation of Central Excise Law and excisable goods were liable for confiscation. Thus, he is the person concerned in dealing with such excisable goods and has very obvious reason to believe that the goods were liable for confiscation. The appellant No.2 has nowhere challenged the allegation how he was not the concerned person. Since the seized goods are liable for confiscation as held in foregoing para, I find no reason to deviate from

the adjudicating authority's decision of imposing penalty under Rule 26 of the Rules. As regards quantum of the penalty, I find that Rule 26 stipulates penalty not exceeding the duty amount which is followed by the adjudicating authority. I therefore, reject the appeal made by the appellant No. 2.

10. In view of above discussion and findings, I partially allow the appeal of Appellant No.1 to the extent that no penalty is imposable under Rule 26 upon them and I reject the Appeal of the Appellant No.2. Accordingly, the impugned order stands modified to that extent and the appeals are accordingly stands disposed of.

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

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

सत्यापित,

(उमा शंकर)
आयुक्त (अपील्स - III)

आर. एन. मीणा,
अधीक्षक (अपील)

By R.P.A.D.

To,

1.	M/s. Milano Papers Pvt Ltd, Survey No. 153, Opp Sartanpar Village, Sartanpar Road, Wankaner- 363622	मेसर्स मिलनों पेपर्स प्रा लिमिटेड सर्वे नं १५३ , सरतानपर गाँव के सामने सरतानपर रोड , वांकानेर ३६३६२२
2.	Shri Bachubhai Bhurabhai Agola, Director, M/s. Milano Papers Pvt Ltd, Survey No. 153, Opp Sartanpar Village, Sartanpar Road, Wankaner- 363622	श्री बचुभाइ भूराभाई अगोला मेसर्स मिलनों पेपर्स प्रा लिमिटेड सर्वे नं १५३ , सरतानपर गाँव के सामने सरतानपर रोड , वांकानेर ३६३६२२

Copy to:

1) The Chief Commissioner, Central Excise, Ahmedabad.
2) The Principal Commissioner, Customs and Central Excise, Rajkot.
3) The Assistant Commissioner, Central Excise, Division-Morbi.
4) The Superintendent, Central Excise, AR-Morbi, Division-Morbi.
5) The PA to Commissioner (Appeals-III), Central Excise, Ahmedabad.
6) Guard File.
7)V2/201/RAJ/2016