[illegible]

[illegible] 2nd Floor, GST Bhavan
[illegible] Ring Road
[illegible] – 302001
[illegible]

[illegible]

[illegible]
[illegible]
[illegible]
[illegible]
[illegible]

[illegible]
[illegible]
[illegible]

Date:
20.12.2017

[illegible]

DIV-EXCUS-000-APP-001-19.01.2019

[illegible] 21.01.2019 [illegible] 23.01.2019

[illegible]
Heard by Shri Sudesh, Principal Commissioner (Appeals), Raipur

1. [illegible]

2. [illegible]

3. [illegible]

4. [illegible]

5. [illegible]

6. [illegible]

7. [illegible]

8. [illegible]

9. [illegible]

10. [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

:: ORDER IN APPEAL ::

The above mentioned appeals have been filed by the Appellants (*hereinafter referred to as* "Appellant No.1 to Appellant No.4) as detailed in the Table against Order-In-Original No. 51/V-DC/JS-000-JC-39-2017-18 dated 20.12.2017 (*hereinafter referred to as* "the impugned order") passed by Joint Commissioner, CGST and Central Excise, Bhavnagar (*hereinafter referred to as* "the lower adjudicating authority") :-

Sr. No.	Appeal No.	Appellant No.	Name & Address
1	V2/555/BVR/2017	Appellant No. 1	M/s. Akhil Ship Breaking Pvt. Ltd. "Manan", Plot No. 2227-E, Waghawadi Road, Near Varal House, Bhavnagar.
2	V2/556/BVR/2017	Appellant No. 2	Shri Ashok Raghuvirsinh Jain, Power of Attorney Holder of M/s. Akhil Ship Breaking Pvt. Ltd. "Manan", Plot No. 2227-E, Waghawadi Road, Near Varal House, Bhavnagar.
3	V2/557/BVR/2017	Appellant No. 3	Shri Anilbhai Bhikhubhai Rathod, Authorised Person of M/s. Akhil Ship Breaking Pvt. Ltd. "Manan", Plot No. 2227-E, Waghawadi Road, Near Varal House, Bhavnagar.
4	V2/2/BVR/2018-19	Appellant No. 4	Shri Vinod Amarshibhai Patel, Plot No. 102, Eacon Mega City, Opposite Victoria Park, Bhavnagar.

2. The brief facts of the case are that the DGCEI issued Show Cause Notice F.No. DGCEI/AZU/35-17/11-12 dated 28.12.2012 to the Appellant No.1 to Appellant No. 4 for clearance of Plates, MS Scrap, etc. obtained from breaking of ships clandestinely without payment of CE duty to various customers alleging as under : –

(a) Appellant No.1 clandestinely manufactured and cleared finished excisable goods attracting Central Excise duty of Rs. 63,03,184/- under Section 11A(1) of the Central Excise Act, 1944 (*hereinafter referred to as* "the Act") without payment of Central Excise duty;

(b) Interest should not be recovered under Section 11AA of the Act;

(c) Penalty should not be imposed upon Appellant No. 1 under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 (*hereinafter referred to as* "the CER");

(d) Penalty should not be imposed upon Appellant No. 2 under Rule 26(1) of the CER;

(e) Penalty under Rule 26(1) of the CER should not be imposed upon Appellant No. 3 and Appellant No. 4, who concerned themselves in

selling of excisable goods in clandestine manner, which they knew and had reason to believe that the same were liable to confiscation.

2.1. The above SCN was adjudicated vide the impugned order, which confirmed demand of CE duty of Rs. 63,03,164/- under Section 11A of the Act, along with interest under Section 11AA and also imposed penalty of Rs. 63,03,164/- upon Appellant No. 1 under Section 11AC of the Act and gave option to pay 25% penalty, if demand along with interest is paid within 30 days of the receipt of the impugned order; also imposed penalty of Rs. 9 lakhs under Rule 26(1) on Appellant No. 2, imposed penalty of Rs. 4.50 lakhs under Rule 26(1) on Appellant No. 3 and imposed penalty of Rs. 3,33,333/- under Rule 26(1) on Appellant No. 4.

3. Being aggrieved with the impugned order, Appellant No. 1 to Appellant No. 4 preferred appeals, inter alia, on the various grounds as under :-

Appellant No. 1 :-

i) Appellant No. 1 stated that the impugned order is not speaking and non reasoned as the lower adjudicating authority has not dealt with the pleas made by them in their written submission and not dealt with judgments referred by them; that the impugned order is issued against principle of natural justice as request to cross-examine brokers were made but no findings have been recorded in the impugned order and relied upon the case laws as under :-

(a) Shalimar Agencies reported as	2006 (120) ELT 166(Tri)
(b) L. Chandrasekar reported as	1990 (48) ELT 29 (Tri.)
(c) Tarshila Spinners reported as	2001 (131) ELT 368 (Tri.)
(d) Sharma Chemicals reported as	2001(130) ELT 271 (Tri)

ii) The lower adjudicating authority has not adduced any evidence of clandestine removal except statements of brokers and the finding that no statement of vehicle owner, buyers of the goods and financial cash flow has been established and therefore, charges of clandestine removal of the goods have not been proved; that charges of clandestine removal are required to be proved with tangible evidence like production of goods, buyers confirmation, etc. and therefore, the DGCEI and the lower adjudicating authority has failed to discharge onus; that they relied upon the judgment of the Hon'ble Supreme Court in the case of Anwar Lal Vs. UOI reported as 1989(13) ELT 1391(SC); that the demand cannot be confirmed on the basis of

evidence recovered from Shri Vinod Patel and Shri Kishore Patel who are third parties; that the department has not discharged its onus of proving the charge of clandestine removal with positive, tangible and affirmative evidences and have just deciphered large number of encoded entries and names appearing in the daily reports and loose chits seized from the factory premises of Appellant No. 1 during the search; that they relied upon judgment of the Hon'ble Supreme Court in the case of Amba Lal reported as 1989(12)ELT 21 (SC).

(iii) Regarding confirmation of differential CT duty (Annexure IV-1 to the Show Cause Notice) in respect of under valuation of the goods Appellant No. 1 submitted that rates quoted by M/s. Major and Minor as well as other agencies/person cannot be considered as actual rates; that differentiating invoices on the basis of price mentioned in the goods is not proper; that the prices calculated by the market research agencies cannot be taken as acceptable transaction value under Section 4 of the Act for the goods sold by the appellant.

(iv) Regarding imposition of penalty under Section 11AC of the Act the appellant submitted that the lower adjudicating authority has not mentioned any section or rule of the Central Excise Law under which penalty is imposed and therefore, they could not defend this charge; that there is no mala fide involved and therefore, imposition of penalty under Section 11AC of the Act is illegal; that

Appellant No. 2 :-

3.1 Regarding imposition of penalty of Rs. 9 lakhs under Rule 26(1) of the CER, Appellant No. 2 reiterated submissions raised in respect of Appellant No. 1 and further added that the lower adjudicating authority has not dealt with the case laws cited by them in their submissions; that he is Director of Appellant No. 1 and had no personal benefit and therefore, the question of imposing personal penalty should not arise; that personal penalty under Rule 26(1) of CER could be imposed on person who acquires possession of or physically dealt with any excisable goods which were liable to confiscation, however, he had no such knowledge and relied upon the decision of the Hon'ble CESTAT in the case of Keshav Kumar Tharad reported as 2003(156) ELT 211 (Tri-Kol).

Appellant No. 3 :-

3.2 Regarding imposition of penalty of Rs. 50 lakhs under Rule 26(1) of the CER, Appellant No. 3 [illegible] made by Appellant No. 3 and added that he is authorised person of Appellant No. 1 and had no personal benefit in the company [illegible] the question of imposing personal penalty does not arise; that personal penalty under Rule 26(1) could be imposed on person who acquired possession of or physically dealt with any excisable goods which were liable for confiscation, however he has no such knowledge and in this regard relied upon the decision of the Hon'ble CESTAT in the case of Keshav Kumar Trivedi reported as 2003(156) ELT 271 (Tri-Kol).

3.3 Appellant No. 4 :-

(i) Appellant No. 3 and Appellant No. 4 stated reiterating the contention made in respect of Appellant No. 1 that the impugned order is in violation of the principles of natural justice as cross examination of Shri Mahendrabhai A. Rana, Partner of M/s. Maruti Metal Industries, Bhavnagar has not been entertained; that statement of Shri Mahendrabhai A. Rana would have been recorded by the officers of DGCEI in the [illegible]; that Appellant No. 4 has been penalized on the basis of statement of the third party; that he relies upon decision of the Hon'ble CESTAT in the case of [illegible] reported as 1990 (48) ELT289 (Tri); Takshila Spinner reported as 2001 (131) ELT 56 (Tri-Che) and Sharma Chemicals reported as 2001 (138) ELT 271 (Tri-Kol); that the impugned order is non speaking and not reasoned one inasmuch as the lower 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 against 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 diary recovered from Appellant No. 3 during the search conducted by the officers of DGCEI were containing details of estimates written by him and relied upon documents have not been provided to him; that he has not hatched the transaction under which the goods were cleared clandestinely; that Appellant No. 4 (Shri Kishore Patel) had no stated that he had purchased goods cleared clandestinely from Appellant No. 1; that penalty imposed on Appellant No. 3 (Authorised Person) of Appellant No. 1 is Rs. 9 lakhs, thereby meaning 14 % of total allegedly duty evaded of Rs. 62,03,164/- and therefore, imposition of

penalty of Rs. 3,33,331/- on Appellant No. 4 works out to 100 % of the duty evasion and therefore, it is illogical and not reasonable; that Appellant No. 4 is not liable to penalty under Rule 25(1) of the Rules.

4. **Personal Hearing :-**

During course of personal hearing the Chartered Accountant appearing for Appellant No. 1 to Appellant No. 4 reiterated the grounds of appeals and submitted written submissions stating that they had requested to cross-examine brokers but their requests were not allowed by the lower adjudicating authority; that there is no concrete evidence of clandestine manufacture and clearances of final products and all documents have been recovered from brokers and 3rd party documents cannot be relied upon; that the daily reports recovered from Shri Rajeshbhai, Manager had been fabricated by them and he left job after search; that no cash has been recovered from them neither any transactions shown as excess / shortage; that the entire case is made on the basis of statements of brokers (i.e. 3rd party) and no investigation done at buyer's end; that without verification with buyers the charges of clandestine clearance cannot be proved and have not been proved; that Appellant No. 4 being broker only need not be imposed penalty; that Appellants relied upon the case laws as under :-

(i) Sanco Ind. Ltd. reported as 2010(281) ELT 803 (Tri-Ahmd)
(ii) Vatur Dyes & Chemicals P. Ltd. 2007 (218) ELT 420 (Tri-Ahmd)
(iii) Polo Star Ind. Ltd. 2007 (216) ELT 257 (Tri-Ahmd)
(iv) Mozabhai Iron & Steel Ind. 2015 (316) ELT 374 (Guj)

4.1 Appellant No. 1 to Appellant No. 3 have filed application for condonation of delay for late filing of appeal by 20 days and Appellant No. 4 has filed appeal late by 30 days. All Appellants raised the ground that their consultant being a chartered accountant was busy in filing of reply to notices issued by the Income Tax department and hence, they could not prepare the appeal in time leading to delay in filing appeal; that there was no intention on their part and if delay is not condoned, they will suffer irreparable loss; that they relied on the various case laws.

Findings :-

5. I have carefully gone through the facts of the case, the impugned order and written as well as oral submissions made by the Appellants. The issue to be decided in

these appeals are as under :-

(a) Whether Appellant No. 1 [illegible] manufactured and cleared finished excisable goods attracting [illegible] and whether it is recoverable from them along with interest ?

(b) Whether penalty of Rs. [illegible] should be imposed upon Appellant No. 1 under Section 11AC of the Central Excise Act read with Rule 25 of the CER.

(c) Whether penalty of Rs. [illegible] should be imposed upon Appellant No. 2 under Rule 26(1) of the CER;

(d) Whether penalty of Rs. 4,[illegible] should be imposed on Appellant No. 3 under Rule 26(1) of the CER.

(e) Whether penalty of Rs. 3,[illegible] should be imposed on Appellant No. 4 under Rule 26(1) of the CER.

5.1 I find that Appellant No. 1 & Appellant No. 3 have filed appeal after 20 days and Appellant No. 4 after 30 days, i.e. beyond normal appeal period i.e. 60 days, but within further period of 30 days stating that their consultant was busy with legal work relating to preparation of reply to legal notices. Since the appeals have been filed within further period of 30 days, I condone delay in filing of appeal by all Appellants and proceed to decide on merits.

5. I find that the officers of Directorate General of Central Excise Intelligence conducted coordinated search and seizure at office of appellants, various brokers, financer, market research agencies, etc., from where incriminating documents like Daily Sales Reports, loose chits indicating cash dealings, files, etc. were recovered and statements of concerned persons recorded under Section 14 of the Act.

6.1 I find from the statements of Appellant No. 1, Appellant No. 3 and Appellant No. 4 and the entries recorded in the Daily Clearance reports, loose chits, etc. recovered during search that the manufacture and clearances of excisable goods, namely, HS Scrap, etc. to buyers were made against cash/unaccounted transactions. Appellant No. 2, Appellant No. 3, Appellant No.4, and Shri Bharatbhai V. Mehta, financer and brokers who played instrumental role in executing transactions explained the details of these private records and the transactions recorded in the recovered private records during search at the business premises of Appellant No. 1. Appellant No. 2, Power of Attorney Holder of Appellant No. 1 in his statement dated 23.07.2012 has *inter alia* accepted clandestine removal of the excisable goods by Appellant No. 1 as reproduced at Para 4.2 of the Show Cause Notice as under :-

Q.4 You are being shown the Record No. 20 of Annexure – A to the Panchnama dated 10.06.2010 drawn at the office of M/s. Akhil Ship Breakers P. Ltd. and M/s. Akankshe Ship Breaking P. Ltd. Bhavnagar. Please explain the details of the daily reports and other documents filed in the same.

Reply: Today I am shown the file bearing No. A-20 recovered from the office of M/s. Akhil Ship Breakers P. Ltd. and M/s. Akankshe Ship Breaking P. Ltd. Bhavnagar. I have seen all the documents lying in there and for the token of having seen it I have put my dated signature on the first and last page of the said record. It contains daily reports of sale and purchase of Oxygen gas. The daily reports are available from the date 10.04.2010 to 05.05.2010. In the daily report of sale, the details of sale of M.S. Scrap obtained from ship breaking are shown. It contains truck number, bill number, party's name, grade of scrap, weight of scrap, amount of sale and name of brokers are written. Said daily report contains details of both the companies i.e. M/s. Akhil Ship Breakers P. Ltd. and M/s. Akankshe Ship Breaking P. Ltd.

Q.5 In the said reports, in many entries, bill numbers and party's names are not written. Instead only "Cash" is written. Please explain.

Reply: About the entries showing Cash transaction, I state that sale of scrap shown in the said entries are made without issuing any bill or invoice. The said sales are made against cash payment and without any bill/invoice.

Q.6 When your have sold scrap against cash and without issuing bill or invoice, what about the duty to be paid on such removal of scrap ?

Reply: I admit that for the sale made against cash without issuing any bill / invoice, no duty has been paid by M/s. Akhil Ship Breakers P. Ltd. and M/s. Akankshe Ship Breaking P. Ltd.

Q.7 You are being shown the Record No. 21 of Annexure-A to the Panchnama dated 10.06.2010 drawn at the office of M/s. Akhil ship breaking P. Ltd. and M/s. Akankshe Ship Breaking P. Ltd. Bhavnagar. Please explain the details of the chits filed in the same.

Reply: I am shown the file bearing No. A-21 recovered from the office of M/s. Akhil ship Breaking P. Ltd. and M/s. Akankshe Ship Breaking P. Ltd. Bhavnagar. I have seen all the documents lying in there. It contains some chits on which some names and amounts are written. I have carefully seen each of the chits. I state that said chits are prepared by our employee Shri Anil Rathod. Actually, it is his duty to collect the payment from the buyers and brokers. In case where scrap is sold without bill, it is the duty of the brokers to get the payment from the buyers as we do not know the actual buyers. Shri Anubhai keeps track of the payment to be received and payment received. For his convenience he writes the details of pending payments, cheques received, payment received through RTGS and cash received etc. to be recovered from the brokers. The details written in these papers to each the companies M/s. Akhil ship Breaking P. Ltd. and M/s. Akankshe Ship Breaking P. Ltd.

Q. 8 Who prepared the [illegible] ?

Reply : One person named [illegible] who looks after our ship breaking yards at [illegible] Alang where the entire work of the ship breaking yards of M/s. Akhil Ship Breaking P. Ltd. and M/s. Alankarna Ship Breaking P. Ltd. is prepared under for the sale of scrap from both the companies. He also prepares the ship repair bills raised from the yard of both the companies.

Q.9 . .

Q.10 ..

Q.11 Please state as to where you have sold scrap during without payment of duty ?

Reply: Sir, we never give bills against actual buyer. Such transactions are always sold through brokers. In such brokers are responsible for the payment, therefore, we never know the actual buyers.

Q.12 As per the details of clearances made from the yards of M/s. Akhil Ship Breaking P. Ltd. and M/s. Alankarna Ship Breaking P. Ltd. it is to admit that certain clearances were against "Cash" and "Credit" and were without payment of duty ?

Reply : I admit that the sale of scrap against "Cash" are ineligible and without payment of duty.

Q.13 Are you ready to pay duty now ?

Reply: Sir, later, I submit cash dated cheques each of Rs. 25,00,000/- from each company towards the liability arising out of this case. I am also ready to pay whatever duty is finally payable by both the companies."

[Emphasis supplied]

6.2 Statement of Appellant (in 3) Authorised person of Appellant No. 1, was recorded on 17.07.2010 wherein he has inter-alia accepted clandestine removal of the excisable goods by Appellant No. 1 as reproduced at Para 6.1 of the Show Cause Notice as under :-

"Q.2 On 10.06.2010 officers of DGCEI, Ahmedabad searched your office at Shamlaji and recovered certain records under the Panchnama drawn on that day. What is your say ?

Reply : I remained present throughout the course of search conducted in the office of M/s. Akhil Ship Breaking P. Ltd. and M/s. Alankarna Ship Breaking P. Ltd. on 10.06.2010 and entire Panchnama proceedings were done in my presence. The records withdrawn by the officers belong to above two companies.

Q.3 You are being shown the file no. 20 from the records withdrawn from above office on 10.06.2010. What do you say about the data recorded

lying in that file ?

Reply: I have seen the papers lying in the file no. 20. The said daily reports contain the details of day to day sale made from both the plots of the above companies at Sosiyo. One Rajeshbhai, working at the plots as the Supervisor in our companies, prepares the said reports. He writes the details of the sales of ship breaking scrap made from the plots during the day in the report and sends it to the office next day.

Q.4 In the said reports, in the first column mark number is written. In the second column bill number or 'Cash' is written. In the third column each party's name is written and thereafter type of scrap, weight, rate, total amount and in the last column name of some of persons are written. Please explain the same.

Reply : I state that when Ship Scrap is sold from our plots at Sosiyo, bill is prepared from there only. Such particulars of bills are written in the said reports. Where no bill number ship party's name are written and only 'Cash' is written, I state that such sales are made without any bill or without paying any cess duty. The persons mentioned in the last column are workers through who our goods are sold.

Q.5 You are being shown the file no. 21 from the records withdrawn from above office on 10.05.2010. It contains some small papers and chits. What do you say about the same ?

Reply : I have seen the file no. 21 and the papers and chits lying in there. I state that it is my responsibility to collect the payments of day to day sales of our companies made as shown in the reports in file no. 20. So for my convenience I write such details on the chits and accordingly collect the payments from parties. In the case where sale is made under bill, I write B.I.C.S or the details of cheques. In the cases where the sales are made without bill, it is the liability of the broker to get the payment from the buyers themselves. I write the name of the broker and amount due against the sales. When both type of payments are received, I again write the details of payment received on another chit.

Q.6 In the said chits, the name of one Bharatbhai Bhandari appears every alternate day. Please explain the same and give the full name and address of Bharatbhai.

Reply: As stated in above, when the payments of sales made without bills are accumulated, as per the order of our boss Shri Ashokbhai Jain, entire cash amount so collected is handed over to Shri Bharatbhai Bhandari and I write in the chits, the details of amount handed over to him. I do not know his full name but he is dealing in finance. His mobile number is 98746 [illegible]. His office is situated in Devpalli, Bhavnagar. I do not know the postal address but personally I can reach there. I do not know what he does with the money given to him by me. I just follow the order of my boss and hand over the amount to him."

[Emphasis supplied]

6.3 Statement of Shri [illegible] Bhavnagar recorded on 11.05.2011 has inter alia [illegible] confidence in respect of clandestine removal of the goods pertaining to Appellant No. 1 as reproduced at Para 7 of the Show Cause Notice :-

> *"Q.3 On 10.05.2010, a Team of DGCEI, Ahmedabad searched the business office of one M/s. Abhi Ship Breaking P. Ltd. and M/s. Alankuda Ship Breaking P. Ltd. situated at Bhavnagar and recovered certain records under the Panchnama drawn on that day. During the scrutiny of the documents recovered, on page "Miscellaneous Expenses" appearing in financial statements of the above companies. You are being shown the chits wherein above name appears. After going through the chits, please state whether you recall a person with that name ?*
>
> *Reply : I have gone through the above said chits and read the details written on it. Since the chits are recovered from the premises of M/s. Abhi ship Breaking P. Ltd. and M/s. Alankuda Ship Breaking P. Ltd., I can say that the name Bhavesh as Supplier appearing in the chits represents me. I have done some business for the above companies.*
>
> *Q.4 On inquiry with Shri Anilbhai Rathod, the manager of the above companies while recording his statement on 17.07.2010 stated that as per his employer's order, he used to recover cash amounts as written in the above referred chits to you. You are being shown the statement of Shri Anilbhai Rathod. Please state what did you do with such cash amounts given to you. You are being shown the statement of Shri Anilbhai Rathod. Please state what did you do with such cash amounts given to you ?*
>
> *Reply : I have read over the statement of Shri Anilbhai and I agree that Shri Anilbhai used to bring cash to me and handed over said cash to me. I had instructions from Shri Ashokbhai Jain, the Director of above companies that as soon as I receive cash from Shri Anilbhai, I had to send the same to him by some special messenger or some time he used to send some person to collect the cash so received. For the same he used to pay me some commission."*

[Emphasis supplied]

6.4 Statements of brokers, namely, Shri Deepak Agrawal on 06.02.2012, Shri Dinesh Gupta on 06.02.2012, Shri Pradeep Gupta on 21.07.2012, Shri Pramod Jain (aka, Tonibhai) on 05.03.2012, Shri Vikas Gupta on 05.03.2012 were recorded wherein all of them in their respective statements,recorded under Section 14 of the Act,have stated that wherever their name appeared in the Daily Sales Reports / Chits, they have acted as broker by arranging buyers for the goods of Appellant No. 1 and have also arranged for collecting sales proceeds of unaccounted goods in cash and entries mentioned in private record indicating "Cash" transactions were handled by them. All the brokers also stated that they have gone through Panchnama dated 10.05.2010 as well as statement of Shri Ashok Jain recorded on 28.07.2010 and statement dated 17.07.2010 of Shri Anilbhai Rathod.

6.5 While confirming demand of CE duty the lower adjudicating authority has held as under :-

> *"3.13 - It is also worth noting that on persons with whom DGCEI have carried out investigations have retracted their statements. Therefore, the testimony of the entries in the private records of M/s. Akhil cannot be doubted and the truth deposed by witness during the course of investigation is valid and reliable for the proceedings before me in as much as the statements of various persons recorded by DGCEI corroborate the transactions contained in the private records seized from M/s. Akhil.*
>
> *3.14 Accordingly, I am compelled to believe that the illicit transactions relating to sales of excisable goods by M/s Akhil reflected in daily reports/loose slips seized from M/s. Akhil are proved sufficiently. I, therefore, find and hold that those transactions pertaining to M/s Akhil recorded in seized daily reports are not backed with their sales data on account of investigative evidence in as much as authenticity of seized daily reports have been proved beyond doubt by confessional statements as well as corroborative evidences / records and statements of various persons.*
>
> *3.20*
>
> *3.21 Based upon the details mentioned in the daily reports recovered the file at Sl.No. 20. of the Annexure to the Panchnama dated 10.08.2010 drawn in the office premises of M/s. Akhil and on the basis of the information given by Shri Anibhai Rabari, duty liability towards illicit clearance of excisable scraps and materials made from the unit of M/s. Akhil is worked out as shown in the Annexure A-1 to the Show Cause Notice and accordingly M/s. Akhil has illicitly cleared 1262.439 MT of dutiable scrap totally valued at Rs. 2,35,04,456/- involving Central Excise duty of Rs. 30,36,969/-. M/s. Akhil have paid some amount of duty by depositing Rs. 20,00,000/- from Account with Cenvat Challan No. 6/2021 dated 10.08.2010 and Rs. 25,59,888/- vide Electronic Challan No. 6/13 dated 22.02.2011."*
>
> [emphasis supplied]

6.6 Appellant No. 1 has contended that the lower adjudicating authority has not allowed cross-examination of witnesses and therefore, principles of natural justice have been violated. In this regard, I find that the lower adjudicating authority has held as under :-

> *"3.17.1 I further find that there is no provision in the Central Excise law for seeking cross-examination, nor the Madras High Court in the case of K. Balan v/s Govt. of India reported in 1982 ELT(010)380 Madras, had held that right to cross examination is not necessarily a part of reasonable opportunity and depends upon the facts and circumstances of each case. It largely depends upon the adjudicating authority, who is not guided by the rules of evidence as such who must offer such opportunity to the party concerned as would assure him proper opportunity to defend himself. The case of K. Balan v/s Govt. of India reported in 1982 ELT(010)380 was distinguished by Hon'ble Tribunal / Ahmedabad in Arifa*

HIRNES PVT. LTD. [illegible] CC, C. EX., AHMEDABAD II reported at 2014 (311) [illegible] (Tri. - Ahmd.) wherein it was held as under:-

"33. In K Saran's case (supra), the Madras High Court states that the necessity of cross examination depends upon the facts and circumstances of each case. The Adjudicating Authority has to give an opportunity to the party represented to rebut against him proper opportunity to defend himself. Opportunity of cross examination is given wherever it is relevant, justified and genuine and is not for protracting the proceedings. The decision in CTC Industries case (supra) is again to the effect that cross examination cannot be granted as a matter of routine and is to depend upon the facts of each case. This Tribunal's decisions cited in the latter of 10-10-2000 are also to similar effect that cross examination is not always a mandatory procedure to be adopted in all cases. The request should not be dismissed arbitrarily or without exercising its discretion in the facts of each case. The Adjudicating Authority may refuse cross examination for justifiable reasons..."

3.17.2 Similarly, in the case of Alankar-Jam Ply-N-Wood Pvt. Ltd vs. Commr. of Cus. & C.Ex., Aurangabad reported at 2004 (177) ELT 1150 (Tri. Mumbai), Hon'ble Tribunal, in their order, in para 6, has held as under:

" 6 ..... Their contentions that principles of natural justice are violated inasmuch as cross-examination of persons whose statements are relied upon, has to be weighed in the light of the facts that all the statements relied upon were placed before them. They had all the opportunity to demolish these statements during the proceedings. Cross-examination cannot be claimed as a matter of right in departmental proceedings.

3.17.3 Further, the Hon'ble Tribunal, in the case of M/s. Beauty Dyers v. CCE, Chennai reported in 2001 (136) ELT 339 (Tri.-Chennai) has observed that Non-availability of witnesses for cross- examination not a fatal flaw when the findings are based on document about which there is no credible explanation and nothing on record to show statements not voluntary or effectively retracted within close proximity of the time these were obtained.

3.17.4 In view of above facts, I find that request for cross-examination Noticees does not merit consideration and hence cannot be acceded to."

[Emphasis supplied]

6.6.1 I find that the request for cross-examination of brokers was made vide letter dated 12.03.2014, scanned copy of which is reproduced as under :-

EXHIBIT "A"

akàpetà

SHIP BREAKING PRIVATE LIMITED

Date: [illegible]

To,
The Commissioner,
Central Excise,
Bhavnagar

Sir,

Sub: Request for cross examination in the matter of Show Cause Notice No. [illegible]

Ref: Letter No. [illegible] dated 16/06/2014 received from your good office

In this regard, we would like to examine the following witnesses. Therefore, it is requesting to allow the cross examination of the following witnesses or else otherwise the department has not given issued the above said show cause notice.

1. Shri Dhaval Agrawal, Broker, Bhavnagar
2. Shri Vinesh Gada, Broker, Bhavnagar
3. Shri Pradeep Gupta, Broker, Bhavnagar
4. Shri Premal Jain (Proprietor), Broker, Bhavnagar
5. Shri Vikas Gada, Broker, Bhavnagar

Therefore, it is requested to arrange the presence of the above witnesses and allow us to cross them.

Yours faithfully

P.A. Reader

6.6.2 Third that Appellant No. 2 and Appellant No. 3 representing Appellant No. 1 and Appellant No. 4 have tendered their statements under Section 14 of the Act and have categorically admitted, on being confronted with the incriminating Daily Sales Reports and loose Chits only, that the entries showing "Cash" transactions are not tallying with their statutory records and in the nature of the goods cleared in clandestine manner or

which no CE duty was [illegible] duty of Rs. 50,56,868/- attributable to clandestine removal [illegible] voluntarily and immediately paid vide challan dated [illegible] of Rs. [illegible]/- and vide challan dated 22.07.2011 of Rs. 25,08,868/- [illegible] Show Cause notice was issued on 28.12.2012. Appellants have also [illegible] that they [illegible] cross-examine. For I find that Appellant No. 1 by [illegible] on one hand they are unequivocally admitting that they have cleared the impugned goods clandestinely and also accepted CE duty involved [illegible] and on other hand they are contesting [illegible] without any substance and only on technical grounds. Therefore, I find that [illegible] the lower adjudicating authority are appropriate in this regard and [illegible] of orders [illegible] have any bearing on the outcome of this case.

6.7 The private records like Daily Sales Records, [illegible] etc. seized during investigation have duly been corroborated by confirming [illegible] and recording confessional statements of brokers, financers and authorised persons of Appellant No. 1 and CE duty involved has also been deposited by Appellant No. 1 before passing of the impugned order. I therefore do not find [illegible] with the impugned order and [illegible] demand of CE duty of Rs. 50,56,868/-.

6.8 I further find that CE duty of Rs. 3,33,33[illegible]/- (Annexure – [illegible] to the SCN) has been confirmed vide the impugned order for clandestine removal of [illegible] plates valued at Rs. 40,45,285/- on the basis of clearances made through Account No. 4. While confirming the demand the impugned order has found as under:

> *"3.23 I further find from Annexure given in SCN that data [illegible] there contain the number of slip breakers, date, quantities [illegible] mentioned against the plot numbers referring to the [illegible] by respective slip breakers. The data mentioned in the said slips also pertain to clearance made for M/s. M/s. Akhil Ship Breaking P. Ltd. through SKI Wood Pallet to various parties. Further, the data pertaining to M/s. M/s. Akhil Ship Breaking P. Ltd. is in consonance with the invoices issued during the relevant period by M/s. M/s. Akhil Ship Breaking P. Ltd. but no invoice could be found to be issued in respect of clearance mentioned in Page No. 13 of Daily Dispatch [illegible] & 19 of the Diary No. A/7 that pertained to M/s. M/s. Akhil Ship Breaking P. Ltd. According to the details found in the clauses, slips, [illegible] Pallet was illegally removed through the [illegible] 40,45,285/- involving evasion of Central Excise duty of Rs. [illegible]/- (Annexure – IX.3) and I find the same to be correct.*
>
> *3.24 I also find that it is clearly apparent [illegible] given in SCN regarding payments received by M/s. Akhil from [illegible] from the entries of the print outs of data mentioned by [illegible]*

Pen drive recovered from the residence of Shri Vinod Patel. I also find the three firm have been also confirmed and accepted by Shri Ashok Jain, Director of M/s. M/s. Akshi Ship Breaking P. Ltd. in the statement deposed before the DGCEI during the investigation."

[Emphasis supplied]

6.8.7 Further, Appellant No. 2 Director of Appellant No. 1 in his statement dated 20.09.2012 inter-alia, deposed as under at Para 11.7 of the Show Cause Notice :-

"Q.6 From the private records and diaries were recovered from Shri Vinod Patel, you are being shown one such diary A/7 and page no. 17 and 19 of the same. The above diary pertains to the year 2009. On the page no. 17 following entries can be seen.

(94.5 21/11

712.5
4057.5
42/5 x 82 = 350550

On page no. 19 following entries are there.

19/11 3915 x 82 = 321030
19/11 6915 x 87 = 601605
20/11 10060 x 8 = 875220
1797855

According to the dealing and explanations given by Shri Vinod Patel in his statements recorded during the investigation, the above details represents (94) is the plot number of Alang/Sosiyo. 19/11 (19/11/2009) and 21/11 (21/11/2009) are the date, 2/5, 3915, 6915 and 10060 are the quantity of scraps in Kgs. Sold by the ship breaker of plot number 94 of the rates of 82 and 8 respectively. The above transactions were also compared with the sales invoices found by your unit and it was noticed that no sales invoices were issued for the transactions mentioned in the above diary. What is your say ?

Reply : I have gone through the page no. 43 of diary no. A09 as mentioned in you above question. Considering the explanations given by Shri Anod Patel, I agree that the above details pertain to my unit M/s. M/s. Akshi Ship Breaking P. Ltd. Plot No. 94 and after going through the particulars of sales invoices issued by my unit, I agree that details of above transactions are not there.

Q. 9 One Pen-drive was recovered from the residence of Shri Vinod Patel on 30.09.2010. The said Pen drive was sent to the Directorate of Forensic Science Laboratory, Gandhinagar to retrieve the data contained in the said pen-drive. DFS has after retrieving the data, submitted the said data in hard copies i.e. in print form. You are being shown the page no. 110 of the cash book of Shri Vinod Patel, maintained in the name of ABC. The amounts written in there have to be read after removing two decimal points Rs. 15,00,000/- (15,000.00) is paid to Ashok.94 i.e. Ashok Jain of Plot no. 94. Similarly on 24.11.2009 Rs. 6,48,000/- (6480.00) is paid to Ashok.94.

Further you are [illegible] of the same page out [illegible] 08.12.2009 [illegible] 4.05 [illegible] 34. The above notice refer to payment made by [illegible] what is your say ?

Reply :- I have seen the page no. 112 and 113 of the print outs of data retrieved by DGS from [illegible] seized from the residence of Shri [illegible] After going through the same and above mentioned notice, I admit that it appears as payments mentioned in there are received by me."

6.8.2 On going through above, it is clear that Appellant No. 2 has accepted the details worked out on the basis of data retrieved from Appellant No. 4. I am, therefore, not inclined to interfere with the impugned order confirming CE duty of Rs. 3,33,331/- against Appellant No. 1 for clandestine removal of the excisable goods and thus uphold the same.

6.8 I also find that the statements recorded during course of investigation are substantial piece of evidences, duly corroborated which have not been retracted at any stage by the statement makers and, therefore, as per the settled legal position sanctity of the same cannot be undermined by bald arguments only. I further find that the authenticity of the records seized from the premises of Appellant No. 1 have been duly corroborated and tallied with the records of Appellant No. 1 and CE duty on the clandestine clearances of the goods pertaining for in the record of Appellant No. 1 have been raised. The Hon'ble CESTAT in the case of Lawn Textile Mills Pvt. Ltd. reported as 2018 (10) TMI 1820-HC, MAD-CE has held as under :-

"30 *The above facts will clearly show that the allegation is one of clandestine removal. It may be true that the burden of proving such an allegation is on the Department. However, clandestine removal with an intention to evade payment of duty is always done in a secretive manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where secrecies involved, there may be cases where direct documentary evidence will not be available. However, based on the stored records, if the Department is able to prima facie establish the case of clandestine removal and the assessee is not able to give any plausible explanation for the same, then the allegation of clandestine removal has to be held as to be proved. In other words, the standard and degree of proof, which is required in such cases, may not be the same, as in other cases where there is no allegation of clandestine removal.*

31. As noticed above, the assessee has not denied any of the allegations, which were put forth except for simple and flimsy retraction. If the assessee had sufficient records to establish their innocence, nothing prevented the Managing Director to say so while making the retraction. There was no attempt made by the assessee to state their case by coming forward to give a statement and producing records. The allegation of parallel invoicing has

not been disproved in the manner known to law. Thus, we find that the Adjudicating Authority, the Appellate Authority as well as the Tribunal concurred on facts and each of them has given independent reasons for their conclusion.

32. Thus, in the absence of any perversity in the finding, the Court cannot interfere with the factual finding recorded by the authorities as well as the Tribunal, as the scope of the appeal before this Court under Section 35-G of the Central Excise Act is to decide of a substantial question of law. We find there is no question of law, much less a substantial question of law arising for consideration in the instant case. Thus, the appeal filed by the assessee is dismissed."

(Emphasis supplied)

6.9 Appellant No. 1 has argued that demand of duty cannot be confirmed on the basis of private records and third party statements without support of other evidence like production, statement of buyers, transportation, etc. In this regard, I find that both the key persons of Appellant No. 1, Banker, who used handle cash sales proceeds of clandestine transactions, brokers have categorically admitted and identified the entries in the private incriminating records. Further, brokers have admitted to have sold goods belonging to Appellant No. 1 without CE invoices and without payment of duty in cash. I also find that the demand has been computed on the basis of Annexures prepared during investigation based on private incriminating records recovered during searches carried out at the premises of Appellant No. 1 and all vital links involved in the case, i.e. brokers, financer, power of attorney holder, authorized representative, etc. have corroborated the evidences gathered during investigation and therefore, demand cannot be said to confirmed without concrete evidence and third party statements.

6.10 None of the statements have not been retracted and hence, the statements have sufficient evidentiary value. I find that all evidences in the case are vital and hard evidences and are sufficiently proving the case against the appellants. In this regard, I rely upon the decision of the Hon'ble CESTAT in the case of Om Prakash Agarwal reported as 2017 (346) ELT 125 (Tri-Del) wherein it has been held as under :-

"5. I note that in both the proceedings almost identical set of facts were involved. The allegation was that based on evidences collected from the suppliers' side, unaccounted receipt and further manufacture of dutiable items by the appellant was sought to be sustained. Admittedly, the case is not only based on the material evidence collected from the supplier's end and also as corroborated by the responsible persons of the supplier's end. The receipt and use of the such unaccounted raw materials for further manufacture has apparently been admitted by the appellants and the duty short paid has also been discharged during the course of investigation itself. The appellants great emphasis on non-availability of the further corroboration by way of details of transport, money receipt, etc. in the present case, the

evidences collected by the [illegible] are relevant and cannot be disputed. The admitted receipts of the goods have been corroborated and admitted by the corresponding [illegible] by the persons who were in charge of the supply [illegible] evidence was brought before the partner of the appellant firm, he subsequently admitted unaccounted clearance of finished goods. However, he did not name the buyers to whom such products were sold in such situation. It is strange that the appellant has taken a plea that the department has not established the details of buyers and receipt of the finished goods to such buyers. It is seen that the records maintained by the suppliers, which were affirmed by the [illegible] cannot be doubted. It is not the case of the appellant that the suppliers maintained such records only to falsely implicate the appellant. In fact, the supply of unaccounted raw material is duly been corroborated by the partner of the appellant's firm. In such situation, it is not tenable for the appellant to now in the appeal stage raise the point of requirement of cross examination, etc. Admittedly, none of the private records or the statements given have been retracted or been contested for their authenticity. In the appeal before the Tribunal, the appellant is making a belated assertion that the statement of the partner of the appellant firm is not voluntary. Various case laws relied upon by the appellant are not of any support in the present case. In the cases involving unaccounted manufacture, the evidence of each case are to be appreciated for somehow. As noted already, the third party's records at the supplier's side as affirmed by the person in charge and further corroborated by the appellant cannot be discounted only on the ground of further evidences like transportation and receipt of money has not been proved. In a clandestine manufacture and clearance, each stage viz. operation cannot be established with precision. On careful consideration of the grounds of appeal and the findings in the impugned order, I find no reason to interfere with the findings recorded by the lower authority. Accordingly, the appeals are dismissed."

[Emphasis supplied]

5.11 It is settled law that in cases of clandestine removal, the Department is not required to prove duty evasion with mathematical precision. My this view is duly supported by judgments of the Hon'ble Supreme Court in the cases of Shri Shah Gumanmal reported as 1981 (13) ELT 153 (SC) & Aafot [illegible] reported as 2005 (235) ELT 587 (SC).

5.12 The statements, if not retracted, are legal and valid in the eyes of law and have to be considered as corroborative evidences as held in the cases of Naresh J. Sukhavani reported as 1996 (83) ELT 258 (SC) and Rakesh Kumar Garg reported as 2016 (331) ELT 321 HC-Delhi. I find that statements admitting clearances of goods without payment of Central Excise duty and without issuing invoices are inculpatory and specific and not retracted and hence, admissible as held in the case of M/s. Hi Tech Abrasives Ltd. reported as 2017 (348) ELT 609 (Tri.-Ahd.)

"14. On careful consideration of the facts and circumstances as outlined

above, I find that the statement of Director is the basis for the demand. The statement is inculpatory and is specific. The Director clearly admitted that the documents/private records recovered by the officers contained details of procurement of raw materials as well as clearance of finished goods with and without payment of duty. This fact is further strengthened by the observation that many entries in the private documents are covered by the invoices issued by the assessee on which duty stands paid. The Director has clearly admitted the truth of the charge as well as clandestine clearance of goods covered by the entries in the private notebooks which are not covered by the invoices. Such statement is admissible as evidence as has been held by the apex Court in the case of Systems & Components Pvt. Ltd. (supra). The activities of clandestine nature is required to be proved by sufficient positive evidence. However, the facts presented in each individual case are required to be scrutinized and examined independently. The department in this case has relied upon the confessional statement of the Director which is also supported by the mentioned entries in the private records. There is no averment that the statement has been taken under duress. ...

25. In view of the foregoing, I find that the Commissioner (Appeals) has erred in taking the view that there is not enough evidence of clandestine removal of goods. Even though the statement of Shri Sanjay Kejriwal, who is said to be the author of the private records recovered has not been recorded, it stands admitted by Shri Tekriwal, Director about the truth of the contents of the private notebooks. Consequently, I find no reason to disallow this piece of evidence."

[Emphasis supplied]

6.13 I also rely on the decision in the case of M/s. Haryana Steel & Alloys Ltd. reported as 2017 (355) ELT 451 (Tri.-Del.) wherein it has been held that private records seized from the possession of appellant's employee at the time of search showing entries for accounted as well as unaccounted goods which have been explained in detail and disclosed by GM of the factory tally with invoices / gate pass is trustworthy; that statement of employee running into several pages and containing detailed knowledge to be considered reliable. I also rely on the decision in the case of M/s. Ramchandra Rexine Pvt. Ltd. reported as 2014 (302) ELT A61 (S.C.) wherein similar view has been taken by the Hon'ble Supreme Court.

6.14 I am of the considered view that the admitted facts need not be proved as has been held by the Hon'ble CESTAT in the cases of Alex Industries reported as 2008 (230) ELT 307 (Tri-Mumbai) and M/s. Divine Solutions reported as 2006 (206) ELT 1003 (Tri. (Chennai)). Hon'ble CESTAT in the case of M/s. Karol Engg. Works reported as 2004 (169) ELT 373 (Tri. Del.) has also held that Admission/Confession is a substantive piece of evidence, which can be used against the maker. Therefore, the Appellant's reliance on various case laws are not applicable in light of the positive evidences available in this case as discussed above and in the impugned order. Hon'ble

CESTAT in the case of M/s. [illegible] reported as 2011 (326) ELT 453 (Tri-De) has also held that when presumption of [illegible] was against the Appellant, pleading of no stagnant [illegible], no excess electricity consumption found, no raw material purchased found unaccounted and no manufacture ratio prescribed by law is of no use.

6.14 In view of above, I find that the contentions raised by Appellant No. 1 are not valid and the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that the Appellants were engaged in clandestine removal of the goods. I, therefore, find that the confirmation of demand of Central Excise duty of Rs. 58,58,866/- and Rs. 3,33,133/- relating to Rs. 53,92,199/- on the ground of clandestine removal of the goods by the lower adjudicating authority is correct, legal and proper.

6.15 It is natural consequence that the confirmed demand of Rs. 62,92,199/- is required to be paid along with interest as applicable under Section 10AA of the Act. I, therefore, uphold the demand in the impugned order.

6.17 I find that this is a case of clandestine clearances of the goods which has been established. The ingredient for invoking extended period and imposing penalty under proviso to Section 11AC of the Act are also available in the case as held by the Hon'ble CESTAT in the case of Sun Microsystems India P. Ltd. reported as 2016 (339) E.L.T. 475 (Tri. - Bang.) and hence, the impugned order has correctly imposed penalty of Rs. 53,92,199/- for clandestine removal under Section 11AC(1) of the Act on Appellant No. 1. The lower adjudicating authority has also correctly granted option of reduced penalty of 25 %, which has not yet been availed by Appellant No. 1.

7. Regarding confirmation of demand of duty of Rs. 5,10,966/- on the ground of under-valuation, Appellant No. 1 submitted that the said charge has been confirmed on the basis of the rates obtained by them from various market research agencies which were higher than rates declared by Appellant No. 1 in its Central Excise invoices; that as per Section 4 of the Act, price prevailing at the time and place of removal is relevant for the purpose of assessment of duty and the transaction value charged by Appellant to different customers for assessment purpose must be accepted unless price is not the sole consideration or where buyers and sellers are related to each other; that the demand raised by the department by rejecting the transaction value on the basis of rates obtained from market research agencies is liable to be set aside.

7.1 The lower adjudicating authority has confirmed the charge of under-valuation inter alia, giving findings as under :

'3.25.1 The Show Cause Notice alleged evasion of Central Excise duty by way of under-valuation of the goods obtained out of breaking up of ships. It is not in dispute that various Research Agencies circulate the price considering all the factors of demand and supply and there is no reason that prices circulated by such agencies are unreasonable one. It is in this backdrop that even Ship breakers/ Brokers/Buyers also subscribe to such market research agencies to have an idea of prevailing prices so as to enable them to sell their goods at maximum rate. It is also not in dispute that the re rollable plates ranging from size 8mm (4 Ard) to 25m (1 1/4 ard) are obtained out of breaking up of ships and the majority of re-rollable plates emerged of breaking of ships are of 12 mm size. In order to substantiate this allegation, the DGCEI conducted inquiry with various marketing research agencies including M/s Major & Minor with reference to market data of various which revealed that day to day price of 12mm size of plates is almost equivalent to the average price of all size within the range of 8mm to 25mm.

3.25.2 On comparison of the price mentioned in the invoices of M/s Akhil and vis of the prices circulated by M/s. Major & Minor, it was also revealed that in many cases the transaction value declared by the M/s Akhil were far less than the actual value prevailing in the market during the respective period. The ship-breakers have, or not declaring the actual size / thickness of M/s Plates cleared by them, undervalued M/s Re-rollable Plates so as to enable them to declare only part of the value of such goods in the invoices and collect the differential value, over and above the declared invoice value, by way of unaccounted cash amounts.

3.25.3 I, therefore, find the substance in the allegation of under-valuation in the present show cause notice particularly when clauses seized from Shri Bharat Manubhai Sheth already contained details of cash transactions with various Brokers / Sign/s / Angadias. Had the aforesaid allegation of under-valuation been not correct, there would not have been involvement of transfer of huge amount of cash which includes part of the undervalued cost of ship breaking materials.

3.25.4 In view of the above, I agree with the contention of the DGCEI that minor variation in price is obvious considering various factors like payment terms, Quantity & Quality of the goods, relation with Buyers, demand and supply situation, therefore, 2% difference in price is considerable one. As stated above, Brokers / Ship Breakers / Buyers take the minimum of the price quoted by market research agencies like M/s. Major and Minor. I, therefore, find and hold that there is no reason to doubt that price quoted by M/s. Major and Minor is actual sale variation of (+/- 2%) i.e. rates of Plates and Scrap 2% lesser than the rate of M/s. Major and Minor is considerable. I, therefore, fully agree with the view adopted by DGCEI that duty short paid on account of variation of price more than 2% is on account of under-valuation of the goods and rightly recoverable from M/s Akhil. Further, I also find that a large number ship breaking units, dealers from Alang and brokers were member of M/s steel tube and were receiving day to day updated on the daily price rates of ship breaking materials through SMS alerts and emails. It is also

revealed that M/s. [illegible] one of the most scientific and comprehensive service of the [illegible] by them. The firm members were fully aware of the [illegible] from the breaking and [illegible] goods with intent to evade payment of Central Excise duty. Further enquiry was conducted with Joint Plant Committee, Kolkata and [illegible] Joint Plant Committee is the only institution which is constituted by the Ministry of Steel for the purpose of facilitating price [illegible] allocation, pricing and distribution of iron & steel materials in the country as well as to function as the official facilitator of the industry. JPC was constituted in 1964 by the Government of India under the powers conferred by clause 17 of The Iron & Steel Control Order, 1956. JPC consist of members and representatives from the Ministry of Steel, Steel Authority of India Ltd., Tata Steel Ltd., Rashtriya Ispat Nigam Ltd., etc. With its authority and vast experience, JPC has maintained a comprehensive database which is considered to be the most authentic and reliable information on Indian steel industry. The databases includes capacity, production and stock of all the major steel producers in the country, domestic market price of iron & steel, FOB and CIF prices and landed cost of steel products, export-import data on iron & steel products, production and prices reserves for select materials for steel making, state-wise and category wise details of dispatches of iron & steel, etc. Apart from the requirements by researchers, academicians, marketing/business strategies of entrepreneurs, financial analysts by the FIs and banks, some of the key uses of the JPC database includes duty formulation on customs, excise, export, formulation of GDP, Industrial Production Index, understanding of price trends, defined trade policy, formulation of Five Year Plans, economic surveys and union budgets, State- wise flow of materials and logistics, etc. In short, the domestic price data on iron & steel products maintained by JPC is considered as the most authentic data of the type for the steel industry. Thus analysis of the invoices provided by JPC, Kolkata proves that M/s Akhil and has undervalued their excisable goods with intent to evade payment of Central Excise duty & thus based on the calculation done by DGCEI I find that M/s Akhil have evaded Central Excise Duty of Rs. 9,10,934/-"

[Emphasis supplied]

7.2 I find that demand of Rs. 9,10,934/- has been confirmed on the ground that the Appellant has shown description of the excisable goods in relevant invoices, as, 'Waste and Scrap of Iron and Steel', 'Old and Used Rails'. The lower adjudicating authority has affirmed the valuation as per rates ascertained from the reputed market research agency. The contention that transaction value declared in the invoices under Section 4 of the Act cannot be rejected does not have force, as clear reason of Appellant No. 1 is apparent from the fact that they did not show the specific description of the excisable goods in the invoice.

7.3 Investigation has recorded statements under Section 14 of the Act and details of unaccounted cash transactions were recovered and corroborated with the details found in the seized diaries/notebooks, etc.

7.4 In view of above, I find the impugned order is proper and accordingly, uphold confirmation of CE duty of Rs. 9,20,984/- along with interest and imposition of equal penalty under Section 11AC of the Act relying upon the case laws as under:-

(i) DSK Manufacturing P. L. 2017 (356) E.L.T. 369 (All.)

15. Having found that the invocation of extended period is justified, the provisions of Section 11AC will statutorily require to be invoked and hence penalty equal to the duty or differential duty determined will necessarily have to be imposed. In arriving at this conclusion, we draw sustenance from the ratio laid down by the Hon'ble Apex Court in the landmark judgment of UOI v. Dharamendra Textile Processors - 2008 (231) E.L.T. 3 (S.C.) and the subsequent judgment in UOI v. Rajasthan Spinning & Weaving Mills - 2009 (238) E.L.T. 3 (S.C.). Accordingly, we hold that appellants M/s. DKN Herbal Manufacturing cannot escape the penalty of Rs. 2,02,09,916/- imposed on them under Section 11AC of the Central Excise Act, 1944 as ordered by the adjudicating authority. The said penalty is therefore upheld.

(ii) ISMT Ltd 2017(6)GSTL 258 (Tri. Mum)

7. Hon'ble High Court of Madras had an occasion to decide the issue whether discharge of duty before issuance of show cause notice shall grant immunity from penalty under Section 11AC of Central Excise Act, 1944, in the case of CCE, Madurai v. Metal Powder Co. Ltd., 2014 (303) E.L.T. 21 (Mad.). It is held that the penalty is punishment for an act of deliberate disregard by an assessee with the intent to evade duty adopting any of the means mentioned in Section 11AC of the Central Excise Act, 1944. The facts and circumstances of the case as well as the modus operandi followed by the appellants in the present case demonstrate that they had deliberate intention to evade duty without inclusion of debit note amount in the assessable value of goods. This could not have been noticed without investigation. Therefore, the appellant does not deserve any consideration of leniency. Accordingly, penalty imposed under Section 11AC is confirmed."

8. Regarding imposition of penalty of Rs. 4 lakhs on Appellant No. 2 under Rule 26(1) of the CER, I find that Appellant No. 2 has admitted his involvement in duty evasion in very categorical terms vide his statement dated 28.7.2015. I find that Rule 26(1) of the Central Excise Rules, 2002 reads as follows :

"Rule 26. Penalty for certain offences. -

(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or five thousand rupees, whichever is greater. ....."

8.1 Appellant No. 2 has concerned himself in removing the goods for enjoying and selling the non-duty paid goods, which were liable to confiscation and, therefore, I have no option but to hold that penalty of Rs. [illegible] imposed on him under Rule 26(1) is justified and I uphold the penalty imposed on him.

9. Regarding imposition of penalty of Rs. 4.50 lakhs on Appellant No. 3 under Rule 26(1) of the CER, I find that Appellant No. 3 has also admitted his involvement in duty evasion in a very categorical manner vide his statement dated 17.7.2010. I find that Appellant No. 3 has concerned himself in removing and selling the non duty paid goods, which were liable to confiscation and hence, I hold that penalty of Rs. 4.50 lakhs imposed on him under Rule 26(1) is justified and proper.

10. Regarding imposition of penalty of Rs. 1.53 lakhs on Appellant No. 4 under Rule 26(1) of the CER, I find that Appellant No. 4 has also admitted his involvement in duty evasion in a very categorical manner vide his statements dated 19.04.2010 dated 20.4.2010, dated 20.12.2010, dated 29.12.2010, dated 03.01.2011 and dated 26.2.2011. I find that Appellant No. 4 has, thus, concerned himself in removing and selling of non duty paid goods, which were liable to confiscation and hence, I hold that penalty imposed on him under Rule 26(1) of the CER is proper.

11 In view of my above findings, I reject appeals filed by Appellant No. 1 to 4 and uphold the impugned order.

12. अपीलकर्ता द्वारा दायर की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है

12 Appeals filed by the appellants are disposed off in above terms.

(कुमार संतोष)
मुख्य आयुक्त (अपील्स)

By R.P.A.D.

To,

1. M/s. Akki Ship Breaking Pvt. Ltd.
"Manar", Plot No. 222/ E,
Waghawan Road,
Near Varal House,
Bhavnagar.

2. Shri Ashok Raghuvir Singh Jain, Power of Attorney Holder
   M/s. Akhil Ship Breaking Pvt. Ltd.
   "Manan", Plot No. 2237 E,
   Waghawadi Road,
   Near Vana House,
   Bhavnagar.

3. Shri Anibar Bhikubha Rathod, Authorised Person
   M/s. Akhil Ship Breaking Pvt. Ltd.
   "Manan", Plot No. 2237 E,
   Waghawadi Road,
   Near Vana House,
   Bhavnagar.

4. Shri Vasu Amrutbhai Patel,
   Plot No. 22, Santosh Park Society,
   Subhashnagar,
   Bhavnagar.

Copy to :-

1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
2) The Commissioner, CGST & Central Excise, Bhavnagar Commissionerate, Bhavnagar information and necessary action
3) The Assistant Commissioner, CGST & Central Excise, Division-II, Bhavnagar.
4) Guard File