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ORDER IN APPEAL :

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as 'Appellant No.1 & Appellant No. 2') as detailed in the Table below against Order-in-Original No. BHV-EXCUS-000-JC-33-2017-18 dated 15.2.2018 (hereinafter referred to as the impugned order) passed by the Joint Commissioner, Central GST, Bhavnagar (hereinafter referred to as the lower adjudicating authority):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2137/BVR/2018-19	Appellant No.1	M/s. Melvi Ship Breaking Co., Plot No. 24-D (58), Ship Breaking Yard, Alang, District Bhavnagar.
2	V2138/BVR/2018-19	Appellant No.2	Shri Iqbal Ahmed Lakhani, Partner of M/s. Melvi Ship Breaking Co., Plot No. 24-D (58), Ship Breaking Yard, Alang, District Bhavnagar.

2. The brief facts of the case are that Show Cause Notice F.No. DGCE/HAZU/SG-58/13-14 dated 26.5.2013 (hereinafter referred to as 'the impugned SCN') was issued to the Appellant No.1, Appellant No. 2 and Shri Bharat Sheth, Broker for clearance of the excisable goods clandestinely to various customers alleging as under:

(a) Appellant No.1 had clandestinely manufactured and cleared their finished excisable goods, attracting Contra- Excise duty of Rs. 19,93,627/- to various customers without issuing invoices, and without payment of Central Excise duty short-paid Central Excise duty of Rs. 35,73,002/- by undervaluing the excisable goods and passed on cenvat credit of Rs. 1,88,521/- without actual delivery of goods.

(b) Appellant No. 2 (Partner of Appellant No. 1) had concerned himself in selling, storing, keeping and removing of the excisable goods, which he knew and had reason to believe that the same were liable to confiscation and this has made him liable for penal action under Rule 25 of the Rules.

2.1. The above SCN was adjudicated by the lower adjudicating authority vide the impugned order which confirmed demands of Central Excise duty of Rs. 53,68,530/- to be recovered from Appellant No.1 under Section 11A (4) of the Central Excise Act, 1944 (hereinafter referred to as the 'Act') along with interest on the confirmed demand under 11AA of the Act and also imposed penalty of Rs. 53,68,530/- upon Appellant No.1 under Section 11 AC of the Act read with Rule 25 of Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') with an option of reduced penalty and imposed penalty of Rs. 5,50,000/- under Rule 26(1) of the Rules and imposed penalty of Rs. 1,88,521/- under Rule 26(2) of the Rules. Penalty of Rs. 4,50,000/- and penalty of Rs. 1,88,521/- also been imposed on Appellant No. 2 under Rule 25(i) and Rule 26(2) of the Rules respectively.

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3. Being aggrieved with the impugned order Appellant No. 1 & Appellant No. 2 have preferred cross appeals in the above captioned proceedings on the following grounds:-

(i) There is violation of the principles of natural justice and violation of Section 9D of the Act, which renders the impugned order as void, illegal and unauthorized; that the persons whose statements were recorded during the enquiry have not been examined as witnesses before the lower adjudicating authority and therefore, statements of such persons are not admissible in evidence in adjudication of the SCN and leads to violation of Section 9D of the Act and Appellate rights of such persons whose statements are relied upon. If a potential excise duty liability has been allowed to be cross-examined before a violation of principles of natural justice. The appellants relied upon following decisions in support of their contention:-

- *India Drugs Pvt. Ltd. - 2011 (324) ELT 41 (F&H)*
- *G Tech Industries - 2011 (324) ELT 303 (F&H)*
- *J & K Cigarettes Ltd. - 2010 (315) ELT 36 (Delh)*
- *Dhartva Industries Ltd. - 2015 (325) ELT 502 (Kar.)*

(ii) The appellants in para 4 of the reply dated 02.9.2015 to SCN, have not only referred to the case law justifying the request for cross-examination of 15 persons whose statements were relied upon but it was also emphasized during persons' hearing, even then the lower adjudicating authority, Dharwad placed a heavy reliance on statements of these persons including Shri. Biprajit Shrivastava, Shri. Manish Patel and representatives of respondents. It is submitted that an opportunity of cross-examination of persons whose statements were relied upon in SCN has to be allowed to the appellants in the impugned proceedings, as held by the Hon'ble Supreme Court in the case of *Shady Gregory Dealer* and also by the Hon'ble CESTAT in number of decisions. The decisions and judgments relied upon by the lower adjudicating authority for rejecting the request of cross-examination of the witnesses are inapplicable and irrelevant to the issue. The appellants relied on decision of the Hon'ble CESTAT in the case of *Arys Finance Pvt. Ltd.* reported as 2014 (311) ELT 525 (Tri. - Ahmed) and judgment of the Hon'ble Gujarat High Court in the case of *Gujarat Cypromet Ltd.* reported as 2017 (345) ELT 520 (Guj.)

(iii) The appellants have repeatedly requested for copies of relied upon documents but such documents have not been given and the adjudication is concluded. The appellants in reply to SCN specifically submitted that relied upon documents were not received by them and this submission is recorded at Para 3.2.1 of the impugned order. This violation of principles of natural justice is sidelined by the lower adjudicating authority by observing that the appellants were required to bring to the notice of DGCET as well as several Excise authorities immediately when SCN was received withful relied upon documents which is factually incorrect.

(v) It is a settled legal position that serious charge of clandestine manufacture and illicit removal of excisable goods cannot be considered only on the basis of statements of partners or directors or employees or any persons associated with a manufacturer. The appellants relied on decisions in the case of Anya Fibres Pvt. Ltd. reported as 2014 (311) ELT 529 (Tri. - Ahmed.), ICL Poshak Corporation reported as 2002 (140) ELT 157 (Tri. - Chennai), Sileram San reported as (2007) SLT 525 and Nico Extrusions Pvt. Ltd. reported as 2008 (249) ELT 455 (Tri. - Ahmed.). There is no evidence brought on record by the department that the appellants having received Rs. 5.85 crore for the disputed transactions in this case. It is a settled legal position that one of the fundamental criteria to be established by the department in case of clandestine manufacture and clearance of goods is the evidence in support of receipt of sale proceeds by the manufacturer. The Annexure T-2 to SCN described 61 transactions of clandestine removals from January, 2009 to June, 2010. But there is not a single buyer to whom such consignments were delivered was identified or located by the department. In order to establish 1170 MT of ship breaking materials by the appellants, the department has to prove that such quantity of material was actually produced by the appellants upon breaking of ships. No document is found from the appellant's premises indicating any production of material not accounted for in RG-1. No private records like diary or note book or loose papers are also found from the appellant's premises wherein entries or jottings about production of such substantial quantity of material were made and no records are found from the appellant's premises about name or address of any of the buyers to whom such materials were delivered nor about receiving any payments in cash from any of buyers towards clandestinely cleared goods. The department has not proved the substantial quantity of ship breaking materials were actually produced and retained by the appellants.

(vi) The case of clandestine removal of 1170 MT of goods is made out on the basis of registers of transporters, but these registers are not corroborated by any other independent evidence and without establishing that such quantity of goods was actually produced by breaking up of ships etc. were actually sold by the appellants. No corroborative evidence of any buyers confirming receiving such material is brought on record by the department that no evidence with regard to receipt of sale proceeds against clandestinely cleared goods is brought on record and no attempt is made by the department to locate buyers. Therefore, transporters registers are not relevant evidence for proving the serious charge of clandestine manufacture and removal of goods. The transporters are not allowed to be cross examined nor were the transporters examined as witness in the proceedings before the lower adjudicating authority under Section 62 of the Act. The appellant relied on following decisions to say that the factors like payment made by the assessee for

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unaccounted inputs, viz. Diesel, Lubricants, Gaspower, Electricity etc. for manufacturing unaccounted quantities of cash or unaccounted money received by the assessee. The absence of any identification of buyers have to be proved by the department. The evidence of transporters evidence alone was not adequate and acceptable for proving supply of clandestine manufacture and removal of excisable goods.

- Indian Special Castings Ltd. - 2003 (257) ELT 322
- Vitolbhai Iron & Steel Industries - 2014 (302) ELT 59 (Trib. - Ahmd.) affirmed by Hon'ble Gujarat High Court reported as 2015 (316) ELT 374 (Guj.)
- TST Pipes Ltd. - 2004 (243) ELT 561
- Juhji Alloys Ltd. - 2011 (302) ELT 487 (Trib.)
- S.M. Energy Techno & Electronics Ltd. - 2015 (328) ELT 433 (Trib. - Ahmd.)
- Shakti Roll Cold Storage Pvt. Ltd. - 2006 (228) ELT 561 (P&H)

(vi) The details appearing in the records of 1986 are also unreliable for the above reasons because such records showing movement of vehicles to ship breaking yard and back would not mean that ship breaking material was actually loaded on the vehicles from the appellant's yard.

(vii) The entries seized from the premises of Shri Bharat Sheth, Broker are highlighted in the SCN. However the diaries of other brokers have not been deciphered the way Shri Bharat Sheth's diaries are deemed to have been deciphered. Therefore, Shri Bharat Sheth's diaries including Diary A/13 are irrelevant for the case of clandestine removal made out against the appellants. The transactions involving demand of Rs. 19,30,827/- have nothing to do with diaries including Diary No. A/13 recovered from Shri Bharat Sheth's premises since 61 transactions of so called clandestine clearances detailed at Annexure TR-2 to SCN do not involve Shri Bharat Sheth as a broker. None of other persons like Devraj, Kiblu, PM, MG, JP etc. has given any evidence supporting department's case that they had facilitated clandestine removal of goods by the appellant or that any of them has transferred money in cash or as to facilitate the fraud as alleged in the SCN.

(viii) The duty has been demanded on alleged clandestine removal based on the registers of several officers and such names are shown under Col.No. 6 of Annexure-TR-2 to SCN. None of these brokers is arraigned in this proceeding for penal action, though they are to be main executors for ensuring proper execution of the fraud.

(ix) The findings recorded by the lower adjudicating authority in Paras 3.7.2, 5.7.2 and Para 3.8 are only suggestions and presumptions and such incorrect and unsubstantiated findings is bad in law. Even if a truck was brought in ship breaking yard by its driver when he was sure of getting his truck load, the fact that a truck was

brought in the yard would not show as to which ship breaking unit had agreed for transporting a full truck load. If a truck was called for by a particular ship breaking unit but goods were not loaded therein for any commercial exigency, the same truck was used by any other unit located nearby. In case such unit proposed to clear goods in the market, the entries in the transporters' registers and corresponding entry of such vehicle in GVB register would not establish that ship breaking material was actually loaded in such vehicle of a particular plant. The plot numbers are also not written specifically or clearly in the transporters' registers nor in the truckers' diaries and also, the appellant's ship breaking unit is located at Plot No. 24-D (56), whereas an expeditor of 24-D found in diary A13, recovered from the premises of Shri Bharat Sheth. The only evidence is statement of Shri Bharat Sheth's account Shri Manish Patel, who has not been examined as a witness in the adjudication proceedings nor is he allowed to be cross-examined by the appellants.

(x) The demand of central excise duty of Rs. 53,78,000/- is confirmed on alleged undervaluation of ship breaking materials sold by the appellant under 1521 invoices on the basis that price rate of ship breaking materials quoted by market research agencies like Major & Minor was considerably higher than the price declared by the appellant. This conclusion is wholly illegal and without jurisdiction because there is no actual undervaluation and there is no evidence also ever remotely indicating that the appellant had recovered any additional amount from the concerned buyers over and above invoiced price. None of the buyers is approached by the department for ascertaining additional amount was recovered from them or otherwise and no statement of a single buyer in support of the allegation of undervaluation of the goods was brought on record. The department has not established that the price rates circulated by Mrs. Major & Minor or Mr. Steer rates were the prices at which such transactions were actually made by the ship breaking units of Alang. The price range or rates published in bulletins and circulars are not acceptable as value for charging duty thereon as held in the cases like Ramchanduz And Silk Yarn & Others reported as 2002 (129) ELT 540 (Guj.); Varaha Plastics Pvt. Ltd. reported as 2009 (236) ELT 193 (SC); Adar Exports Ltd reported as 2000 (116) FLT 715; Dimple Overseas Ltd. reported as 2007 (220) ELT 109.

(xi) Statement of the Appellant No. 2 has been recorded but there is no admission or confession by the Appellant No. 2 as regards undervaluation or clandestine removal of goods by the Appellant No. 1. Appellant No. 2 was not agreed with documents and records like transporters' records, diaries, entries in GMB register and therefore only because he could not explain movements of such documents and records, it could not be considered that Appellant No. 2 can be held to have suspected clandestine removal and undervaluation of goods.



(xii) The appellant is registered with the Central Excise Department and has been under supervision and control of the Central Excise officers and filing monthly returns. The audit papers have been verified by the officer and PLA bearing out the assessable value of goods exported by the appellant. Therefore, there has not been any suppression of facts or willful misstatement of facts on appellant's part, which would empower the department to charge extended period of limitation. It has not been shown as to what was the suppression of facts or willful misstatement or contravention of Central Excise law on the part of the appellant. Under these circumstances, the SCN issued to the appellant demanding central excise duty from January, 2009 is time-barred and hence, the imposition in the action of invoking extended period. The question is well decided in the case of Continental Foundation J. Venture reported as 2004 (16) ELT 177 (SC), Jaiprakash Industries Ltd. reported as 2002 (148) ELT 491 (SC), Padmni Products reported as reported as 1983 (43) ELT 95 (SC) and Goshakar Drugs and Liniments reported as 1989 (42) ELT 276 (SC).

(xiii) Penalty is a quasi-criminal matter and, therefore, it could be resorted to only in cases where mala fide intention or guilty conscious of an assessee was established. Since it is required to be established that evasion of an assessee was deliberate in the matter of penalty, this measure is to be resorted to sparingly. In the facts of the present case, where no allegation of any mala fide intention to evade payment of duty is made out against the appellant, there is no justification of penalty imposed under Rule 25 of the Rules read with Section 14A of the Act. The appellant relies on decision in the case of Hindustani Steel Limited reported as 1978 (2) ELT (J153) (SC) in support of their contention.

(xiv) The imposition of penalty on the Appellant No. 2 under Rule 25(1) of the Rules is without justification because a personal penalty on the partner cannot be imposed when penalty was imposed on partnership firm as held by the Hon'ble Gujarat High Court in cases of Jaiprakash Motwan reported as 2010 (255) ELT 204 (Guj.); Muhammed Ferozkhan Mohammed Ghani; reported as 2012 (258) ELT 176 (Guj.) and Mahendra Kumar Kapadia reported as 2012 (250) ELT 51 (Guj.) and also by the Hon'ble Bombay High Court in the case of Jupiter Exports reported as 2007 (212) ELT 641 (Bom.). Penalty on Appellant No. 2 under Rule 25(2) of the Rules is also bad and illegal inasmuch as Rule 26 of the Rules is not applicable in the instant case and relied on decision in the case of Standard Pencils reported as 1996 (38) ELT 246 and 7 U. Aka reported as 2005 (38) ELT 721.

(xv) There is no short levy or short payment or non-levy or non-payment of central excise duty, the impugned order for recovery of interest under Section 11A/Section 11AA of the Act is bad and illegal.

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4. Personal hearing in the matter was attended by Shri Anil H. Dava and Aditya S. Tripathi, Advocates on behalf of Appellant No. 1 and Appellant No. 2 and reiterated the grounds of appeals and submitted that they have not been supplied relied upon documents as is evident from Para 3.2.1 of the impugned order read with Para 17 of SCN; that they have requested cross-examination of 10 persons including brokers, buyers and transporters also but cross-examination denied without justified reasons as is evident from Para 3.11.1 of the impugned order even though specifically given reasons for cross examination as detailed at Para 2.1.11 read with Para 2.1.6 to 2.1.10 of reply to SCN; that in absence of that the impugned order is not legal and proper and this case needs to be remanded to the adjudicating authority.

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 the present appeals is whether the impugned order, in the facts and circumstances of the case, confirming demand and imposing penalty is correct or otherwise.

6. It is on record that Appellant No. 1 was registered with Central Excise and Appellant No. 2 was the Partner of Appellant No. 1. The officers of the Directorate General of Central Excise Intelligence (hereinafter referred as DGCEI) gathered intelligence, which indicated that some ship breaking units of Alang/Sosiyia are engaged in large scale evasion of Central Excise duty by way of clandestine removal of goods, diversion of goods, undervaluation of goods etc. and that most of such illicit activities are carried out by Ship Breakers of the area with support of some brokers, who made arrangements of transportation for delivery of the goods and realization of sale proceeds, supply of false Central invoices without any physical supply of goods etc. The DGCEI searched the premises of various transporters and recorded statements of the responsible persons, which revealed that the transport operators did not own any truck and supply the truck on commission basis to various ship breaking units, that after negotiating the transportation charges, they used to enter the details such as plot no., name of the ship breaker, etc. in the booking register and send truck only after finalizing the deal between ship breaker and the buyer so that chance of returning the truck without loading the goods would not arise; that there were many entries in the registers for which no corresponding invoices issued by the Appellant No. 1 and the goods were cleared clandestinely without preparation of Central Excise invoice and without payment of Central Excise duty therefore, the booking registers were seized. Investigation was also conducted with the brokers and statements of brokers were recorded which revealed that either broker or Appellant No. 2 contacted the transporter after finalization of the deal to purchase/sale of goods; that the entries made in the booking registers were shown to

the crokers and all their vehicles and their names mentioned in the registers as correct. The records of entries in registers obtained at GMB check post have been verified and it was noted that the entries found in booking registers were correlated with registers maintained by the appellant. Statement of Appellant No. 2 was recorded under which he stated that as a partner, he looks after all the work at the premises of Appellant No. 1. He is called only after the deal to sell the goods have been finalized and a copy of Annexure TR-1 prepared on the basis of 34D entries found in booking registers obtained by transporters, he admitted that trucks had gone to Plot No. 240 at the premises of Appellant No. 1 and entries are correlated with the invoices issued by Appellant No. 1 whenever invoices were issued for removal of goods. He admitted that whenever invoice not issued have been mentioned in Annexure A-1, no invoice was issued by the Appellant No. 1. Search was also conducted at the warehouse-cum-office premises of Shri Bharat Sheth, Broker on 30.3.2010 and many original documents were seized. Statements of Shri Bharat Sheth, Shri Shrantik Shantibhai Sheth, and Shri Manish Patel, Accountant were recorded and entries written in codes language were deciphered by Shri Manish Patel, Accountant. Statement dated 17.5.2010 of the Appellant No. 2 was recorded under which he after perusing statements of broker and his accountant and entries found in the Diary, he could not give any viable reply to the diversion of goods as evident against entries mentioned in Annexure A-1 prepared on the basis of details mentioned in seized Diary A/13 deciphered by Shri Manish Patel, Accountant of Shri Bharat Sheth under his statement. Statements of authorized persons of M/s. Steel Rules Info. and M/s. Major & Minor Exms Pvt. Ltd. were recorded under which they produced day-to-day prices prevailing in the market for ship breaking materials i.e. scrap and plates for the period 29.1.2009 to 15.10.2010 which revealed that the Appellant No. 1 has declared lower value than the prices prevailing in the market at the material time and thereby undervalued the excisable goods and short-paid Central Excise duty of Rs. 52,78,000/-.

7. I find that both these appellants, i.e. Appellant No. 1 and Appellant No. 2 submitted same contentions in the Appeal Memoranda. The appellants strongly contended that cross examination of 15 witnesses were done by the lower adjudicating authority and therefore, statements of these witnesses cannot be relied upon for confirmation of demand. I find that the trip booking registers recovered from various transporters, statements of authorized persons of such transporters, diaries recovered from San Bharat Sheth, Broker and statements of Shri Bharat Sheth and Shri Manish Patel, Accountant of Shri Bharat Sheth were produced before Appellant No. 2 at the time of recording his statements. The Appellant No. 2 was allowed to explain the details mentioned in trip booking registers and diaries and he admitted that whenever 'invoices not issued' was written in trip booking registers, they had not



issued central excise invoices and the Appellant No. 2 has not given any plausible explanation with regard to diversion of the excisable goods which was coming out from the diaries maintained by Shri. Bharat Shastri, Broker. Hence, I find that both these appellants sought for cross-examination of witnesses whose statements were relied upon in the SCN and in the impugned order, without specifying as to how such cross-examination will help them to arrive at a different conclusion. Therefore, I do not see any infirmity in the decision of the lower authority in denying the cross examination to the appellants, especially when no specific reason for seeking cross examination has been set out by the appellants. I would like to rely upon judgment of the Hon'ble Supreme Court in the case of *Telestar Travels Pvt. Ltd.* reported as 2013 (289) E.L.T. 3 (S.C.) wherein it has been held as under.

20. Coming to the case at hand, the Adjudicating Authority has mainly relied upon the statements of the appellants and the documents seized in the course of the search of their premises. But, there is no dispute that apart from what was seized from the business premises of the appellants the Adjudicating Authority also placed reliance upon documents produced by Mrs. Anita Chohan and Mr. Neel. These documents were, if it is submitted disclosed to the appellants who were permitted to inspect the same. The production of the documents duly examined by the appellants was in the nature of production in terms of Section 159 of the Evidence Act, where the witness producing the documents is not subjected to cross-examination. Such being the case, the refusal of the Adjudicating Authority to permit cross examination of the witnesses producing the documents cannot even on the principles of Evidence Act be found fault with. At any rate, the disclosure of the documents to the appellants and the opportunity given to them to rebut and explain the same, was a substantial compliance with the principles of natural justice. This being so there was and could be no prejudice to the appellants nor was any demonstrated by the appellants before us or before the Courts below. The third limb of the case of the appellants also in that view fails and is rejected.

(Emphasis supplied)

7.1 The Hon'ble High Courts of Telangana and Andhra Pradesh in the case of *Mandhari Stainless Wires Pvt. Ltd.* reported as 2013 (380) E.L.T. 255 (A.P.) has also held as under -

23. Therefore, it is clear that the right to cross-examine is not absolute at least, neither as the cases of this nature are concerned. If there are factual grounds to show that the denial of cross-examination was based upon the sound logic, then the order of adjudication cannot be interfered with.

(Emphasis supplied)

8. The appellants have submitted that copy of relied upon documents were not provided to them. I find that Para 17 of SCN dated 1.7.2013 clearly states that the documents relied upon are noted in Annexure-RUD to SCN and copies thereof whenever not supplied earlier are either enclosed or would be made available for inspection on demand. I find no force in the argument of the appellants since it is not forthcoming from the argument that the appellants had made any request to inspect the relied upon documents and the request was not considered by the department.

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5. The appellants contend that the charge of clandestine manufacture and illicit removal of excisable goods is not to be based only on the basis of statements of partners; that no evidence has been produced by the department that the appellants having received sale proceeds for the disputed transactions in this case; that no buyer to whom such consignments were delivered, was identified or located by the department; that transport receipts are not corroborated by any other independent evidence; that the entries appearing in the records of GMB are also unreliable because such records do not mention of vehicles to this breaking yard and back would not mean that this breaking material was actually loaded on the vehicles from the appellants' depot.

6. I find that in the instant case the SCN proposing recovery of Central Excise duty of Rs. 15,90,627/- on clandestine removal of the excisable goods was issued based upon nominating records i.e. Trip Booking Registers seized from vehicle transporters' premises and verification of records of entry/exit of vehicle at GMB check post, statements of transporters, brokers and Appellant No. 2. I further find that the seized records and registers maintained by GMB as well as statements of transporters and brokers were perused by the partner of the Appellant No. 1 i.e. Appellant No. 2 who produces Central Excise Invoices issued by Appellant No. 1. After perusing the seized documents and statements and after tallying details of invoices with details mentioned in trip booking registers, he admitted that 343 entries of removal of goods mentioned in Annexure TR 1 to the SCN pertained to Appellant No. 1 and that in respect of 61 entries mentioned in Annexure TR 2 to the SCN, they had not prepared central excise invoices. Thus, the details mentioned in trip booking register as well as records maintained at GMB check post along is authentic and correct and have evidentiary value and can be relied upon in confirmation of demand. I find that details mentioned in trip booking register and register maintained by GMB check post have been duly considered.

7.2 I also find that the statements recorded during course of investigation are substantial piece of evidence 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 transporters' premises are tallying with the records of Appellant No. 1. The Hon'ble High Court of Madras in the case of Lawn Textile Mills Pvt. Ltd. reported as 2018-11024-1924-HC-MAD-CX has held as under:-

"30. The above facts all clearly show that the allegation is one of clandestine removal. It may be said 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 secret manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where evidence

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involved, there may be cases where direct documentary evidence will not be available, however heard in the seized records. If the Department is able to prove facts 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 to be proved. In other words, the quantum 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 amount and duty retraction. If the assessee had submitted requisite 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 supporting records. The allegation of parallel invoicing has not been disproved in the manner known to law. Thus, we find that the Assessing Authority, the Appellate Authority as well as the Tribunal proceeded on facts and evidence and they have given independent reasons for their conclusion.

32. Thus, in the absence of any perversity in the finding, the Court cannot interfere with the aforesaid finding recorded by the authorities as well as the Tribunal, as the scope of this appeal before this Court under Section 261B of the Central Excise Act is to decide on 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)

9.3 I find that the Appellant No. 2 was allowed to go through the Annexure TR-1 prepared on the basis of 340 entries found in booking registers maintained by transporters and having examined the said details, he admitted that trucks has gone to Plot No. 2443 i.e. the premises of Appellant No. 1 and entries are correlated with the invoices issued by Appellant No. 1 wherever invoices were issued for removal of goods, and admitted that wherever invoice not issued have been mentioned in Annexure TR-1 no invoice was issued by the Appellant No. 1. Hence I find that authenticity of details mentioned in the Booking registers cannot be doubted. I find that the Booking registers and registers maintained at SMC check post, Alang are vital and hard evidences and are sufficient to prove 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) FLT 125 (IT-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 suppliers and and also as corroborated by the responsible persons of the suppliers and. The receipt and use of the such unaccounted raw materials for further manufacture has apparently been admitted by the appellants and due duty short paid has also been discharged during the course of investigation itself. The appellants' great emphasis on non-availability of the further

consideration by way of purchase of raw material, money receipt, etc. In the present case, the evidence in respect of the suppliers' side is categorical and cannot be disputed. The entries of the suppliers have been corroborated and a list of bills and copies of their vouchers by the persons who are in control of the assessee's unit. When such evidence was brought before the court of the Assessments Unit, he categorically admitted unaccounted clearance of raw materials however he did not show the buyers to whom such raw materials were sold in such situation, it is strange that the assessee has denied that the department has not established the details of the buyers of the finished goods to such buyers. It is seen that the copies of the bills of the suppliers, which were affirmed by the persons in charge, control of the assessee. It is not the case of the assessee that the suppliers maintained such records only to falsely implicate the assessee. In fact the supply of unaccounted raw materials has been corroborated by the partner of the assessee's firm. In such situation, it is not possible for the assessee to, now in the appeal stage, raise the point by requirement of cross-examination, etc. Admittedly, none of the private records of the assessee's firm have been retracted or inter-contested by their maintainers in the appeal before the Tribunal, the assessee is making a belated assertion that the statement by the partner of the assessee's firm is not genuine. Matters raised have never been taken up by the assessee and not of any supplier in the present case. In the cases involving unaccounted materials, the evidence of such cases are to be appreciated for conclusion. As noted above, the third party's records of the supplier's side as affirmed by the person in charge and further corroborated by the assessee cannot be discredited only on the ground of further evidences like transactions and receipt of money has not been proved. In a clandestine manufacture and clearance, each stage of operation cannot be established with accuracy. 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)

9.4 It is settled law that in cases of clandestine removal, the department is not required to prove duty evasion with mathematical precision. My view is duly supported by judgments of the Hon'ble Supreme Court in the cases of *Shri Shan Gurnamal* reported as 1993 (13) ELT 1801 (SC) & *Arifur Tohilos (I) P. Ltd* reported as 2009 (235) ELT 557 (SC).

9.5 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 *Narsh J. Sukrawani* reported as 1996 (63) ELT 235 (SC) and *Rakesh Kumar Gang* reported as 2016 (331) ELT 321 HC Delhi. I find that statements admitting clearance 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. H Tech Abrasives Ltd.* reported as 2017 (346) ELT 005 (Tn. -Del.)

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 his 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 charts as well as clandestine

clearance of goods covered by the entries in the private notebooks which are not covered by the invoice. 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.

15. 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 Kojiwari, who is said to be the author of the private records recovered has not been recorded, it stands admitted by Shri Jekriwal, Director about the truth of the contents of the private notebooks. Consequently, I find no reason to disallow this piece of evidence.

(Emphasis supplied)

9.6 In view 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 Aax Industries reported as 2008 (230) E.L.T. 0073 (Tri-Mumbai) and M/s. Divine Solutions reported as 2006 (206) E.L.T. 1005 (Tri. Chennai). Hon'ble CESTAT in the case of M/s. Karan Engg. Works reported as 2004 (166) E.L.T. 373 (Tri. Delhi) has also held that Admission/Confession is a substantial piece of evidence, which can be used against the maker. Therefore, the Appellants 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. N R Sponges P Ltd reported as 2015 (328) E.L.T. 453 (Tri-Del) has also held that when preponderance of probability was against the Appellant, passing of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted and no input-culprit ratio prescribed by law is of no use.

9.7 In view of above, I find that the contentions raised by the Appellant No. 1 & Appellant No. 2 are of no help to them 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. 15,90,827/- on the ground of clandestine removal of the goods, by the lower adjudicating authority is correct, legal and proper.

3.3 It is natural consequence that the confirmed demand of Rs. 15,90,827/- is required to be paid along with interest at applicable rate under Section 11AA of the Act. I therefore uphold the impugned order to this extent.

9.9 I find that this is a case of clandestine clearance of the goods which has been established. Ingredients of invoking extended period of demand and imposing penalty under provision Section 11AC of the Act are same as held by the Hon'ble



CESTAT in the case of Shri. B. S. Sheth & Co. v. State of Karnataka 2019 (239) E.L.T. 475 (Tri. - Bang.) and for the impugned order has correctly imposed penalty equal to duty of Rs. 18,00,000 on account of clandestine removal under Section 14AC (1) of the Act.

10. Regarding diversion of goods, namely the stock of Shri Bharat Sheth, Broker was searched by the DSGE. Entries for removal, dates containing details of removal of goods, name of the buyer, quantity of goods, value, receipt of sale proceeds in cash etc. Statements of Shri Bharat Sheth, Broker, Shri Shankar Sheth, Son of Shri Bharat Sheth, and Shri Manish Patel, Accountant of Shri Bharat Sheth and details mentioned in cover of goods were deciphered by Shri Manish Patel. Shri Manish Patel in his statement, under two entries two shrotronic names have been mentioned. In all these names, goods have been delivered to final name and invoice has been issued in the name of other shrotronic name. The Appellant No. 2 was shown statements of all shrotronic names and Annexure-1 prepared on the basis of such deciphered entries found in seized copy marked as A/13. However, he has not reported the entries made in the diary and he agrees with the correctness of the diary. Hence, in this case evidence received from the premises of the broker backed by confessional statements of a broker and his accountants is admissible in the eye of law. The contention raised by Shri Manish Patel, were confirmed by Shri Bharat Manharlal Sheth and they have related their statements. It is on record that all transactions were recorded in ciphered and codes manner and the case was made out after deciphering and decoding the same. The transactions recorded in diaries and storage devices seized from Shri Bharat Manharlal Sheth were further corroborated with relevant records. These facts and circumstances as per the Indian Evidence Act, 1872 and are sufficient to prove the case against the appellants. Hence, I hold that the operations had fraudulently passed on several credit of Rs. 1,88,52,10 without physical delivery of goods.

11. Regarding allegation of undervaluation, it has been contended that the rates quoted by M/s. Stee Rates, M/s. Major and Minor as well as other agencies/persons are not actual rates prevailing during that period. I find that ship breakers and brokers subscribed to publications issued by various research agencies in order to ascertain prevailing market prices so as to enable them to transact the goods. Inquiry conducted by DGCET with various marketing research agencies revealed that day to day price of 12mm size of plate is almost equivalent to average price of all size of rolling plate within the range of 6 mm. to 25 mm. Thus, department has proved receipt of money over and above invoice value. The price adopted by DGCET is relied upon by most of the ship breaking yards of Alang and the goods emerging out of breaking up of ship are sold at about the same price. I find that in order to be just and fair, the investigation has also allowed variation upto 2% in the price published by M/s. Major

Sd/-

and Minors. I find that in a case where assessable appellant has indulged in clandestine clearances as well as undervaluation of the goods produced by them, no one can establish one-to-one correlation of goods sold and payments received in cash or through agencies. In my view, it is sufficiently proved from the entries in the dairies recovered from brokers that cash transactions took place between various rolling mill/furnace units and Appellant No. 1 through brokers. Therefore, I find that the rejection of transaction value and replacement of the same by the price prevailing is correct in view of Valuation Rules as well as Section 4 of the Central Excise Act, 1944 and hence I hold that said payment of central excise duty of Rs. 33,78,003/- is recoverable from the Appellant No. 1.

12. In view of above, I find that Appellant No. 1 has evaded payment of Central Excise duty by way of clandestine removal of goods as well as by undervaluation of the goods and had fraudulently passed on Cenvat Credit by issuing Central Excise invoices without actual supply of the excisable goods hence, I hold that the order of adjudicating authority is correct, legal and proper.

13. I find that Appellant No.1 has intentionally adopted unlawful means to evade payment of excise duty. The evasive mind and intention of Appellant No.1 is clearly established. Therefore, I hold that the removal of excisable goods in this case was of clandestine nature, i.e. removal with pure intention to evade payment of excise duty. In view of above, I hold that the appellant No.1 is liable to pay the Central Excise duty amounting to Rs. 53,68,630/- under the provision of erstwhile sub-section (1) of Section 11A(4) of the Act. It is natural consequent that the continued dues are required to be paid along with interest at applicable rate under the provisions of erstwhile Section 11AA of the Act. And by acting in this manner, the appellant No.1 is liable for penalty equal to the duty under rule 25 of the Rules read with Section 11AC of the Act.

14. I find that the facts of this case have revealed that Appellant No. 2 was the key person of Appellant No. 1 and was directly involved in clandestine removal of goods as well as fraudulent supply of counterfeit invoices without physical delivery of goods by Appellant No. 1 and in undervaluation of the excisable goods manufactured and cleared by Appellant No. 1. He was looking after day-to-day functions of Appellant No. 1 and had concerned himself in all matters related to the excisable goods including manufacture, storage, removal, transaction, selling etc. of such goods and hence, was knowing or had reason to believe that these goods were liable to confiscation under the Central Excise Act, 1944, and Rules made thereunder. I therefore, find that imposition of penalty of Rs. 5,50,000/- and penalty of Rs. 1,56,527/- upon Appellant No. 2 under Rule 25(1) & 25(2) of the Rules is correct, proper and justified.



14.1 The Appellant for a long period of time has been a partner and the penalty cannot be imposed on the partner as well as on the partnership firm. I do not find any force in the argument of the appellant. In the present case, there are cogent evidences that the Appellant for a long period played an important role in evasion of central excise duty. It is also a reality that it is not possible on the person who has dealt with such evasion to say that he does not know that the same are liable to confiscation. My view is that as recorded by the order of CESTAT in the case of Radhika Paints Pvt Ltd reported as 2013 (308) F.T. 120 (T. - Ahmed.) wherein it has been held thus:-

"The show cause notice issued in the case of the goods were offending in nature and therefore liable to confiscation and adjudicating authority has recorded a finding that goods are offending in nature. There is only a technical objection in the appeal that he has not specifically mentioned that these goods are liable to confiscation. In view of the specific allegation in the show cause notice which indicates the nature of offences as far as goods are concerned and the consequence of such offence, the findings recorded by the original adjudicating authority is sufficient to show that the goods were liable to confiscation and therefore, imposition of penalty is justified."

(Emphasis supplied)

14.2 I find that Hon'ble CESTAT, Ahmedabad in the case of Yurusbhai Samaduddin Doydiwala reported as 2010 (304) F.T. 120 (T. - Ahmed.) has already held that personal penalty upon partner is impossible in addition to penalty imposed on the partnership firm.

14.3 I also find that the honorable Gujarat High Court in the case of G. P. Swaran reported as 2014 (308) F.T. 284 (Mad.) has held as under:-

8. It is true that the statutory authority imposed penalty on the firm as well as on the partner. The finding recorded by the original authority was confirmed in appeal. The legality and correctness of the order was once again tested by the CESTAT. The CESTAT being the final fact finding authority arrived at a conclusion that there was sufficient evidence to show that the appellant exported the weaving looms by fabricating the records and engraving the year of manufacture.

9. The only question raised in the present appeals is as to whether the statutory authority was justified in imposing fine on the firm as well as on the partner.

10. Section 112(a) of the Customs Act, 1962 provides that not only the person who is instrumental in doing a particular act by violating the provisions of the Act but also the person who abets it or commits such act is also liable for payment of penalty. The goods in question were imported in the name of the firm by name M/s. Sri Ram (ex. The appellant in C.M.A. No. 517 of 2012 in his capacity as the partner abetted the firm to commit the offence. Therefore, the statutory authority was fully justified in imposing fine on the firm as well as on the partner."

(Emphasis supplied)

(Signature)

15 In view of above, I uphold the impugned order and reject appeals filed by Appellant No. 1 and Appellant No. 2.

16.6 अपीलकर्ताओं द्वारा दजे की गई अपीलों का निपटारा उपरोक्त तरीके से किया जात है।

15.1 The appeals filed by the Appellants stand disposed of in above terms.

(Signature)

(Signature)
कुमार अशोक

महान आयुक्त (अपीलें)

By R.A.A.

To,

1.	M/s. Malvi Ship Breaking Co., Plot No. 24-D (58), Ship Breaking Yard, Alang, District-Bhavnagar.	मे. मालवी शिप ब्रेकिंग कंपनी, प्लॉट नं. २४-डी (५८), शिप ब्रेकिंग यार्ड, अलंग, डिस्ट्रिक्ट - भावनगर
2.	Sarigbal Ahmed Lakhani, Partner of M/s. Malvi Ship Breaking Co., Plot No. 24-D (58), Ship Breaking Yard, Alang, District-Bhavnagar.	श्री इकबाल अहमद लखानी, पार्टनेर मे. मालवी शिप ब्रेकिंग कंपनी, प्लॉट नं. २४-डी (५८), शिप ब्रेकिंग यार्ड, अलंग, डिस्ट्रिक्ट - भावनगर

Copy to:-

- 1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information please
- 2) The Commissioner, GST & Central Excise Bhavnagar Commissionerate, Bhavnagar for necessary action.
- 3) The Assistant Commissioner, CGST Division-I, Bhavnagar for necessary action.
- 4) Guard File No. V2/38/BVR/2018-19

