



प्रधान आयुक्त (प्रतिष्ठा, वित्त बजट विभाग, राष्ट्रपति भवन क्षेत्र, दिल्ली-110003)  
 (THE PRINCIPAL COMMISSIONER (APPEALS) GST & CENTRAL EXCISE)



आपल संख्या: ए.पी.सी.ए. 16/10/019-2019  
 दिनांक: 28.01.2019

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**BHV-EXCUS-0001-APP-016-10-019-2019**

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**:: ORDER IN APPEAL ::**

The below 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. BHV-EXCUS-000-JC-43-2017-18 dated 22.12.2017 (*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 of the Appellant
1	V2/538/BVR/2017	Appellant No. 1	M/s. Bansal Infrakon (P) Ltd. Plot No. 154, Sosiyu Ship Breaking Yard, Sosiyu/Wang, Bhavnagar. Office : Plot No. 2137, Near Golden Arc, Attabhai Chowk, Bhavnagar.
2	V2/539/BVR/2017	Appellant No. 2	Shri Vjay K. Bansal, Director, M/s. Bansal Infrakon (P) Ltd. Plot No. 154, Sosiyu Ship Breaking Yard, Sosiyu/Wang, Bhavnagar. Office : Plot No. 2137, Near Golden Arc, Attabhai Chowk, Bhavnagar.
3	V2/33/BVR/2018-19	Appellant No. 3	Shri Vinodbhai Anarshibhai Patel, Plot No. 102, Eson Mega City, Opposite Victoria Park, Bhavnagar.
4	V2/27/BVR/2018-19	Appellant No. 4	Shri Kishore Anarsingh Patel, Proprietor of M/s. Sinee Krishna Enterprise, 304, Shoppers Point, Animal Chowk, Waghawadi Road, Bhavnagar - 364 001.

2. The brief facts of the case are that Directorate General of Central Excise Intelligence issued Show Cause Notice F.No. DCEI/AZU/36-52/13-14 dated 3.6.2013 to the Appellant No. 1 to Appellant No. 4 alleging clearances of MS Scrap/Plates etc. obtained from breaking of ships clandestinely without payment of CE duty to various customers and also undervaluing the goods as under :-

- (a) Appellant No.1 clandestinely manufactured and cleared finished excisable goods attracting Central Excise duty of Rs. 90,23,932/- 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, 2007 (*hereinafter referred to as 'the CER'*);
- (d) Penalty of Rs. 15,34,038/- should not be imposed under Rule 26(2) (i) of the CER for passing on fraudulent Central Excise liability by issuing excisable

Invoices without actually delivering the goods.

- (e) Penalty should not be imposed upon Appellants No. 2 under Rule 26(1) & (2) of the CER.
- (f) Penalty under Rule 26(1)&(2) 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 as under :-

- (i) confirmed demand of CE duty of Rs. 90,23,902/- under Section 11A of the Act, along with interest under Section 11AA and imposed penalty of Rs. 90,23,90/- 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;
- (ii) imposed penalty of Rs. 16,34,035/- under Rule 26(2)(i) of the CER on Appellant No. 1;
- (iii) Imposed penalty of Rs. 9 lakhs under Rule 26(1) of the CER and Rs. 16,34,035/- Under Rule (2)(i) of CER on Appellant No. 2;
- (iv) imposed penalty of Rs. 21,644/- on Appellant No. 3 and Appellant No. 4 each under Rule 26(1) of the CER;
- (v) imposed penalty of Rs. 16,34,039/- under Rule 26(2)(i) of the CER on each Appellant No. 3 and Appellant No. 4.

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

**Appellant No. 1 :-**

(i) Appellant No. 1 stated that the Impugned order has been passed only on the basis of the third party's evidence; that the lower adjudicating authority has not given specific findings while passing the impugned order and relied upon the pocket books, diaries, etc. seized under Panchnama dated 30.3.2010 from the office-cum-residence premises of Shri Vinod Patel and Shri Kishore Patel; that statements of vehicle owner / transport agencies cannot be relied upon without any corroborative evidence; that they relied upon the ~~case-laws~~ as under :-



acceptable transaction value under Section 4 of the Act for the goods sold by the appellant; that the lower adjudicating authority has not established that Appellant No. 1 has received money over and above the amount shown in the respective consignments and therefore, the impugned order confirming differential amount of CF duty on the charge of under-valuation is not correct.

(v) Regarding imposition of penalty of Rs. 90,23,902/- 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 Appellant No. 2 reiterated submissions raised by Appellant No. 1 against imposition of penalty of Rs. 9 Lakhs under Rule 26(1) of the CER and imposition of penalty of Rs. 16,34,038/- under Rule 26(7)(c) of the CER, Appellant No. 2 reiterated submissions raised in respect of Appellant No. 1.

**Written submissions filed by Appellant No. 1 & Appellant No. 2 :-**

Appellant No. 1 and Appellant No. 2 filed written submissions on 31.12.2018 wherein they inter-alia, submitted that names of the customers to whom Appellant No. 1 had sold goods in clandestine manner have not been disclosed; that the names of the customers from whom cash amount has been received has also not been disclosed; that the PF party evidences and statements cannot be relied upon for confirming demand; that the Show Cause Notice is time barred as private records have been seized on 30.3.2010 whereas Show Cause Notice has been issued on 29.03.2011 for the period from 2008-09 to 2010-11 (upto 01.06.2010); that the charge of under valuation cannot be confirmed without challenging assessment of monthly returns and only on the basis of market inquiry; that they relied upon the decision of the Hon'ble CESTAT in the case of Om Aluminium Pvt. Ltd. reported as 14 (311) ELT 354 (Tri-Phase) and Bajrang Casting - Order No. A/11033-1103/2015; that demand, interest and penalty confirmed vide the impugned order are required to be set aside.

**Appellant No. 3 & Appellant No. 4 :-**

Appellant No. 3 and Appellant No. 4 submitted similar grounds which are as under :-

(i) that they made request for cross - examination of Shri Mahendrabhai A. Rana, Partner of M/s. Maruti Metal Industries, Bhavnagar, however, the request has not been considered by the lower adjudicating authority and therefore, the impugned order is not tenable; that the lower adjudicating authority has not recorded any findings regarding request made for cross-examination of Shri Mahendrabhai A. Rana; that no penalty has been proposed upon Shri Mahendrabhai Rana; that it appears that the officers of Directorate General of Central Excise Intelligence might have promised Shri Mahendrabhai Rana that if he gave favourable statement he would not be penalized; that in this regard Appellant relied upon the case laws as under :-

- |                                   |                           |
|-----------------------------------|---------------------------|
| (a) Sharma Agencies reported as   | 2000 (120) ELT 156 (Tri.) |
| (b) L. Chandrasekar reported as   | 1990 (48) ELT 29 (Tri.)   |
| (c) Takshila Spinnars reported as | 2001 (131) ELT 36B (Tri.) |
| (d) Sharma Chemicals reported as  | 2001 (130) ELT 271 (Tri.) |

(ii) that the impugned order is non speaking; and non - reasoned one inasmuch as the lower adjudicating authority has not dealt with the pleas made by them in their written submission; that judgments referred by them have not been discussed; that the impugned order is issued against the principle of natural justice as relied upon documents have not been supplied to defend their case; that diary recovered from Appellant No. 3 during the search conducted by the officers of DGCEI were containing details of Estimates and rat bills; that no transporters or buyers of goods in Angadia have admitted that goods have been cleared in the clandestine manner.

(iii) that it has not been proved that the appellant was involved in evasion of duty of Rs. 11,644/- as shown in Annexure - VK.1 and Annexure -VK.2 to the Show Cause Notice; that there is no documentary proof regarding transport of goods cleared by the ship broker to Appellant No. 1 customer's premises;



(iv) that there is no evidence regarding transaction of amount of Rs. 1,98,30,568/- for purchase of scrap without receipt of the goods.

(v) that they have not dealt with the excisable goods as required under Rule 26 of the CFR so as to impose penalty etc. In support of their contention, they relied upon the decisions of the Hon'ble CESTAT in the case of Godraj Boyce & Mfg. Co. reported as 2003 (148) EIL 161 (T); A.M. Kulkarni reported as 2003 (56) ALT 563 (Tri-Mem) and Ram Kish Singh reported as 2003 (151) FT 457 (Tri-Dej); that the lower adjudicating authority has not discussed in as to which manner Appellants abetted the ship breakers in raising such documents on the basis of which M/s. Shree Anshra Enterprise or other buyers have wrongly availed Central credit of Rs. 16,34,036/- without delivery the corresponding goods mentioned in the said duty-paid documents and therefore, imposition of penalty under Rule 26(2) of the CFR is not proper; that there has to be some evidence regarding transactions of Rs. 1,98,30,568/- for purchase of SS scrap without receipts of the goods, however, no such evidence has been discussed in the impugned order.

(vi) Penalty imposed on the Director of the Appellant No. 1 is Rs. 9,00,000/- for the alleged duty evasion of Rs. 90,23,902/- which approximately 10 % of the duty evaded and therefore, penalty of Rs. 21,544/- for alleged duty evasion of Rs. 21,444/- means 100 % penalty which is not correct and therefore, penalty equal to duty involved imposed upon Appellant No. 3 and Appellant No. 4 is not proper.

#### 4. Personal Hearing :-

Personal hearing in respect of Appellant No. 1 and Appellant No. 2 was fixed on 27.11.2018, 30.11.2018 and 19.12.2018, however, on all three occasions they failed to avail opportunity of personal hearing. During course of personal hearing the Chartered Accountants, appearing for Appellant No. 3 & Appellant No. 4, reiterated the grounds of appeals.

Despite personal hearing notices sent to the Commissionerate, no reply / response has been received and also no one appeared for personal hearing. Hence, I proceed to decide the appeals on the basis of available facts and



evidences

4.2 Appellant No. 1 to Appellant No. 4 filed applications for condonation of delay in filing of appeals by 4 days, 3, days, 25 days and 26 days beyond normal appeal period of 60 days, but within further period of 30 days. I condone delay in filing of appeals by these four Appellants and proceed to decide on merits.

**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 has clandestinely manufactured and cleared finished excisable goods attracting CE duty of Rs. 90,23,902/- and whether it should be recovered from them along with interest or not;

(b) Whether penalty of Rs. 90,23,902/- should be imposed on Appellant No. 1 under Section 11AC of the Act read with Rule 25 of the CER and also Rs. 16,34,038/- under Rule 26(2) (i) of the CER or not;

(c) Whether penalty of Rs. 16,34,038/- is imposable on Appellant No. 1 under Rule 26(2) or not;

(d) Whether penalty of Rs. 9 lakhs and Rs. 16,34,038/- should be imposed upon Appellant No. 2 under Rule 26(1) and also under Rule 26(2) of the CER respectively or not;

(e) Whether penalty of Rs. 21,644/- under Rule 26(1) and also penalty of Rs. 16,34,038/- under Rule 26(2) of the CER should be imposed on Appellant No. 3 or not;

(f) Whether penalty of Rs. 21,644/- under Rule 26(1) and also penalty of Rs. 16,34,038/- under Rule 26(2) of the CER should be imposed on Appellant No. 4 or not.

6. I find that the officers of Directorate General of Central Excise Intelligence conducted coordinated search and inquiry at office of Appellants, various brokers, Director, transporters, Gujarat Maritime Board (GMB) market research agencies, etc., from where incriminating documents like Diaries/Note books/Registers/bip registers, 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. 2 to Appellant No. 4 and the entries recorded in the Diaries/Note books/Registers/GMB records, etc. recovered

during search and investigation that the manufacturers and dealers of excisable goods, namely, Plates, Scrap, etc. to buyers were made against unaccounted / cash transactions. All appellants, transporters, etc. played a pivotal role in aiding and abetting unaccounted transactions explained the details of these private records and the transactions recorded in the private records recovered during search. Appellant No. 2 in his statement dated 25.2.2013, has averred, categorically accepted, distribution removal of the excisable goods by

**Appellant No. 1:** I have seen the above said statements of Shri Vinod Patel and I am satisfied that he is the proprietor of the business of ship breaking materials. I have seen the above said statements of Shri Vinod Patel and I am satisfied that he is the proprietor of the business of ship breaking materials. I have seen the above said statements of Shri Vinod Patel and I am satisfied that he is the proprietor of the business of ship breaking materials. I have seen the above said statements of Shri Vinod Patel and I am satisfied that he is the proprietor of the business of ship breaking materials.

**Appar - 10:** As I stated above, you do not sell any goods through letters but business such as Shri Vinod Patel is Shri Krishna Patel as a representative of buyers negotiate with me for supply of ship breaking materials to the buyers.

**Question - 10:** The officers of DCIT, Ahmedabad conducted search at the residence of the proprietor of Shri Vinod Patel and his brother Shri Krishna Patel on 11.04.2010. During the search, certain private records including diaries were recovered from his premises and statements by the officers. The details maintained by Shri Vinod Patel are written in ciphered and coded manner. To get the explanation about the details written in the said diaries, a statement of Shri Vinod Patel was recorded during the investigation. He at many places deciphered the details written by him in the above said diaries. You are being shown all the statements of Shri Vinod Patel dated 23-04-2010, 29-04-2010, 20-12-2010, 23-11-2010, 03-03-2011 and 25-02-2011. After going through the same, please give your comments.

**Answer - 10:** I have seen the above said statements of Shri Vinod Patel and I am satisfied that he is the proprietor of the business of ship breaking materials. I am not able to decipher the same.

**Question - 11:** Do you know Shri Krishna Patel? What is the nature of his business transactions with your company?

**Answer - 11:** I know Shri Krishna Patel who is the brother of Shri Vinod Patel. He is in the business of ship breaking materials for many years. As far as business dealing with them is concerned, we have several consignments cleared through their dealing in various consignments.

**Question - 12:** Can you please inform me the transactions done with M/s. Shree Krishna Enterprises? When usually you order for purchase of materials in the name of M/s. Shree Krishna Enterprises?

**Answer - 12:** As I said, we have supplied many consignments to M/s. Shree Krishna Enterprises. We received orders on behalf of M/s. Shree Krishna Enterprises either from Shri Vinod Patel or from Shri Krishna Patel.

**Question - 13:** You may please inform me about 29-04-2010, 20-12-2010, 23-11-2010, 03-03-2011, 25-02-2011, with the 23-04-2011 of Shri Krishna Patel, proprietor of M/s. Shree Krishna Enterprises wherein he claimed that Shri Vinod Patel has no connection in the business of M/s. Shree Krishna Enterprises. But in your statement you have mentioned the name of Shri Vinod Patel also is linked to the consignment cleared to M/s. Shree Krishna Enterprises. Please clarify on the issue?

**Answer - 13:** I have seen the above statements of Shri Krishna Patel. I am not able to decipher the same. As far as my dealing is concerned, we used to get orders from both Shri Vinod Patel and Shri Krishna Patel for supply of materials to M/s. Shree Krishna Enterprises.

**Question - 14:** Please provide photocopy of Page No. 122 of the search report of Shri Vinod Patel wherein the following consignments are mentioned as "Material to be used for ship breaking" in order to know the purchase of your company. On receipt of the information furnished with details on these pages it is found that all these consignments were sent to M/s. Shree Krishna Enterprises.

For all these consignments, there is no entry in the books of account of your company that these consignments were cleared without actually supplying material to your company thereby facilitating M/s. Shree Krishna Enterprises to take IED/VAT credit. You will have something to say on this.

**Answer - 14:** I have seen the above pages. I am not able to decipher the same.

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**Question - 13:** You may peruse page No 21 & 22 of ledger with account books of BSNL for the year 2009-10 which was printed from the produce seized from Shri Vinod Patel under Purchase dated 28-02-2010 wherein the details of transaction in respect of bill No. 2382 and 2383 both dated 17-02-2010 are recorded. Value of purchase made and details of payments made for these purchases is recorded as under:-

Bill No.	Date	Weight in MT	Assessment Value	Central Excise duty	TATY value charges	Amount in Rs.) Gross value of bill
2382	17-02-2010	11.78	15,83,400	1,31,680	73,952	17,89,032
2383	17-02-2010	15.63	21,81,200	1,84,388	1,60,895	24,86,483
TOTAL			37,64,600	3,16,068	1,74,847	42,55,515
Payment made by cheque to M/s. Bharat Systems Ltd on 22-03-2010						42,55,515
Cash paid back by M/s. Bharat Systems Ltd on 22-03-2010					35,20,000	
As per condition, amount retained by M/s. Bharat Systems Ltd					4,10,322	
Cash demand in this transaction to M/s. Shree Krishna Enterprises					72,150	
Shortage to Shree Vinod Patel in this transaction payable by M/s. Bharat Systems Ltd					1,15,127	
TOTAL						42,55,515

The above information clearly establishes that your company had only issued invoices without actually supplying goods. In order to show it as genuine transaction, cheque payment was made by M/s. Shree Krishna Enterprises, which was returned to M/s. Shree Krishna Enterprises after deduction of agreed amount as per conditions. Offer your views and comments on the above details?

**Answer - 13:** I have seen the above page. I have no comments to offer on the issue.

**Question - 14:** You may peruse copy of Page No. 3 of Police Diary No. 4/6 which was seized from Shri Vinod Patel on 30-03-2010 wherein it third row amount of Rs. 4,10,322/- was shown as paid to your company on 22-03-2010 against bills 2382 & 2383. If this entry is read with data retrieved from produce as shown in the previous question, it clearly establishes that Rs. 4,10,322/- is retained by your company for issuing bills without supply of goods thereby facilitating fraudulent availing of CENVAT credit by M/s. Shree Krishna Enterprises. Do you have anything to say on this issue?

**Answer - 14:** I have seen the above page. I have no comments to offer on the issue.

**Question - 15:** You may peruse copy of Page No. 126 of file No. 4/1 which was seized from Shri Vinod Patel on 30-03-2010 wherein 2600 kg material @ Rs. 25.01 valued at Rs. 65,026/- was shown as purchased from your shop breaking yard at PSE No. 154 on 02-04-2009. Can you please give the details of invoice issued by your company for this consignment?

**Answer - 15:** I have seen the above page. I have no comments to offer on the issue.

**Question - 16:** As no invoice was raised on 02-04-2009 for the goods purchased by Shri Vinod Patel, do you agree the 2600 kg material @ Rs. 25.01 valued at Rs. 65,026/- was cleared without issuing invoice and without payment of central excise duty on 02-04-2009?

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**Answer - 18:** I state that we have not checked any goods without issuing invoice. I have no comments to offer on this issue.

**Question - 18:** You may please refer to 36 of **Exhibit Diary No. 47** seized from Shri Vinod Patel. Latest information dated 30-03-2010 and ledger with account name of M/S. for the year 2009-10 which was printed from the periodic statement of details of transactions in respect of bill No. 1345 dated 31-10-2009 is recorded. Value of purchases made and details of payments made for these purchases is recorded as under:

Bill No.	Date	Weight in MT	Accountable Value	Central Excise duty	VAT/other charges	Invoice value of VAT
1345	31-10-2009	5.13	20116	51148	28722	70000
Payments made by cheque to M/s. Bansal Infraco Ltd on 09-12-2009						70000
Cash paid back by M/s. Bansal Infraco Ltd on 22-02-2010						50000
As per condition amount returned by M/s. Bansal Infraco Ltd						67250
Cash benefit in this transaction to M/s. Sange Krishna Enterprises						35600
Shareage to Shree Vinod Patel in 1/2 transaction due to by M/s. Bansal Infraco Ltd						17245
<b>TOTAL</b>					<b>70000</b>	

The above information clearly establishes that your company had not issued invoices without actually supplying goods. In order to shape its genuine transaction, cheque payment was made by M/s. Sange Krishna Enterprises, which was returned to M/s. Sange Krishna Enterprises in cash after deduction of agreed amount as per conditions. Offer your view and comments on the above details?

**Answer - 19:** I have seen the above page. I have no comments to offer on this issue.

4.18.2. It can be seen from the deposition by Shri Vijay K. Bansal, that he knew Shri Vinod Patel and Shri Kishor Patel; that on being asked to comment on the entries showing purchase of ship breaking materials from Plot No. 154 and payments made to Plot No. 154 as mentioned in Diaries maintained by Shri Vinod Patel, he refrained from offering any comment / corrections of the details mentioned by Shri Vinod Patel in his diaries.

6.2 Statement of brokers, namely, Shri Bimal Jain on 23.8.2011, Shri Satish Gupta on 24.8.2011, Shri Pawan Agarwal dated 24.08.2011, Shri Chharmendra H. Sanghvi on 25.08.2011 and Shri Manoj Gupta on 24.08.2011 were recorded under Section 14 of the Act who were involved in the unaccounted clearances transactions the excisable goods of Applicant No. 1 wherein they have agreed in their respective statements recorded under Section 14 of the Act that as soon as the deal for supply of cargo is finalized with the ship-breaking unit & concerned buyer, they contacted

the transporter no. phone for providing truck and informed them about the quantity of scrap to be transported, destination, etc.. I find that the lower adjudicating authority, in this regard, has found as under at Para 6.2 of the impugned order. *".... The transporters, on the basis of telephonic talk, enter the details in the register and send the Truck at the Snp breakers premises. During the course of recording the statements, the entries made by the transporters in their registers were also shown to the breakers and all have confirmed the details mentioned in the Registers as correct. The statements of the breakers corroborate the statements of the transporters and it proves that the entries made in the Registers by the transporters are correct."*

6.3 The statements of transporters, namely, M/s. New Jashankar Transport Co. and M/s. Jashankar Transport Co. on 4.3.2010; 6.4.011 and 6.7.2011; M/s. Vardhaman Transport, Bhavnagar 6.4.2011 and 24.6.2011; M/s. Shri Guruparak Road Carriers on 24.2.2011 and 6.7.2011; M/s. Bhadrna Rampura Carriers on 6.4.2011 & 29.06.2011. M/s. Shoomi Transport on 4.10-2010, 6.4.2010, - 5.6.2011; were recorded under Section 14 of the Act and these statements reveal that Appellant No. 1 was involved in clearances of unaccounted and non duty paid excisable goods; that the transporters did not have their own trucks and they supplied trucks to Appellant No. 1 on commission basis; that they noted down truck number, plot number of snip breaker, in their Booking / Trip / Day Registers along with the corresponding invoices, however, where no invoice was issued, nothing was mentioned in their registers. I find that the records recovered from transporters have been decoded, explained and corroborated in very elaborate manner by incorporating scanned images of documents/records from Page No. 44 to Page No. 50 of the Show Cause Notice. The Investigator also gathered details from the register maintained at the gate by the officials of Gujarat Maritime Board and the lower adjudicating authority has recorded as under :-

*"3.7.2 As per the prevailing practice for transport of scrap from Alang, the shippers pay entry fees to GMB and bring their trucks inside the ship recycling yard only when they are sure of getting full truck load and agreed freight charges. Further from the statement of the transporters, it is clear and undoubted fact that the inducements for trucks were always mixed after the sale deal was finalized so as to avoid any kind of unnecessary charges to be paid to the truck owners. Further, I find that there is no scope of any other truck to get the goods for loading directly in the event of cancellation by some ship breakers. Therefore,, I find that once the deal is finalized between buyer and seller, then only the*

transporter operators consigned and there is booked for transport of goods from the inland ship receiving yard. The facts is further supported by the entry made in the GMB register and further by the truck driver for entering in the ship receiving yard. The statements of transporter operators are supported by the entries in the GMB registers and further corroborated by non-satisfactory reply given by Sri Ram Krishna Jain in this regard. Further, Sri Ram Krishna Jain was not able to give any satisfactory reply regarding loading of trucks from other plots and deals with the buyers regarding entries that have not been correlated with the entries of OFIs and entries in the register of transporter operators. Thus, from the annexure prepared on the basis of registers of transporters, registers of GMB and on the basis of load carried by the truck from the premises of M/s. Durgal Infracon Ltd. I find that excisable goods as worked out in Annexure TR.1.2 obtained from ship breaking yard was removed clandestinely without issuance of proper Central Excise Invoice and without payment of proper Central Excise duty of Rs. 1,85,787/-.

3.7.3 It is also more worthy to mention .....

3.8 The DRCET also conducted inquiry with Transporters, Brokers, GMB, research agencies with .....

6.4 Appellant No. 1 has contended that the lower adjudicating authority has not allowed cross-examination of one Shri Mahendralal A. Rana, Partner of M/s. Maruti Metal Industries, Shevtagar and therefore, the principles of natural justice have been violated. In this regard, I find that the lower adjudicating authority has held as under :-

"3.11.1 I further find that there is no provision in the Central Excise Law for seeking cross-examination. Hon'ble Madras High Court in the case of K. Balan v/s Govt. of India reported in 1982 ELT(010)386, Madras, has 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)386 was distinguished by Hon'ble Tribunal Ahmedabad in ARYA FIBRES PVT. LTD. Versus COMMISSIONER OF C. EX., AHMEDABAD-II reported at 2014 (311) F.L.T. 529 (Tri. - Ahmed.) wherein it was held as under:-

"33. In K Balan's case (supra), the Hon'ble 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 concerned as would assure him proper opportunity to defend himself. Opportunity of cross examination is given wherever it is relevant, justified and genuine and is not for prolonging the proceedings. The decision in GTC Industries case

(para) 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 letter of 10-10-2008 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.. "

3.11.2 Similarly, in the case of *Akankshaam Fly-Wood Pvt. Ltd vs. Commo. of Cus. & C.Ex., Aurangabad* reported at 2014 (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,

3.11.3 Further, the Hon'ble Tribunal, in the case of *M/s. Beauty Dyes v. CCF, Chennai* reported in 2001 (136) ELT 139 (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.

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

[Emphasis supplied]

6.4.1 I find that the request for cross-examination of Shri Mahendra A. Rana, Partner of M/s. Manuf Metal Industries, Bhanvragar has been appropriately dealt with by the lower adjudicating authority, especially when the Appellant No. 1 and Appellant No. 2 have demonstrated gross negligent attitude in not even appearing before this appellate authority for personal hearing. Request for cross-examination loses legal sanctity when one is not keen for availing benefit of personal hearing where they could have even explained their point of view as to why cross-examination was essential. Having failed to avail opportunity, I find that the findings of the lower adjudicating authority in this regard do not merit any interference.

6.4.2 I find that Appellant No. 2, Appellant No. 3 and Appellant No. 4 who tendered their elaborate statements under section 14 of the Act during the investigation have avowed, on being confronted with the incriminating Diaries/Notebooks etc., that the entries showing transactions and not tallying with their statutory records are in the nature of the goods cleared in clandestine manner on which no CE duty has been paid by them. Further, records recovered from Gujarat Maritime Board also corroborate the details of transactions for which non-invoice or CE duty was paid. I find that Appellant No. 1 is trying to brow beat and hold together, inasmuch as on one hand they are admitting that they have cleared the impugned goods clandestinely and on other hand they are contesting duty evasion without any substance and merely on technical grounds. Therefore, I find that findings of the lower adjudicating authority are appropriate in this regard and cross-examination do not have any bearing on the outcome of the case, especially when there are overwhelming documentary and oral evidences against Appellant No. 1. I would like to rely upon judgment of the Hon'ble Madras High Court in the case of Mrs. Lawn Textile Mills Pvt. L. reported as 2018 TIOI-1924-Hon'ble CESTAT-MAD-CX wherein it has been 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 secret manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where securities involved, there may be cases where direct documentary evidence will not be available. However, based on the seized 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 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."*

[Emphasis supplied]

6.5 In the instant case the incriminating private records seized during investigation have been duly corroborated by Appellant No. 2, Appellant No. 3, Appellant No. 4 brokers, transporters, records of Gujarat Maritime Board. I, therefore, uphold demand of Central Excise duty of Rs. 4,83,78/- in respect of 20 entries as detailed in Annexure - 1R.1.2 of the Show Cause Notice.

6.6 Regarding Central Excise duty of Rs. 21,644/- (5940 kgs. of quantity / 6



entries / Annexure - VK-1) on the goods clandestinely removed. Appellant No. 1, *inter alia*, contended that the charge of clandestine removal of the goods could not be confirmed on the basis of statements or records recovered from third parties, without carrying out investigation at buyers' end and without proving financial flow back.

6.6.1 In this regard, I find that the lower adjudicating authority has very correctly confirmed the demand of CE duty, inasmuch as for establishing demand raised by Annexure -VK-1, the investigation has been carried out in depth, elaborate and holistic manner. Author/Writer of the private diaries/notebook have ascertained and brokers involved, that is, Appellant No. 3 and Appellant No. 4 have been extensively interviewed and diaries decoded scrupulously to establish the charge of clandestine removal against Appellant No.1. I find from Page No. 4 to 32 of the Show Cause Notice narrating Statements of Appellant No. 3 dated 19.4.2010, 20.4.2010, 28.12.2010, 23.12.2010, 03.1.2011 and 26.2.2011 wherein he has, *inter alia*, explained, decoded and accepted the details like Plot No., size of the goods, rate of goods, amount of sales proceeds etc. noted down in the private records/diaries in very exhaustive manner. Similarly, I find from Page No. 4 to 32 of the Show Cause Notice narrating Statements of Appellant No. 4 dated 20.4.2010, 17.09.2010 and 11.2.2011 he also explained and corroborated details of clandestine removal in respect of Appellant No. 1.

6.6.2 I further find that a statement dated 1.1.2011 of Shri Mahendrabhai Rana, Partner of M/s. Maruti Metal Industries, Bhavnagar dealing in ship propellers, has also been recorded under Section 14 of the Act wherein he has replied in one of the questions posed by the investigation as under,

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supply both invoices and receipts to our firm. Accordingly, they

Q.18: What about the payment made for such purchase of boxes without goods? Please explain.

A.18: When Shri Kishore Patel and Shri Vinod Patel purchase items from the ship breaking units, each ship breaking unit would invoice for the excise elements included in the invoice. For example, if the quantity is shown as 3000 Kgs and rate is Rs. 100/- per kg, then the total value would be Rs. 30 lakhs; when the excise duty element is Rs. 1.50 lakhs. Out of this, the ship breaking unit will keep with them, i.e. Rs. 96,000/- and the remaining 29.54 lakhs is passed on to Shri Kishore and Shri Vinod. Out of this 40%, they keep about 15% and the remaining 25% is referred to us. While selling such goods to our clients, we fix the rate as Rs. 295/- and then charge excise for the purpose of passing on credit to our clients. Thus the subject item is finalized.

Q.19: I am showing you Page No. 1 of the seized file No. A/1, which appears to be a confession statement for the brokerage business. Names of the parties include one 'Rana'. Please peruse the same and explain whether 'Rana' indicates your name or otherwise? If so, please explain the contents of the said sheet. Please also explain who are the other names written as Bahadurji, Rajesh, Manish, AK Gupta, V Bansal, VK, etc.?

A.19: This page shows the commission amount paid by us to Shri Vinod Patel for 425 MT goods. Other names are Shri Bahadurji of M/s. Suresh Metals, Shri Rajesh of M/s. Laxmi Steel Plot No. 4, Shri Manish who is the partner of Shri Mukesh Agrawal of M/s. Manish Metals, Shri Anam Gupta of M/s. Kusinco Industries (Plot No. 1-5), Shri Vinay Bansal of Bansal Group, etc. I do not whose name is written as VK.

Q.20: Now please examine Page Nos. 59 to 65 which are weighment slips issued by Mariani Weigh Bridge situated at Tauria Road Highway, Meerut. Some of these slips carry a code written by Shri Vinod Patel in his own handwriting which appears as "Mehendra-33" and "Mehendra-34". Please explain the nature and contents of these pages?

A.20: I have examined the said Page Nos. 59 to 65 of the file No. A/1 and admit that the name 'Mehendra' indicates my name. Shri Mehendra Rana and the suffixes 33 and 34 indicates M/s. Madhav Steel (S&I) and M/s. Madhav Industrial Corporation situated at Plot Nos. 53 and 54, which are owned by Shri Anandji Lal Patel. The weighment slips are in respect of the goods which we had purchased from the said two ship breaking units as a part of our offshore business as explained above.

Q.21: Please specify whether these purchases have been accounted for in the official books of accounts of either you, or Shri Vinod Patel or even the ship breaking units?

A.21: No Sir. These are unaccounted transactions carried out by us wherein payments were made in cash.

6.7 I find demand of CE duty of Rs. 21,644/- (Annexure - VK -1 to the Show Cause Notice) has been arrived at on the basis of 6 entries found in Diary marked A/1 resumed from Shri Vinod Patel (i.e. Appellant No.3). The details contained in the said Diary mentions amongst other details, date of clearances, quantity, rate, address of plot number of Appellant No. 1 etc. from where the said transactions of clandestine removal were recorded. Authenticity and veracity of the diaries and private records have been amply established and corroborated in the instance case vide statements of Appellant No. 3 and Appellant No. 4 and answer to Question Nos. 10 to Question No. 19 of the Statement of Appellant No. 2 dated 25.2.2013 also lend credence

to the authenticity of the unaccounted transactions in this regard. The inescapable inference that can be drawn from the transactions recorded in the recovered Diary marked as Serial No. A/1 is that the diary is genuine and not imaginary or rough details, like estimates as has been attempted to be made out by Appellants and therefore, importance of private diaries and confessional statements recorded in connection with these diaries cannot be whittled down by bald submissions of the Appellant No. 1. The lower adjudicating authority delivered his findings at Para 3.14 of the impugned order on the basis of appreciation of the relevant pages of diary marked as serial No. A/4 containing stark details of clandestine removal. Statements of Appellant No. 3 and Appellant No. 4 have also been recorded on 19.4.2010 and 20.4.2010 wherein *modus operandi* and recording of details of Diaries has been explained at length.

6.7.6 In view of above evidences and statements of Appellant No. 2, Appellant No. 3, Appellant No. 4 and statement of Shri Mahendrabhai Rana dated 1.1.2011, I find that demand of CE duty of Rs. 21,644/- in respect of 6 entries has been correctly confirmed by the lower adjudicating authority.

5.6 I 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 credibility 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 and other premises have been duly corroborated and tallied with the records of Appellant No. 1 and CE duty on the clandestine clearances of the goods non accounted 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 2015-TIOL 1924-HC-MAD-CA 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 secret manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where secrets involved, there may be cases where direct documentary evidence will not be available. However, based on the seized 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 to be correct. 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 an 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 timely 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 inventory 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 136 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, transporter, brokers, Director, writer of private Diaries / Notebooks etc. have categorically admitted and identified the entries in the private incriminating records. Further, brokers and transporters have admitted to have sold / transported goods belonging to Appellant No. 1 without CE invoices and without payment of duty. 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 same have also been tallied with the statutory record of Appellant No. 2 and all vital links involved in the case have corroborated the evidences gathered during investigation and therefore, demand cannot be said to be confirmed without concrete evidence and statements.

6.10 No statement has 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 unit and also corroborated by the responsible persons of the supplier's side. 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 concoction by way of details of transport, money receipt, etc. In the present case, the evidences collected from the supplier's side is categorical and cannot be disputed. The private records of the suppliers have been corroborated and admitted for the correctness of their contents by the persons who were in-charge of the supplier's units. When such evidence was brought before the partner of the appellant's unit, he categorically admitted unaccounted clearance of dutiable items. 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 transport of the finished goods to such buyers. It is seen that the records maintained by the suppliers, which were affirmed by the persons in-charge cannot be brushed aside. 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 materials has 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 by requirement of cross-examination, etc. Admittedly, none of the private records or the statements given have been rejected or later retracted for their authenticity. In the appeal before the Tribunal, the appellant is making a rebuttal assertion that the statement by the partner of the appellant's firm is not voluntary. Various case laws relied upon by the appellants 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 their merits. As noted already, the third party's records at the supplier's side as affirmed by the persons in-charge and further corroborated by the appellant cannot be circumvented 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 of 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]

6.11 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 Sri Shah Gumanma reported as 1983 (13) ELT 631 (SC) & Anfil Textiles (T) P. Ltd. reported as 2079 (235) ELT 567 (SC).

6.12 I also rely on the decision in the case of M/s. Haryana Steel & Alloys Ltd. reported as 2017 (305) ELT 432 (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 statements 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. Rainkumdra Rexina Pvt. Ltd. reported as 2014 (302) ELT A61 (S.C.) wherein similar view has been taken by the Hon'ble Supreme Court.

6.13 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. Suchawani reported as 1996 (83) ELT 258 (SC) and Rakshit Kumar Sarg reported as 2015 (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 (316) ELT 606 (Tri-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 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 charts 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. ..."*



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 Kataria, 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]

6.14 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 2006 (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. Karori Engg. Works reported as 2004 (166) E.L.T. 373 (Tri. Del.) has also held that Admission/Confession is a substantial 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. N R Sponco P Ltd reported as 2015 (328) E.L.T. 453 (Tri-Del) has also held that when preponderance of probability was against the Appellant, pleading of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted and no input-output ratio prescribed by law is of no use.

6.15 In view of above, I find that the contentions raised by Appellant No. 1 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. 5,05,431/- by the lower adjudicating authority is correct, legal and proper.

6.16 It is natural consequence that the confirmed demand of Rs. 5,05,431/- is required to be paid along with interest at applicable rate under Section 11AA of the Act. I, therefore, uphold order of recovery of interest under the impugned order.

6.17 I find that this is a case of clandestine clearances of the goods which has been established. The ingredients for invoking extended period of demand 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 2015 (339) E.L.T. 473 (Trib. - Ben.) and hence, the impugned order has correctly imposed penalty of Rs. 5,12,471/- 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 % to the Appellant No. 1 on the condition, as per Section 11AC of the Act.

7. Regarding confirmation of demand of duty of Rs. 85,13,471/- (Annexure - UV-1 to the SCN) on the ground of under-valuation, Appellant No. 1 has submitted that the sale 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 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; 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 infra-via, giving findings as under:-

*3.15 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 unrealistic. 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 Anil) to 25mm (14Anil) are emerged 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 DICEI conducted inquiry with various marketing research agencies including M/s Major & Minor with reference to pricing 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.*

*3.16 On comparison of the price mentioned in the invoices of M/s BIL vis-à-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 BIL were far less than the actual value prevailing in the market during the respective period. The ship-breakers have, by not declaring the actual size / thickness of MS Plates cleared by them, under-avaled MS*



Relevant States 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.

3.17 I, therefore, find the substance in the allegation of under-valuation in the present show cause notice particularly when devices seized from Shri Vinod Patel and Kishore Patel already containing details of cash transactions with various Brokers / Shroffs / Angadies. 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.

3.18 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 reference 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 one 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 undervaluation of the goods and rightly recoverable from M/s. BIL. Further, I also find that a large number ship breaking units, dealers from Alang and Broken were member of M/s Steel rates 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 Steelrates were adopting the most scientific and appropriate analysis of the data gathered by them. The Ship breakers were fully aware of the rates of the scrap generated from ship breaking and intentionally undervalued the goods with intent to evade payment of Central Excise duty. .... This analysis of the rates provided by IPC, Kolkata proves that M/s BIL 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 BIL have evaded Central Excise Duty of Rs. 85,18,472/-.

[English supplied]

7.2 I find that demand of Rs. 85,18,472/- has been confirmed on the ground that the Appellant was fully aware of actual rates of the scrap generated from ship breaking and intentionally undervalued the goods with intent to evade payment of CE duty. 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 membership of Appellant No. 1 is apparent from

the fact that they did not show the specific description of the taxable goods in the invoice. Investigation has recovered documents under Section 14 of the Act and details of unaccounted cash from addressees were recovered and corroborated with the details found in the seized diaries, notebooks, etc.

7.3 In view of aforesaid, I am finding the impugned order improper and accordingly, uphold confirmation of C.D. duty of Rs. 65,38,492/- along with interest thereupon and equivalent penalty under Section 11AC of the Act. To this regard, I rely upon the case laws as under :-

(i) ISMT Ltd. 2017(5)CSTL 298 (in-Mum)

*7. For the High Court of Madras had an occasion to decide the issues 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 Painter Co. Ltd., 2014 (305) E.L.T. 71 (Mad.). It is held that the penalty is punishment for an act of deliberate deception by an assessee with the intent to evade duty involving any of the means mentioned in Section 11AC of the Central Excise Act, 1944. The facts and circumstances of this case as well as the nature of conduct 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 appellants does not deserve any consideration of leniency. Accordingly, penalty imposed under Section 11AC is confirmed.*

(ii) DKN 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. Dhararamdra Textile Processors - 2008 (232) 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. 2,03,69,544/- imposed on them under Section 11AC of the Central Excise Act, 1944 as ordered by the adjudicating authority. The said penalty is therefore upheld.*

8. Regarding imposition of penalty equal to Cenvat Credit of Rs. 16,34,038/- under Rule 26(2)(i) of CEA on Appellant No. 1 for wrongly passing on Cenvat credit. Appellant No. 1 contended that sale of MS scrap, etc. was made by Appellant No. 1 ex-factory gate and delivery billhead was given at factory gate. Appellant No. 1 also submitted that if a

consignment of the goods is subsequently diverted, it is not responsibility of Appellant No. 1 as they had handed over custody of the goods to buyers at factory gate.

B.1 Para 3.14 of the impugned order has read as under :-

*"3.14 ..... I further find that from data/information available in the seized diaries A/7 & A/10 and ABC ledger account with account name 'BSM' entries marked with Prod. No. 154) showing the entry of such transaction with code 'Cons', shows that these invoices are issued by M/s. DIL without supply of goods mentioned therein in order to facilitate fraudulent passing on of CENVAT credit to the buyer as mentioned in Annexure-VK.2 of the notice. I also find that as shown in the Annexure-VK.2 in 21 cases M/s. DIL has issued Central Excise invoices without supply of goods to M/s. Shree Krishna Enterprises or to its buyers and thereby passed on fraudulent Cenvat credit amounting to Rs. 16,34,035/- to said furnace units as detailed in the said annexure and I find the same to be correct."*

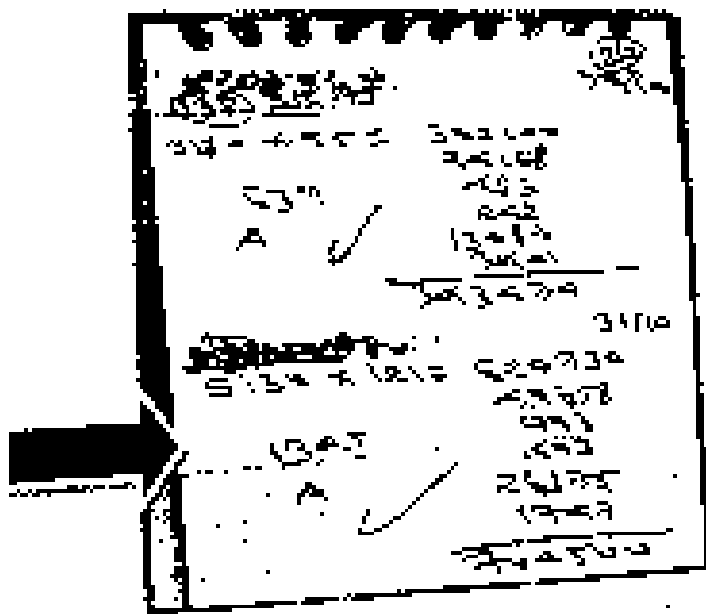
*[Signature]*

B.2 Para 4.16.2(i) to Para 4.16.2(k) of the Show Cause Notice reads as under :

7. Para 4.16.2(i), 4.16.2(j) & 4.16.2(k)

4.16.2(i) One such transaction relating to supply of fraudulent invoice without supply of goods and the mode of settlement of payment relating to such transaction, is explained herein below. The transaction is recorded in A/C ledger account of T3301491 of No. 154.

4.16.2(j) In order to better comprehend the issue, copy of page No. 26 of Annexure - A17 is reproduced herein below



Entry marked with arrow relates to bill No. 154. This transaction was dated out on 31-10-2009. Figure 5180 stands for quantity in kgs. and rate per kg is Rs. 2217. Number 1345 mentioned therein denotes Invoice No. and gross value of bill is Rs. 7,00,500/-.

4.16.2(k) In order to ascertain whether information mentioned in the diary is correct or not, Invoice No. 1345 dated 31-10-2009 was referred to. On reconciliation of the information mentioned in the diary and information available in the Invoice No. 1345 dated 31-10-2009 perfectly matches. This proves that entry made in the diary by Smt. Vinod Patel is correct. For better understanding, scanned image of Invoice No. 1345 dated 31-10-2009 is reproduced herein below:-

*[Handwritten signature]*

F. No. DSCEI/20136/52, 2017-14

**BANSAL**  
COOPERATIVE SOCIETY

Type Invoice: **INVOICE**  
 Invoice Particular of Complete Goods from Factory or Warehouse at Banskimpally  
 Part of the Contract Order No. 2017

<p>Invoice No. <b>1945</b>          Date of Issue <b>09/12/2009</b>          Invoice Particular of Complete Goods from Factory or Warehouse at Banskimpally          Part of the Contract Order No. 2017</p> <p>Invoice to: <b>Shri. Ramesh Chandra</b>          Trade No. <b>123456</b>          Invoice No. <b>1945</b></p>	<p>Invoice Particular of Complete Goods from Factory or Warehouse at Banskimpally          Part of the Contract Order No. 2017</p> <p>Invoice to: <b>Shri. Ramesh Chandra</b>          Trade No. <b>123456</b>          Invoice No. <b>1945</b></p>
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Description of Goods	Quantity	Rate	Amount	Remarks
<p>Invoice Particular of Complete Goods from Factory or Warehouse at Banskimpally            Part of the Contract Order No. 2017</p>	2000	115	230000	<p>Invoice Particular of Complete Goods from Factory or Warehouse at Banskimpally            Part of the Contract Order No. 2017</p>

Total Invoice Amount: **230000**  
 Total Invoice Amount: **230000**  
 Total Invoice Amount: **230000**

I hereby certify that the above invoice is true and correct and that the goods described therein are of the quality and quantity specified and that the same are free from all defects and are fit for the purpose intended.

4.16.2017) From the seized image of Invoice No. 1945 dated 20-10-2009, it can be seen that this invoice was issued by M/s. Bansal Infrason Ltd to M/s. Shri. Ramesh Chandra, Banskimpally, which is a registered trading firm owned by Shri. Ramesh Chandra. Quantity stated is shown as 2.136 per MT and rate was Rs. 120000/- per MT. Gross total of bill value is shown as Rs. 260,000/-. Transactions relating to this invoice is entered on 09-12-2009 in ledger, word 'COND' is mentioned. In the course of investigation, it is found that whenever word 'COND' is mentioned, such transactions were fictitious transactions and in such cases, only invoices were issued without supply of goods and thereby facilitated the recipients of invoices to take CENVAT credit fraudulently. Thus word 'COND' mentioned in Sr. No. 75 of the ledger entry

8.3 In view of above, I find that the Department has sufficiently discharged onus of proving 21 transactions for passing of Central Credit of Rs. 16,34,039/- by appreciating documentary evidences in the date contained in Stanzas at serial Nos. A/7 to A/10 and also as contained in Pen Drive seized from the premises of Appellant No. 4, without accompanying goods. I, therefore, uphold imposition of penalty of Rs. 16,34,039/- under Rule 26(2) of the CER on Appellant No. 1.

8.4 Regarding imposition of penalty of Rs. 9 lakhs on Appellant No. 2 (Director of Appellant No. 1) under Rule 26(1) of the CER, I find that Appellant No. 2 has admitted his involvement in duty evasion in vide his statement dated 25.2.2013. 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 two thousand rupees, whichever is greater.*

8.4.1 Appellant No. 2 has concerned himself with the goods for removing and selling the non-duty paid goods, which were liable to confiscation and penalty imposed is also very proportionate and reasonable, therefore, I hold that penalty of Rs. 9 lakhs imposed on him under Rule 26(1) is justified and I uphold this penalty as legal and proper.

8.5 Regarding imposition of penalty of Rs. 16,34,039/- lakhs on Appellant No. 2 (Director of Appellant No. 1) under Rule 26(2) of the CER, I find (2) of the Central Excise Rules, 2002 reads as follows :-

*\* Rule 26. Penalty for certain offences. -*

*(2) .....*

*(2) ANY PERSON WHO issues -*

*(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or*

*(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder under his obtaining of CEM/AT credit under the CEM/AT Credit Rules, 2004 or refund,*

shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."

[Emphasis supplied.]

8.6 As discussed above at Para 8 to 8.3 of this order, Appellant No. 2 have indulged in issuance of excisable invoice without accompanying goods and therefore, with the aid of such invoice user has availed the right benefit of Cenvat credit and thus, penalty has been correctly imposed by the lower adjudicating authority and I uphold the same.

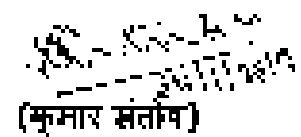
9. Regarding imposition of penalty of Rs. 21,644/- under Rule 26(1) of the CER and Rs. 16,34,238/- under Rule 26(2) of the CER each on Appellant No. 3 (Shri Vinod Patel), as well as on Appellant No. 4 (Shri Kishore Patel), I find that Appellant No. 3 has admitted his involvement in duty evasion vide his statement dated 19.04.2010, dated 20.4.2010, dated 20.12.2010, dated 23.12.2010 and dated 3.1.2011. I also find that Appellant No. 4 has also admitted that he aided and abetted Appellant No. 1 in CE duty evasion and his confessional statements dated 20.4.2010, dated 17.9.2010 and dated 1.12.2010 bear ample testimony to this fact. As discussed above, passing of fraudulent Cenvat credit has also been upheld. I, therefore, find that Appellant No. 3 and Appellant No. 4 both have concerned themselves in removing, selling and dealing with the non-duty paid goods, which were liable to confiscation and hence, I have no option but to hold that penalty is imposable on them under Rule 26(1) and Rule 26(2) of the CER. I, therefore, uphold penalty on Appellant No. 3 (Shri Vinod Patel) as well as on Appellant No. 4 (Shri Kishore Patel) under Rule 26(1) of the CER and under Rule 26(2) as imposed.

10. In view of my above findings, I reject appeals filed by all four Appellants and uphold the impugned.

11. अपीलकर्ता द्वारा दंड को गड़ अपील न. निम्न द्वारा उपरोक्त तरीके से किया जाता है।

11. Appeals filed by the Appellants are disposed off in above terms.



  
(कुमार संतोष)

प्रधान आयुक्त (अपील्स)

By R.P.A.D.

To,

1. M/s. Bansal Infraco (P) Ltd.  
Plot No. 154, Sasiya Ship Breaking Yard,  
Sasiya/Alang, Office : Plot No. 2137,  
Near Golden Arc Attache Chowk,  
Bhavnagar.
2. Shri Vijay K. Bansal, Director,  
M/s. Bansal Infraco (P) Ltd.  
Plot No. 154, Sasiya Ship Breaking Yard,  
Sasiya/Alang, Office : Plot No. 2137,  
Near Golden Arc Attache Chowk, Bhavnagar.
3. Shri Vinodbhai Amarsinhji Patei,  
Plot No. 202,  
Talon Mega City,  
Opposite Victoria Park, Bhavnagar.
4. Shri Kishore Amarsingh Pale, Proprietor of  
M/s. Shree Krishna Enterprises, 304,  
Shoppers Point, Radival Chowk,  
Waghawadi Road,  
Bhavnagar - 364 001.

**Copy to :-**

- 1) The Principal 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