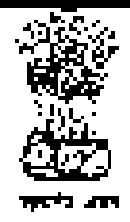




THE NATIONAL HUMAN RIGHTS COMMISSION  
AND THE PRINCIPAL COMMISSIONER, APPEALS, GOVT. OF GUJARAT, INDIA.



વિધાનભવન, રાજકોટ શહેર, ૩૬૦૦૦૧, ગુજરાત  
The National Human Rights Commission  
Government of Gujarat, India.  
Gujarat Secretariat - Gandhinagar, Gandhinagar, Gandhinagar, Gandhinagar

સંખ્યા: ૩૬/૨૦૧૯  
આદેશ નંબર:  
૨૨/૧૬૭૨૦૨૦-૨૦૧૯

જન્મ તારીખ:  
૦૮/૦૯/૨૦૧૯  
૧૨/૦૯/૨૦૧૯ થી ૨૨/૦૯/૨૦૧૯

દિવસ:  
બુધવાર  
૩૦/૦૯/૨૦૧૯

શ્રી: સુશીલા કાન્હોલાભાઈ શાસ્ત્રી

SHIL-KAN-000-APP-020-2019

તારીખ: ૨૬/૦૯/૨૦૧૯  
Date of Order:

૨૬/૦૯/૨૦૧૯

તારીખ: જાહેર કરવાનો તારીખ:  
Date of Issue:

૩૦/૦૯/૨૦૧૯

શ્રી: સુશીલા કાન્હોલાભાઈ શાસ્ત્રી, મુખ્ય પ્રમુખ, રાજકોટ શહેર.  
Shri. Sushila Kanholabhai Shastri, Principal Commissioner (Appellate), Rajkot

૧) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૨) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૩) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૪) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૫) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૬) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૭) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૮) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૯) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.

૧૦) આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.  
આદેશ: રાજકોટ શહેરના પુસ્તકાલયના પુસ્તકોની સંખ્યાની વિગતો આપવાની વિનયી સંજ્ઞા.



**ORDER IN APPEAL :**

Shri Hetal Navnitrai Shah, 204 Satya Flats, Naar Blood Bank, Mehila Colliage Circle, Bhavnagar (hereinafter referred to as "the Appellant") against Order-in-Original No. 12/ACBVR-2/BVR/MC/2017-18 dated 28.1.2018 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central GST Division, Bhavnagar-2, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority')

2 The brief facts of the case are that investigation conducted by the Officers of Anti-Evasion Wing, Bhavnagar in view of information shared by the Income Tax (Investigation), Ahmedabad, who provided copy of documents seized by them from M/s. NBM Iron & Steel Trading Pvt. Ltd., Bhavnagar (hereinafter referred to as 'the ship breaking unit'), revealed that the ship breaking unit had cleared excisable goods obtained from breaking of ships without payment of Central Excise duty and without preparation of Central Excise invoices during the financial year 2009-10 and 2010-11. Statements of the buyers and brokers of the appellant were recorded under Section 14 of the Central Excise Act 1944 (hereinafter referred to as 'the Act') confirmed that they purchased/brokered the goods from the appellant without payment of Central Excise duty and without Central Excise invoices and that the payments were made in cash. Show Cause Notice F.No. V/15-78/Dev/HQ/2014-15 dated 26.12.2014 (hereinafter referred to as 'the impugned SCN') was issued to the ship breaking unit and other 5 notices including the appellant proposing recovery of Central Excise duty of Rs. 12,30,149/- Under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') along with interest under Section 11AA of the Act from the ship breaking unit and to impose penalty under Section 11AC of the Act and under Rule 25 of Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') upon the ship breaking unit and also to impose penalty under Rule 28(1) of the Rules upon the appellant and other noticees. The SCN was adjudicated by the lower adjudicating authority vide the impugned order, which imposed penalty of Rs. 3,18,518/- upon the appellant under Rule 28(1) of the Rules, he being involved in selling of clandestinely cleared excisable goods.



3. Being aggrieved with the impugned order, the appellant has preferred present appeal, *inter-alia*, on the following grounds -

(i) The impugned order passed by the lower adjudicating authority is bad in law, unjust and illegal and is not maintainable in the eyes of law. The impugned order is based only on private records seized by the Income Tax department from the ship breaking unit without placing the corroborative evidences. Statement of the appellant was recorded on 16.1.2013 wherein the appellant has specifically stated that loading/sorting of the goods manufactured by the ship breaking unit was made through 'Chhantiwala' deployed by the buyers. However, in the present case, no such evidences have been placed on record regarding name of buyers or no statements of the said Chhantiwala appears to have been recorded to sustain the illicit removal of the excisable goods cleared by the ship breaking unit and no money flow back has been taken on record. Further, no evidences have been placed on record which established that the goods under dispute had actually been loaded from the said ship breaking unit and actually removed from the factory gate of the said ship breaking unit. Therefore, it is established that the impugned order has been passed on assumption and presumption basis and on the basis of third party evidence without corroborative evidence.

(ii) The lower adjudicating authority has violated the principles of natural justice inasmuch as though the appellant had requested to supply the hard copies of Relied Upon Documents, particularly, copies of 17 weighment slips. The lower adjudicating authority has failed to establish the means of transportation, money flow back and names of the buyers etc. The lower adjudicating authority has also failed to establish that the appellant was in knowledge that the disputed goods were liable to confiscation and no order of confiscation of goods has been passed. Thus, it is established that the appellant was not at all concerned in any illicit activities under Rule 25(1) of the Rules.

(iii) The findings at Para 2 of the impugned order are given without verifying the procedures being followed under Section 33 of the Act and therefore, are not proper and legal. Therefore, the impugned order is not self-contained order under Section 33 of the Act as no RUDs were supplied to the appellant though

in the Annexure-K it has been mentioned to have been enclosed. It is submitted that only reading out 11 weighment slips at the time of recording of statement is not affirmative to prove the charge as alleged in the SCN.

(iv) Notwithstanding the above submissions, it is submitted that the lower adjudicating authority has referred Final Order No. 113/FINAL ORDER/CEX/VKP/2017 dated 26.5.2017 passed by the Settlement Commission in appeals filed by the ship breaking unit and other 3 co-noticees. The Settlement Commission has passed the order on the basis of acceptance of duty liability by the ship breaking unit in respect of 119 entries made in Annexure-II, prepared by the department, out of which 5 entries belong to the appellant. It is found that where no description of goods has been mentioned, the details were pertaining to clearances of non-excisable goods. Further, in respect of one entry pertaining to the appellant, it has been accepted that no truck has capacity of transporting the goods having weight of 100 MT and accordingly the Settlement Commission has held that the duty determined by considering removal of 100 MT of goods is not true and correct. The description of goods has not been mentioned by the department so far as the information given against 2 entries pertaining to the appellant and are to be termed as non-excisable goods. Therefore, the lower adjudicating authority has imposed penalty of Rs. 3,18,518/- upon the appellant without any cogent grounds. The appellant relied on following decisions in support of their contention

- Om Aluminium Pvt. Ltd. – 2014 (311) ELT 354 (Tri. – Ahmed.)
- Order No. W/11033-11034/2015 dated 17.7.2015 passed by CESTAT, Ahmedabad in the case of Bajrang Castings Pvt. Ltd.
- JSL Industries Ltd – 1999 (109) E.T 318 (Tri.)
- Kapadia Dyeing, Bleaching & Finishing Works – 2000 (124) ELT 82 (Tri.)
- Parshuram Cement Ltd. – 2003 (160) ELT 213 (Tri. – Delhi)
- Essvee Polymers (P) Ltd. – 2004 (165) ELT 291 (Tri. – Chennai)
- Sangnermar India Pvt. Ltd. – 2003 (158) ELT 703 (Tri. – Delhi)

4 Personal hearing in the matter was attended by S/Shri N. K. Maru and U. H. Qureshi, Consultants on behalf of the appellant and reiterated the grounds

of appeals and made written P.H. submissions and submitted that the case has been booked on the basis of Income Tax records shared by Income Tax authority that the appellant is broker only that they work only to allow purchasers and sellers to meet each other; that they are not involved in any clandestine activities; that penalty imposed on them may be set aside in view of no evidences against the appellant

**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 appellant. The issue to be decided in the present appeal is whether the impugned order, in the facts and circumstances of this case, imposing penalty under Rule 23(1) of the Rules is correct or otherwise.

6. The appellant has contended that the impugned order has been passed on assumption and presumption basis and on the basis of third party evidence without corroborative evidence. However, I find that the facts of the case revealed that the charge of clandestine clearance of the excisable goods has been framed on the basis of information shared by the Income Tax authority together with the incriminating documents recovered by them from the ship breaking unit. The gate passes and weighment slips recovered from the ship breaking unit evidenced that the ship breaking unit had clandestinely cleared the excisable goods without payment of Central Excise duty and without preparation of Central Excise invoices with intent to evade payment of Central Excise duty. The Director of the ship breaking unit under his statement recorded by the Central Excise officers on 27.11.2012 admitted clandestine clearances of the excisable goods and avowed that they sold the goods to purchasers through brokers on oral orders. The appellant under his statement dated 16.1.2013 recorded before Central Excise officer has also admitted that he acted as a broker in finalizing the deal of purchase and sale of M.S. Plates and M.S. scrap; that he perused 11 weighment slips on which his name had been written and he confirmed that he had brokered the deals in respect of the said weighment slips; that he did not keep any records relating to brokerage work undertaken by him and he was not in a position to state names of the buyers of the goods; that the ship breaking unit had sold these goods in cash

*[Signature]*

without issuing any invoice wherein he was broker. The statements of the buyers of the goods and some other brokers were also recorded which confirmed that the ship breaking unit had clandestinely cleared the excisable goods without payment of duty and received the sale proceeds in cash. I further find that in some cases, where details mentioned in Gate passes and Weightment slips recovered from the ship breaking unit and details mentioned in Central Excise invoices are found tallied. Therefore, authenticity of the documents cannot be doubted. Hence, the incriminating documents shared by the Income Tax authority corroborated with the depositions made by the Director of the ship breaking unit and the statement of the appellant himself are vital evidences, which prove that the appellant has concerned himself in sale and purchases of the clandestinely cleared goods which he knew that the same were liable to confiscation. Hence, I do not find any merit in the argument made by the appellant and hold that penalty under Rule 28(1) of the Rules is imposable upon the appellant for the reasons stated in below paragraphs.

6.1 I find that the statements recorded during course of investigation are substantial pieces of evidences, duly corroborated, which have not been retracted at any stage by the statement makers and therefore, as per the settled legal position sanctity of the same cannot be undermined by bald arguments only. The Hon'ble High Court of Madras in the case of Lawn Textiles Mills Pvt. Ltd. reported as 2015-TIOL-1924 HC-MAD-CX 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 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 ship breaking unit 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.

31 As noticed above the ship breaking unit has not denied any of the allegations, which were put forth except for simple and flimsy

retraction. If the ship breaking unit 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 ship breaking unit to state their case by coming forward to give a statement and producing records. The allegation of parallel invoicing has not been disproved in the manner known to law. Thus, we find that the Adjudicating Authority, the Appellate Authority as well as the Tribunal concurred on facts and each of them has given independent reasons for their conclusion.

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

*[Emphasis supplied]*

7. The appellant has also contended that name of buyers were not placed on record to sustain the illicit removal of the excisable goods cleared by the ship breaking unit and no money flow back has been taken on record; that no evidences have been placed on record which established that the goods under dispute had actually been loaded from the said ship breaking unit and actually removed from the factory gate of the said ship breaking unit. I find that the arguments of the appellant do not hold any field in view of fact that none of the persons including Director of the ship breaking unit, whose statements were recorded have denied that the excisable goods were neither loaded from the ship breaking unit nor denied that the goods were not removed from the factory gate of the ship breaking unit. The appellant on perusal of 11 weighment slips has in fact confessed in his statement dated 16.1.2013 that the excisable goods detailed therein were obtained from breaking of old ships and sold from the ship breaking unit, which has not been retracted at any stage. The appellant did not name the buyers in his statement to whom the excisable goods were sold, saying that he did not remember their names but he admitted to have got sold to many of them. It is strange that the appellant has now taken plea that the department has not established the details of buyers. I find that the records maintained by the ship breaking unit, which were affirmed by the Director of the ship breaking unit cannot be brushed aside and it is not the case of the appellant that the ship breaking unit maintained such records on y

*[Signature]* 16/1/2013



to falsely implicate the appellant.

7.1 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 supported by judgments of the Hon'ble Supreme Court in the cases of Shr. Shah Gumanma, reported as 1983 (13) ELT 1631 (SC) & Aaflet Textiles (i) P. Ltd. reported as 2009 (235) ELT 587 (SC).

7.2 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 D. Sukhawani reported as 1996 (83) ELT 258 (SC) and Rakesh Kumar Garg reported as 2016 (331) ELT 321 HC-Delhi. I am of the considered view that the admitted facts need not be proved as has been held by the Hon'ble CESTAT in the cases of Alex Industries reported as 2008 (230) ELT 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.

8. The appellant has submitted that copy of relied upon documents were not provided to them. I find that Para 14 of SCN dated 28.12.2014 clearly states that the documents relied upon are listed in Annexure-R to SCN and the copy of RJDs can be made available for inspection on demand. I do not find any request/s placed by the appellant that the appellant had made any request to inspect the relied upon documents and the request was not considered by the department. Further, copies of weighment slips were perused by the appellant at the time of recording of his statement dated 16.1.2013 and therefore, it cannot be said now that the RJDs mainly containing these weighment slips were not provided to the appellant.

9. In view of above, I find that the contentions raised by the appellant are of no help to him and the department has adduced sufficient oral and documentary corroborative evidences to demonstrate that the appellant has concerned himself in sale and purchase of the clandestinely cleared goods which he knew that the goods were liable for confiscation.

*[Signature]*

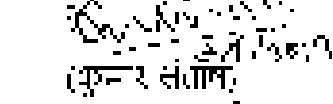
10. I further find that the impugned SON proposing recovery of Central Excise duty of Rs. 12,50,149/- along with interest and imposition of penalty under Central Excise Act and Rules framed thereunder was issued to the ship breaking unit Director of the ship breaking unit and other 5 co-noticees, the ship breaking unit, Director of the ship breaking unit and 2 noticees preferred applications before the Settlement Commission which vide order dated 28.5.2017 confirmed Central Excise duty of Rs. 9,17,116/- along with interest and imposed penalty of Rs. 50,000/- upon the ship breaking unit and penalty of Rs. 10,000/- on each of two co-noticees. Looking to the quantum of penalty imposed by the Settlement Commission upon ship breaking unit and Director of the ship breaking unit, I find that penalty of Rs. 3,18,518/- imposed upon the appellant is excessive. I therefore, reduce the penalty to Rs. 50,000/- to meet with the ends of justice.

11. In view of above, I modify the impugned order and reduce penalty to Rs. 50,000/- upon the appellant under Rule 2B(1) of the Rules.

10. अति उत्कर्षोऽपि इतदर्थं कीर्तयामि ते न निष्पत्ति उपरोक्त तर्को से किम जात है।

12. The appeals filed by the Appellants stand disposed off in above terms.

  
R.P.A.D.

  
प्रधान आयुक्त (अपील)  
Bhavnagar

By R.P.A.D.

To,  
Shri Hetal Navnitrai Shah,  
204, Satya Flats,  
Near Blood Bank,  
Mahila College Circle,  
Bhavnagar.

श्री. हेतल नवनीतराज शाह,  
२०४, सत्या फ्लैट्स,  
ब्लड बैंक के पास,  
महिला कॉलेज सर्कल,  
भावनगर

Copy for information and necessary action to:-

- 1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone - Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
- 3) The Assistant Commissioner, CGST Division-I, Bhavnagar.
- 4) Guard File.