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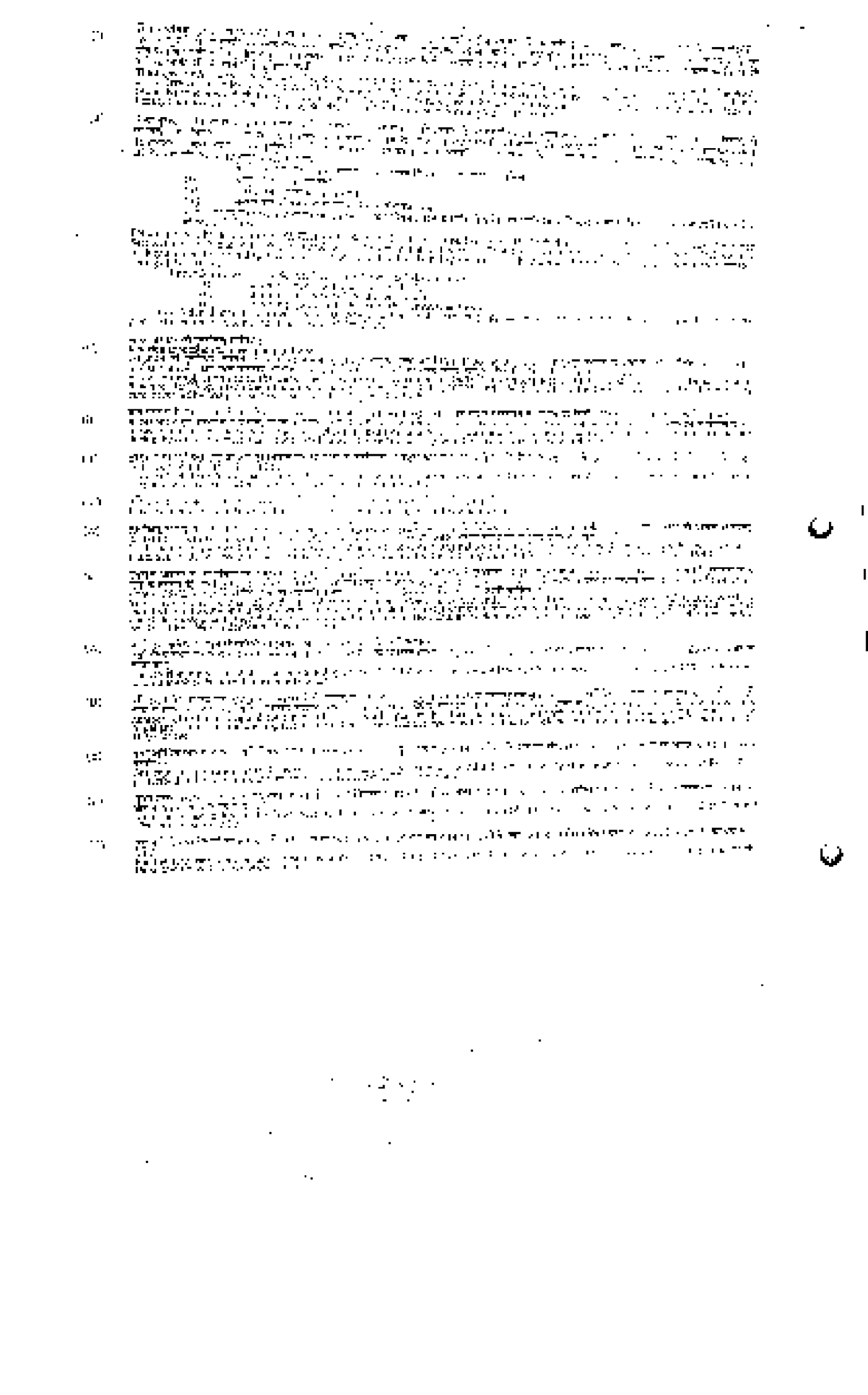
[illegible]-EXCU[illegible]-000-APP-[illegible]-[illegible]-022-2019

[illegible]	28.01.2019	[illegible]	31.01.2019

[illegible] Shri Kumar Santosh, Principal Commissioner [illegible]

[illegible]



:: ORDER-IN-APPEAL ::

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1 and Appellant No.2" as detailed in Table below) against Order-in-Original No. BHV-EXCUS-000-JC-40-2017-18 dated 21.12.2017 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST and Central Excise, Bhavnagar (hereinafter referred to as 'lower adjudicating authority') :-

Sl. No.	Appeal No.	Appellants	Name & Address of the Appellant
1.	V2/17/BVR/2018-19	Appellant No.1	M/s Gupta Steel (Shipbreakers) D-9, Opp OBC Bank, B/h Ram Mantra Mandir, Bhavnagar.
2.	V2/18/BVR/2018-19	Appellant No.2	Shri Kapoorchand Kakaram Bansal Proprietor of M/s Gupta Steel (Shipbreakers) D-9, Opp OBC Bank, B/h Ram Mantra Mandir, Bhavnagar.

2. The facts of the case are that Appellant No. 1 (holding Central Excise Registration No. AAMPB1617KXM001) was engaged in breaking of ships imported for breaking purpose at their plot at the Ship Breaking Yard, Alang. Intelligence gathered by the Directorate General of Central Excise Intelligence indicated that most of the Shipbreaking units of Alang/Sosiya of Bhavnagar District were evading payment of Central Excise duty by resorting to clandestine removal and under valuation of their finished goods viz. MS plates and scrap. Investigation carried out by the officers of DGCEI revealed that Appellant No. 1 evaded payment of Central Excise duty by resorting to clandestine removal of their finished goods, with active support of Shri Bharat Sheth, broker. The investigation also alleged that Appellant No. 1 indulged in under valuation of their goods and thereby evaded payment of Central Excise duty. The Appellant No. 1 availed fraudulent Cenvat credit without delivery of goods in collusion with Shri Bharat Sheth.

2.1 Show Cause Notice No. DGCEI/AZU/36-320/2012-13 dated 3.1.2013 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty of Rs. 65,38,706/- should not be demanded and recovered from them under proviso to Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as "Act") along with interest under Section 11AB of the Act and proposing imposition of penalty under Section 11AC of the Act read with Rule 25 of the

Central Excise Rules, 2002 (hereinafter referred to as 'Rules') and penalty of Rs. 92,289/- under Rule 26(2)(i) of the Rules. The Show Cause Notice also proposed imposition of penalty, *inter alia*, upon Appellant No. 2 under Rule 26 of the Rules.

2.2 The above said Show Cause Notice was adjudicated vide the impugned order which confirmed Central Excise duty of Rs. 65,38,706/- under Section 11A(1) along with interest under Section 11AA of the Act and imposed penalty of Rs. 65,38,706/- under Section 11AC of the Act with option of reduced penalty as envisaged under provisions of Section 11AC of the Act and penalty of Rs. 92,289/- under Rule 26(2)(i) of the Rules upon Appellant No. 1. It also imposed penalty of Rs. 3,00,000/- under Rule 26(1) of the Rules and Rs. 92,289 under Rule 26(2)(i) of the Rules upon Appellant No. 2.

3. Being aggrieved with the impugned order, Appellants No. 1 and 2 have preferred appeals on various grounds, *inter alia*, as below :-

<u>Appellant No. 1 :-</u>

(i) The impugned order has not at all dealt with the pleas made in written reply of the appellant; that judgments referred to and relied upon have been ignored by the lower adjudicating authority, which makes the impugned order non-speaking and non-reasoned; that the lower adjudicating authority had not recorded any finding on the arguments raised before him and has cursorily and mechanically dealt with the pleas of the appellant. The appellant reiterate the pleas made by them in their reply to SCN and written submission filed before the lower adjudicating authority as if the same are specifically canvassed herein also.

(ii) The adjudicating authority contravened the principles of natural justice by not allowing cross examination of transporters. It is elementary principles of natural justice that person who is sought to be proceeded against and in adjudication on the basis of third party statements should be afforded effective opportunity to challenge the correctness of the same as per law by cross examination.

(iii) The fact of clandestine removal has to be proved and it is not a matter of inference; it cannot be based upon mere surmises and assumptions. It is well settled principle of law that charges of clandestine removal are serious charges and cannot be established based upon some diaries of unverified nature; that diaries recovered from Shri Bharat Sheth during the search carried out by DGCEI is third party evidence which cannot be relied for demanding duty and imposing

penalty and relied upon case law of Tejwal Dyestuff Industries reported in 2007(216) ELT 310 in this regard;

(iv) Apart from the registers of the transporters, which are not having much evidentiary value, there is virtually no evidence on record to establish clandestine activities of the appellant;

(v) Onus to prove the clandestine removal of goods is on the Department who alleged that the Appellant had sold the goods illicitly. The Department should have disclosed evidence with reasons and documents. However, in the instant case, burden was not discharged by the Department.

(vi) The Appellant did not receive the amount, which has been indicated in private diaries and paid in cash to the Appellant. No investigation was extended to any purchaser that they had made any payment on account of the clandestinely removed goods to the appellant. The Department has not produced any evidence regarding inquiry from buyers about such purchase, flowback of funds from buyers, in absence of which findings recorded in impugned order are not sustainable.

(vii) The appellant had not indulged in undervaluation of goods and had not evaded Central Excise duty and had not received differential payment in cash from their buyers towards the goods sold by them. If the rates quoted by M/s Major and Minor and other agencies are actual rates prevailing during that period as reported by the adjudicating authority, then said prices should be taken for each and every invoices issued by them, which has not been done. They have sold goods either equal or higher than the prices circulated by the market research agencies. Hence, the prices of the market research agencies are not acceptable as transaction value of the goods sold by them.

(viii) The penalty imposed under Section 11AC of the Act is illegal as it is established principle that intentions about commission of any offence are to be proved. In absence of any evidence that excisable goods manufactured by the appellant had in fact been cleared without invoices by them, the allegation of clandestine removal excisable goods did not arise at all. No evidence was adduced in the SCN to establish that the alleged acts or omissions had been committed by the appellant deliberately or contumaciously or in flagrant violation of provision of law or with intention to evade duty. No penalty was imposable when there was no mala fide intention to evade payment of duty.

(ix) The Appellant had cleared MS scrap on payment of duty through brokers. The delivery of the goods was given at factory gate to the broker's representative

the buyers on payment of cheque or RTGS. There is no evidence on record to show that the Appellant did not receive the payments regarding sale of goods in question through banking channel. There is not evidence that the Appellant connived with the purchase through Shri Bharat Sheth by issuing only duty paying documents. Hence, penalty imposed under Rule 26 is liable to be set aside.

Appellant No. 2:-

(i) Appellant No. 2 has stated that the impugned order is non-speaking and non-reasoned one inasmuch as the lower adjudicating authority has not dealt with the plea made by them in their written submission, as well, judgments relied by them were completely ignored. The adjudicating authority contravened the principles of natural justice by not allowing cross examination of certain persons. It is elementary principles of natural justice that person who is sought to be proceeded against and in adjudication on the basis of third party statements should be afforded effective opportunity to challenge the correctness of the same as per law by cross examination.

(ii) That he is proprietor of the firm and proprietor and proprietary concern are legally one and the same person and therefore imposition of personal penalty under Rule 26 of the Rules is not sustainable and relied upon case laws of (i) Seven Seas Carpet- 2006 (194) ELT 497 (ii) Radiant synthetic industries- 2005 (202) ELT 71; and (iii) Vijay Metal Industries - 2006-(201) ELT 425.

4 Personal hearing in the matter was granted on 30.11.2017. The Appellant vide letter dated 27.12.2018 submitted written submission wherein it has been contended that.

(i) The investigation failed to show any amount received by them in respect of alleged clandestine removal of goods; that there is neither inquiry as to how the goods changed hands nor any corroborative evidence from the consignees / manufacturers and relied upon case laws of (i) Shree Industries Ltd.-2010 (258) ELT 505 (ii) Vasan Dyes & Chemicals Pvt Ltd. - 2007 (218) ELT 120 (iii) D.P. Inc. 2007 (216) ELT 242.

(ii) They are not liable to penalty under Section 11AC as there is evidence adduced to establish that the alleged acts or omission was committed deliberately with intention to evade to duty; that there are no incriminating documents on record but only statements of co-noticees. In absence of any corroborative evidence, there is not merits in imposing penalty upon them and relied upon case laws of (i) Ramesh J. Sukhawani - 1996 (83) ECR 456 (ii) Rakesh Kumar Garg - 2016 (333) ELT 221 (iii) Kanori Engg. Works - 2014 (306) ELT 373.

Findings:

5. I have carefully gone through the facts of the case, the impugned order, the Appeal Memoranda and written as well as oral submissions made by the Appellants. The issue to be decided is whether the impugned order, in the facts of this case, confirming demand on Appellant No. 1 and imposing penalty on Appellants No. 1 and 2 is correct, legal and proper or not.

6. I find that the Officers of the DGCEI carried out investigation and covered shipbreakers, including Appellant No.1, brokers, market research agencies, transporters, Angadias etc. to unearth alleged evasion of Central Excise duty by way of clandestine removal of goods. Searches carried out at the premises of various transporters resulted in recovery of registers/ documents showing details of transportation of goods from the premises of Appellant No. 1, viz. date, Truck No., Plot No., broker names etc. The investigation was extended at the check post maintained by Gujarat Maritime Board(GMB) which revealed that GMB maintained records of movement of vehicles at the Ship breaking yard which consisted details like, date, vehicle details, purpose, in & out time. On comparing the details recovered from Transporters with the records maintained by GMB, it was revealed that most of the entries were found tallying. I find that during search carried out at the residence and business premises of Shri Bharat Sheth, broker recovered incriminating documents showing purchase of Plates/Scrap from Appellant No.1 on behalf of their clients for which no corresponding invoices were found issued by Appellant No. 1. On being confronted with the evidences gathered during investigation, Appellant No. 2 in his statement dated 9.10.2012 recorded under Section 14 of the Act, inter alia, accepted about clandestine removal of goods, as reproduced at para 8.1 of the Show Cause Notice as under:

> "Q. 8: You are being shown the Panchnama dated 30.3.2010 drawn in the residential cum business premises of Shri Bharat Sheth and [illegible] No. [illegible] and 13 of the Annexure A to the said Panchnama. In the said diaries certain transactions made by or through Shri Bharat Sheth are mentioned in ciphered manner which were deciphered and explained by Shri Manish Patel an employee of Shri Bharat Sheth during the investigation by DGCEI. Such details pertain to transactions made by your company through Shri Bharat Sheth. You are being shown one page [illegible] which pertains to date 18.8.2009 of diary no. A/13. The entry appears in same as under:
>
> [illegible]
>
> Decoding of the above entry reads as 29 is the [illegible] 103.487 is variety (type of scrap plates), 3600 is [illegible] Rajasthan [illegible] is the registration number of truck in which goods were transported and 10.540 is the weight of goods cleared. Do you agree with the above explanation given by Shri Manish Patel who has worked as above

details in the said diary ?

Ans. 18: I have gone through the above said diaries and above entry. I have gone through the explanation given by Manish Patel and Rupen with the goods appear to be clearance [illegible] as stated by Manish Patel.

Q.19: When the details of above entry compared to the invoices issued by your company during the respective period, no invoice is found issued for the goods clearance as per above entry. What is your explanation?

A.19: I have compared the above entry with the invoice details [illegible] available with your office and I state that no invoice appears to be issued for the above clearances.

Q.20: [illegible] transactions written in above three diaries [illegible] either the goods cleared by your company or payment received by your company or diversion of goods [illegible] goods were cleared to one party and invoices were issued to another party by your company. Annexure DS-1.1, Annexure DS-1.2 and Annexure DS-1.3 are prepared on the basis of the details of such transactions in above three diaries and as explained/clarified by Shri [illegible] Shah and [illegible] employee. Please go through the same and explain.

A.20: I have seen all the above annexures [illegible] per the entries recorded in the diaries recovered from [illegible] and the explanations given by Manish Patel and Rupen [illegible] the details mentioned in the above annexures are correct.

Q.21: The entries relating to clearances of goods as mentioned in Annexure DS-1.1 were compared with the sales invoices issued by your company or your group company but no invoices could be found issued for the clearances mentioned in the above diaries. Please explain.

Ans.21: I do not have any explanation.

(Emphasis supplied)

6.1 I find that there are substantial evidences available on record in the form of documentary evidences recovered from the premises of transporters, broker and office of the GMB as well as statements of Appellant No. 2, broker, transporters, market research agencies etc. I also note that these substantial evidences duly corroborated have not been retracted by the Appellants, transporters etc. till date and at any stage and therefore, as per settled legal position, sanctity/validity of the statements cannot be undermined.

6.2 After analyzing the evidences available in the form of (i) registers recovered from the Transporters showing transportation of goods from the premises of Appellant No.1 which corroborated with records maintained by Gujarat Maritime Board (ii) incriminating documents recovered from the

residence/business premises of Shri Bharat Shah, broker showing goods purchased from Appellant No. 1 on behalf of their clients (iii) confirmatory statement of Authorized Person of Appellant No. 1 who admitted to have removed their finished goods without issuance of Central Excise invoices (iv) statements of transporters who transported the finished goods from the premises of Appellant No. 1. I am of the considered view that Appellant No.1 was indulged in evasion of Central Excise duty.

6.3 Appellant No. 1 has contended that the lower adjudicating authority has not allowed cross-examination of transporters and therefore, principles of natural justice have been violated. In this regard, I find that the lower adjudicating authority at para 3.11 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 Vs. Govt. of India reported in 1982 ELT (386) 386 has held that right of 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 afford such opportunity to the party so that he could assert his reasonable opportunity to defend himself. The case of K. Balan Vs. Govt. of India reported in 1982 ELT (386) 386 was distinguished by Hon'ble Tribunal Ahmedabad in Arya Fibres Pvt. Ltd. Versus Commissioner of C. Ex., Ahmedabad-II reported at 2014 (311) E.L.T. 529 (Tri.-Ahmd.) wherein it was held as under :-

"19. In K. Balan's case (supra), the Hon'ble Madras High Court held 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 secure him proper opportunity to defend himself. Adequate opportunity of cross examination is given wherever it is relevant, justified and genuine and is not for prolonging the proceedings. The decision in Kisan Industries case (supra) is again to the effect that cross examination cannot be granted as a matter of routine and is to depend upon the facts of each case. This Tribunal's decisions cited in the 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 cannot 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 Shivam Ply-N-Wood Pvt Ltd Vs. Commr. of Cus. & C.Ex. Aurangabad reported at 2004(177) ELT 1150 (Tri.-Mumbai), Hon'ble Tribunal, in the said order in para 6, has held as under :-

"6. ... Their contentions that principles of natural justice are violated because no cross examination of persons whose statements are relied upon, has not been granted in the facts of this case that all the statements relied upon were not retracted 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.

[illegible] Further, the Hon'ble Tribunal, in the case of M/s Rotary Dyers Vs CCE, Chennai reported as 2010(256) ELT [illegible] (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.

[illegible] In view of above facts, I find that request for cross-examination by the Noticees does not merit consideration and hence is not to be acceded to."

6.4 I find that documents recovered from the premises of the transporters contained details of transportation of consignments from the premises of shipbreakers, including Appellant No. 1, like date, truck no, shipbreaker's plot no., destination, name of broker etc and these details were also corroborated with the records maintained by Gujarat Maritime Board in the form of permit registers. Thus, evidences gathered from transporter's end were independently corroborated with the evidences gathered from GMB. I also find that none of the statements of transporters has been retracted. The transporters' role was limited to transportation of goods and they had no reason to admit in their statements, which were contrary to the facts. Thus, non granting of opportunity of cross examination of transporters by the lower adjudicating authority has not vitiated the proceedings. I, therefore, in agreement with the lower adjudicating authority, discard this contention being devoid of merits.

7. Regarding confirmation of demand of duty of Rs. 47,90,715/- on the ground of under valuation, Appellant No. 1 submitted that they had not indulged in undervaluation of goods and had not received differential payment in cash from their buyers towards the goods sold by them; that they had sold goods either equal or higher than the prices circulated by the market research agencies; that prices of the market research agencies are not acceptable as transaction value of the goods sold by them.

7.1 I find that the lower adjudicating authority has confirmed the charge of under valuation, *inter alia*, giving findings as under :-

"[illegible] The Show Cause Notice alleged evasion of Central Excise duty by way of undervaluation of the goods cleared out of breaking up of ships. [illegible] dispute that Market 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 [illegible]. It is in this backdrop that even Ship Breakers/Brokers/Buyers also subscribe to such market research agencies [illegible] of prevailing prices [illegible]

of all the type/grade at maximum rate. It is also not in dispute that re-rollable plates ranging from size 8 mm [illegible] to 25mm [illegible] emerge out of breaking up of ships and the majority of re-rollable plates emerged out of breaking of ships are of 12 mm size. In order to substantiate this allegation the DGCEI conducted inquiry with various marketing research agencies including M/s. Major & Minor with reference to pricing data which revealed that day to day price of 12mm size of Plate is almost equivalent to the average price of all size within the range of 8mm to 25mm.

5.16 On comparison of the price mentioned in the invoices of M/s Gupta vis a vis of the prices estimated by M/s. Major & Minor, it was clearly revealed that in many cases the transaction value declared by the M/s Gupta were far less than the actual value prevailing in the market during the respective period. The ship breakers by not disclosing the actual size / thickness of M S Plates cleared by them undervalued MS Re-rollable Plates so as to enable them to declare only part of the value of such goods in the invoices and collect the differential value in cash and shows the declared invoice value, by way of unaccounted cash amounts.

5.17 I, therefore, find the substance in the allegation of under-valuation in the present show cause notice particularly when diaries seized from Shri [illegible] Sheth already containing details of cash transactions with various Brokers/Shroffs/Angadias etc. Had the charge of allegation of under-valuation been not true, there would not have been involvement of transfer of huge amount of cash which includes part of the undervalued amount of ship breaking materials.

5.18 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, Dealers / 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 [illegible] Rates of Scrap 2% lesser than the rate of M/s. Major and Minor is acceptable and the above 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 is clearly recoverable from M/s Gupta. Further, I also find that a large number of ship breaking units, dealers from Alang and Bhavnagar were members of M/s. Steelmint and were receiving day to day updates on the daily price rates of ship breaking materials through SMS alerts and emails. It is also revealed that M/s Steelmint were adopting the most scientific and appropriate analysis of the data gathered by them. The Ship breakers were fully aware of the price of the scrap generated from ship breaking and intentionally undervalued the goods with intent to evade payment of Central Excise duty. [illegible] M/s Gupta has undervalued their excisable goods with intent to evade payment of Central Excise duty and thus based on calculation done by DGCEI, I find that M/s Gupta have evaded Central Excise duty of Rs. [illegible]

7.2 I find that the prices of MS Plates/ Scrap circulated by market research agencies like M/s Steel Rates Info and M/s Major and Minor Infra Pvt Ltd were considered to ascertain correctness of the transaction value declared by the Appellant. I find that said market research Agencies determine the price of MS Plates/ Scrap after taking into account various factors like demand and supply, prices prevailing in different parts of country etc and then circulate the price. The fact that large number of Ship breakers, brokers and dealers from Alang and Bhavnagar have subscribed to their services gives sanctity to the services rendered by the said agencies and there is no valid reason to discard their prices as unreasonable. I, therefore, hold that the lower adjudicating authority has rightly confirmed demand on the charge of under valuation of the goods cleared by Appellant No. 1.

8. Appellant No. 1 has argued that demand of duty confirmed on the basis of diaries recovered from the premises of third party like broker Shri Bharat Sheth is not sustainable. In this regard, I find that the diaries maintained by Shri Bharat Sheth recorded licit as well as illicit transactions of Appellant No. 1 and only those entries for which corresponding sale invoices were not issued by Appellant No. 1 have been taken into account for the purpose of demanding duty. I also find that transactions reflected in the said private records were further corroborated by statements of the transporters, who accepted to have transported the goods from the premises of Appellant No. 1. The registers maintained by the Transporters contained details of transportation of goods from the premises of Appellant No. 1 which were further corroborated with the records maintained at GMB check post. Therefore, demand cannot be said to be based only on third party documents but duly corroborated by host of evidences recovered during investigation. I also find that the very fact of many persons involved negate the concept of third party. In the instant case, the evidences of clandestine removal have been gathered by the investigating officers successfully from many places and therefore, these documents cannot be called third party documents but corroborative and supporting evidences. I rely upon the Order of the Hon'ble CESTAT in the case of Om Prakash Agarwal reported as 2017 (348) ELT 125 (Tri-Del), wherein it has been held that :-

> "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 procurement and further manufacture of finished items by the appellant was sought to be sustained. Admittedly, the case is not only based on the [illegible] evidence collected from the supplier's end but also is corroborated by the responsible persons of the appellant's end. The receipt and use of the such unaccounted raw materials for further manufacture has apparently been admitted by the appellant and the duty short paid has also been discharged during the course of investigation itself. The appellant has given emphasis on non-admissibility of the earlier

corroboration 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 discarded. 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 person in the appellant's unit, he categorically admitted to receipt/clearance of dutiable items. However, he did not name the buyers to whom such products were sold. In such situation, it is claimed 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 person-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 retracted or later contested for their authenticity. In the present appeal, the Ld. Counsel for appellant is making a belated assertion that the statement by the partner of the appellant firm is not voluntary. Various case laws relied upon by the appellant are not of any support in the present case. In the cases involving unaccounted manufacture and clearance, the evidences of each case are to be appreciated for conclusion. As noted already, the third party records of the supplier's side as affirmed by the person in charge and further corroborated by the appellant cannot be dismissed only on the ground that further evidences like transportation and receipt of money has not been proved. In a clandestine manufacture and clearance, such mode 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]

9. Appellant No. 1 has contended that the Department has not discharged burden of proof for alleged illicit transactions and that evidences regarding buyer of goods, flow back of funds from the buyers were non existent. In this regard, I have already discussed in Paras supra that the Department has adduced sufficient evidences in the form of incriminating documents recovered from the premises of Shri Bharat Sheth which contained details of goods purchased by them on behalf of their clients from Appellant No. 1 without cover of Central Excise invoices and without payment of Central Excise duty. These evidences were further corroborated in the form of statements of transporters who deposed that they had transported the goods from the premises of Appellant No.1. I also find that none of the statements have been retracted so far. Considering substantial evidences in the form of documentary and oral evidences on record, I am of the considered opinion that the Department has discharged its burden of proof for clandestine removal of goods by Appellant No.1. Regarding money flow back, I find that lower adjudicating authority has discussed at Para 2.27 about cash payments made Shri Bharat Sheth to Appellant No.1. In cases of clandestine removal, Department is not required to prove the case with mathematical precision. My views are supported by the order passed by the Hon'ble Tribunal in the case of A.N. Guha & CO. reported in 1996 (86) E.L.T. 333 (Tri.), wherein it has been held that,

... In such cases of clandestine removal, it is not possible for the Department to prove the same with mathematical precision. The Department is expected to have discharged their burden if they place so much of evidence which, prima facie, shows that there was a clandestine removal. If such evidence is produced by the Department, then the onus shifts on to the Appellants to prove that there was no clandestine removal."

9.1 The Hon'ble CESTAT in the case of Ramachandra Rexin Pvt Ltd reported as 2013 (295) E.L.T. 116 (Tri. - Bang.) has held as under:-

"7.3 In a case of clandestine removal, involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by the Department in a mathematical precision. After all, a person indulging in clandestine activity takes sufficient precaution to hide/destroy the evidence. The evidence available shall be those left in spite of the best care taken by the persons involved in such clandestine activity. In such circumstances, preponderance of probabilities and circumstances of the case have to be looked into and a decision has to be arrived at on the yardstick of 'preponderance of probability' and not on the yardstick of 'beyond reasonable doubt'."

9.2 The Hon'ble Supreme Court as reported in 2014 (302) E.L.T. A61 (S.C.) has upheld the above order of the CESTAT.

9.3 I also rely on the order passed by the Hon'ble CESTAT, Ahmedabad in the case of Apurva Aluminium Corporation reported at 1996 (261) E.L.T. 515 (Tri. Ahmd.), wherein at Para 5.1 of the order, the Tribunal held that,

"Once again the onus of proving that they have accounted for all the goods produced, shifts to the appellants and they have failed to discharge this burden. They want the department to show trail invoice details of goods transported or not transported. There are several decisions of Hon'ble Supreme Court and High Courts wherein it has been held that in such clandestine activities, only the person who indulges in such activities knows all the details and it would not be possible for any investigating officer to unearth all the evidences required and prove with mathematical precision, the evasion or the other illegal activities".

9.4 I find that the statement of Appellant No. 2 admitting removal of goods without issuing Central Excise Invoices is inculpatory and not retracted has to be held as admissible as held in the case of M/s. Hi Tech Abrasives Ltd. reported as 2017 (346) ELT 606 (Tri.-Del.) as under:

"7.4 On careful consideration of the facts and circumstances as detailed above, I find that the statement of Director is the basis for the demand. The statement is inculpatory and unambiguous. 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 charges as well as of clandestine clearance of goods covered by the entries in the private documents 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 and every 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 corroborated by the other evidences in the private records. There is no averment that the statement has been taken under duress. The assessee also does not appear to have asked for cross-examination during the process of adjudication.

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

16. The evidence of clandestine clearance has been brought on record only as a result of investigation undertaken by the department. The evidences unearthed by the department are not statutory documents and would have been ... but for the investigation. Therefore, this is a clear case of suppression of facts from the department and accordingly the extended period of limitation is invocable in this case and hence the demand cannot be held to be time-barred."

[Emphasis supplied]

9.5 I also rely on the Order passed by the Hon'ble CESTAT in the case of M/s. Karori Engg. Works reported as 2004 (166) E.L.T. 373 (Tri. Del.) wherein it has been held that the statement is a substantive piece of evidence which can be used against the maker. The Hon'ble CESTAT in the case of M/s. N.K Sponge P Ltd reported as 2015 (328) ELT 453 (Tri-Del) has also held that when preponderance of probability was against the Appellant, pleadings of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted for and no input-output ratio prescribed by law etc. are of no use. The Hon'ble High Court in the case of International Cylinders Pvt Ltd- reported at 2010(255) ELT68(P.H.) held that once the department proves that something illegal had been done by the manufacturer which prima facie shows that illegal activities were being carried, the burden would shift to the manufacturer. It is a basic common sense that no person will maintain authentic records of the illegal activities or manufacture being done by it. 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.

9.6 In view of above, the various contentions raised by the Appellants are of no help to them since the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that Appellant No.1 has evaded payment of Central Excise duty by resorting to clandestine removal of the finished goods and undervaluation of goods. I, therefore, hold that confirmation of demand of Central Excise duty of Rs. 65,06,706/- by the lower adjudicating authority is correct, legal and proper.

10. Since demand is confirmed, it is natural consequence that the confirmed

demand is required to be paid along with interest at applicable rate under Section 11AA of the Act. I, therefore, uphold order to pay interest on confirmed demand.

10.1 This is a case of clandestine removal of the finished goods as held in above Paras and therefore the impugned order has correctly imposed equal and mandatory penalty of Rs. 57,78,279/- on Appellant No. 1 under Section 11AC of the Act. The impugned order has correctly given option of reduced penalty of 25% to Appellant No. 1 as prescribed under Section 11AC of the Act, hence, I concur with this decision on penalty on Appellant No. 1.

10.2 Regarding imposition of penalty under Rule 26(2) of the Rules, Appellant No. 1 has contended that the Appellant has cleared MS scrap on payment of duty through brokers; that the delivery of the goods was given at factory gate to the brokers accompanying the buyers on payment of cheque or RTGS; that there is no evidence on record to show that the Appellant did not receive the payments regarding sale of goods in question through banking channel or that the Appellant connived with the purchaser through Shri Bharat Sheth by issuing only duty paying documents. I find that the Appellant No. 1 was involved in passing Cenvat credit to rolling mills through Shri Bharat Sheth, broker without delivery of goods. The DGCEI unearthed the modus operandi adopted by Appellant No. 1 by deciphering the entries recorded in diaries recovered during search as elaborated in detail at para [illegible] of Show Cause Notice. Thus, it is beyond doubt that Appellant No. 1 colluded with Shri Bharat Sheth, broker in fraudulent passing of Cenvat credit without giving delivery of goods. Hence, penalty of Rs. 92,285/- imposed by lower adjudicating authority on Appellant No. 1 under Rule 26(2) of the Rules is correct and I uphold the same.

11. The Appellant No. 2 has contended that he is proprietor of the firm and proprietor and proprietary concern are legally one and the same person and therefore, imposition of personal penalty under Rule 26 of the Rules is not sustainable. I find that penalty of Rs. 9,00,000/- has been imposed under Rule 26(1) of the Rules and penalty of Rs. 92,285/- has been imposed under Rule 26(2)(i) of the Rules upon the Appellant No. 2 who is proprietor of Appellant No. 1. I find that proprietorship has no separate legal existence from its proprietor. The rights and obligations of proprietary concern are in fact rights and obligations of its proprietor and hence, separate imposition of penalty upon proprietor is not legal as held by the Hon'ble High Court of Punjab & Haryana in the case of Vinod Kumar Gupta reported as 2013(287) ELT 34 (P & H). I, therefore, set aside the penalty imposed under Rule 26(1) and Rule 26(2)(i) on Appellant No. 2. The impugned order is set aside to that extent.

12. In view of above, I reject the appeal of Appellant No. 1 and allow the appeal of Appellant No. 2.

12.1 [illegible]

12.1 The appeals filed by the Appellants are disposed off as above.

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

सत्यापित
[illegible]
अधीक्षक (अपील्स)

By R.P.A.D.

To,

1. M/s Gupta Steel (Shipbreakers)
   D-9, Opp OBC Bank,
   B/h Ram Mantra Mandir,
   Bhavnagar.

2. Shri Kapoorchand Rakaram Bansal
   Proprietor of M/s Gupta Steel (Shipbreakers)
   D-9, Opp OBC Bank,
   B/h Ram Mantra Mandir,
   Bhavnagar.

Copy to:

1) The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone, Ahmedabad for his kind information please.
2) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar for necessary action.
3) The Joint Commissioner, GST & Central Excise, Bhavnagar for necessary action in the matter.
4) Guard File