

ORDER IN APPEALS

The three mentioned appeals have been filed by the Appellants (hereinafter referred to as 'Appellant No.1 to Appellant No.3 as detailed in the Table) against Order-in-Original No. CHV-EXCISE-DUB-IC-35-2017/18 dated 9.12.2017 (hereinafter referred to as 'original order') passed by Joint Commissioner, GST and Central Excise, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority') :-

S. No.	Appeal No.	Appellant No.	Details of the Appellant
1	27/523/MVR/2017	Appellant No. 1	M/s. Bansal International (P) Ltd., Plot No. 1, Soshiy Ship Breaking Yard, Alang, Bhavnagar.
2	27/521/MVR/2017	Appellant No. 2	Sri Vijay K. Bansal, Authorised Signatory of M/s. Bansal International (P) Ltd., Plot No. 1, Soshiy Ship Breaking Yard, Alang, Bhavnagar.
3	27/551/MVR/2017	Appellant No. 3	Shri Vinodbhai Amreshbhai Patel, Plot No. 112, Escort Mega City, Opposite Victoria Park, Bhavnagar.
	27/523/MVR/2017	Appellant No. 4	Shri Ashok Amreshbhai Patel, Proprietor of M/s. Shree Krishna Enterprise, 304, Shoppers Point, Parvat Chowk, Waghavadi Road, Bhavnagar - 384 001.

4. The brief facts of the case are that Directorate General of Central Excise Intelligence (hereinafter referred to as "DGCIIT") issued Form Central Notice F.No. DGCIIT/2017/36-55/17-18 dated 12.6.2017 to the Appellant No. 1 in Appellant No. 1 allowing clearances of MS Scrap/Plate. But clearance from breaking of ships clandestinely without issuance of the invoices and without payment of Central Excise duty to various customers and also under varying the goods as under :-

- (a) Appellant No. 1 clandestinely manufactured and cleared finished excisable goods amounting Central Excise duty of Rs. 1,02,54,796/- under Section 11A(i) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') without payment of Central Excise duty.
- (b) Interest should not be recovered from Appellant No. 1 under Section 11A of the Act;
- (c) Penalty should not be imposed upon Appellant No. 1 under Section 11A(i) of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the CEAR');
- (d) Penalty of Rs. 16.27,580/- should not be imposed under Rule 26(2) (i) of the CEAR pertaining to non-issuance of valid credit by issuing excisable material.

without actually delivering the goods.

- (e) Penalty should not be imposed upon Appellant No. 2 under Rule 26(1) & (2) of the CER.
- (f) Penalty under Rule 26(1) & 26(2) of the CER should not be imposed upon Appellant No. 3 and Appellant No. 4, who furnished 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 CF Duty of 1,62,54,786/- under Section 11A of the Act, along with Interest under Section 21MA and imposed penalty of Rs. 1,62,54,786/- 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. 16,27,592/- under Rule 26(2)(i) of the CER on Appellant No. 1;

(iii) imposed penalty of Rs. 16 lacs under Rule 26(1) of the CER and Rs. 16,27,592/- under Rule 26(2) of CER on Appellant No. 2;

(iv) imposed penalty of Rs. 1,57,277/- on Appellant No. 3 and Appellant No. 4 each under Rule 26(1) of the CER;

(v) imposed penalty of Rs. 16,27,592/- under Rule 26(2) 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, *inter alia*, on the various grounds as under :-

Appellant No. 1 :-

1) 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 parked boxes, diaries, etc. seized under Panchnama dated 30.5.2010 from the office cum residence premises of Shri Vinod Kober and Shri Kishore Kober; that statements of vehicle owner / transport agencies cannot be relied upon without any corroborative evidence; that they relied upon the case-laws as under :-

- (i) Mahaxamri Dyeing Mill reported as 2016(243) JT 453 (T1-And)
- (ii) Alliance Agro. Pvt. Ltd. reported as 2016 (338) 2LT 749 (T1-Che)
- (iii) Jindal Drugs Pvt. Ltd. reported as 2016 (240) HT 157 (P&R)

(i) The lower adjudicating authority has erred in recording findings that the seized private records have been examined on the basis of statements of brokers, transporters, etc. as there are nothing but the third party evidences; that without adding evidence of trucks and trailers the statement of authorized person of the appellant is not sustainable; that private records/diaries, trip registers, records and register of Gujarat Maritime Board, statements of brokers are not direct material evidence; that the charge of manufacturing removal is required to be established along with date of the production, electricity and raw material from which the final product has been manufactured; that permission to cross-examine the witness had not been granted and thus the impugned order has been passed only on the basis of presumption and assumption.

(ii) The on sale of goods used sold at the factory gate and transportation of the said goods used to be managed by the buyer of the goods or by the brokers and the freight charges were also paid by the buyers and after passing of the trucks loaded with goods from the factory gate there was no control of Appellant No. 1; It is the fact that Appellant No. 1 had received sales proceeds of the goods from the concerned buyers either through cheques or through RTGS; that they relied upon the order of Commissioner, Central Excise, Vapi who had in similar issue of assessing of the fraudulent Constat credit dropped penalty proposed under Rule 2b(2) of the CB&I that penalty of Rs. 1,62,54,786/- under Section 11AC of the Act imposed on Appellant No. 1 is also required to be set aside.

(iii) Regarding confirmation of differential CTD duty (Annexure D10) to the Show Cause Notice in respect of under valuation of the goods Appellant No. 1 submitted that rates quoted by M/s. Major and Minor as well as other agencies/person cannot be considered as usual rates; that differentiating invoices on the basis of price mentioned in the goods is not proper; that the prices regulated by the market research agencies cannot be taken as acceptable Intervention 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 exported money over and above the amount shown in the respective declarations and invoices. The impugned order concerning differential amount of CTD duty on the charge of Under-valuation is not correct.



2) Regarding imposition of penalty of Rs. 1,82,51,700/- under Section 11AC of the Act the appellants submitted that the lower adjudicating authority has not mentioned any section or title 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, etc.

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. 16,54,238/- under Rule 26(7)(i) of the CTR, Appellant No. 2 reiterated submissions raised in favour 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 11.01.2019 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 3rd party evidence and statements cannot be relied upon for confirming demand; that the Show Cause Notice is time barred as private records have been seized on 30.5.2018 whereas Show Cause Notice has been issued on 03.06.2017 for the period from 2006-09 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 cases of Om Aluminium Pvt. Ltd. reported as 014 (211) ELT 354 (Tri-India); Pushpan Pharmaceuticals Co. reported as 1985(76)ELT401(SC) and Bajrang Casting - Order No. A/11035/1103/2015; 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 of appeals, which are as under :-



(i) that they made request for cross - examination of Shri Mahendrabhai A. Rana, Partner of M/s. Maruli Meta 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 imposed 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 relies upon the case laws as under:-

(a)	Shalimar Agencies reported as	2000 (123) ELT 166 (Tri.)
(b)	L. Chinmasekar reported as	1990 (48) ELT 29 (Tri.)
(c)	Takshita Spinnings reported as	2004 (137) ELT 568 (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 in violation against the principle of natural justice as opportunity to cross examine was not been provided and relied upon the decision of the Hon'ble CESTAT in the case of Shalimar Agencies reported as 2000 (123) ELT 166 (Tri.); that diary / CD / pen drive recovered from Appellant No. 3 during the search conducted by the officers of DCCEI were containing details of Est/mates and not bills; that no manufacturers or buyers of goods or Angadia have admitted that goods have been stored in the clandestine manner.

(iii) that it is surprising that the lower adjudicating authority has considered tallying some cases in diaries with those in electronic storage device as corroborative of clandestine removal of the goods

(iv) that the removal of goods from a factory involves physical movement and transportation however, such movement and to whom the goods removed clandestinely were sold have not been captured by the lower adjudicating authority; that there is no evidence to suggest that the Appellant has concealed



is included with the ship breaker to facilitate the evasion of Central Excise duty.

(v) that they have not dealt with the excisable goods as required under Rule 26 of the CER so as to impose penalty; that two brothers living in the same house would not mean that they were conducting their business together and therefore, to impose penalty under Rule 26 of the CER charges have to split out and role played by each person should also be brought out and the Appellant should not be imposed penalty for removing goods involving duty of Rs. 11,50,227/.

4. Personal Hearing :-

Personal hearing in respect of Appellants was fixed on the following dates :-

Appellant No.	Dates of Personal hearings
Appellant No. 1 & 2	08.11.2018, 26.11.2018, 16.12.2018, 09.01.2019
Appellant No. 3	29.11.2018, 19.12.2018, 08.01.2019

However, Appellant No. 1 to 3 failed to avail opportunity of personal hearing and therefore, their appeals are taken up for disposal on merits on the basis of Appeal Memorandum.

4.1 Personal hearing in respect of Appellant No. 4 was attended by Shri. Madhav N. Velinkariya, Advocate during which he reiterated the grounds of appeal and submitted written submissions, inter alia, contending that cross-examination of Shri Mahendra Rana, partner of M/s. Maruti Metal Industries has not been granted; that the impugned order suffers from many legal infirmities and order is passed in violation of principles of natural justice; that only because Appellant No. 3 and Appellant No. 4 lived in same house would not mean both are involved; that entries made in the diaries and data retrieved from pen drive and CD recovered from Appellant No. 4 were only Estimates and not bill; that physical movement of allegedly clandestinely removed goods has not been proved; that it is not proved that Appellant No. 4 was involved in issue of invoices without physical delivery of goods; that penalty is not imposable under Rule 26 of the CER on Appellant No. 4 as he has not dealt with any goods as prescribed under Rule 26 and relied upon Division of HOD's

CESTAI in the case of Godrej Boyce & Mfg. Co. reported as 2022(148)ELT161(1) and A. M. Kulkarni reported as 2003(56)RIT573(Tri-Bun).

4.2 Describe personal hearing notices sent to the Commissionerate, to 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.

4.3 Appellant No. 1 to Appellant No. 4 have filed applications for condonation of delay in filing of appeals by 10 days, 15 days, 24 days and 25 days respectively beyond normal appeal period of 60 days on the ground that Appellant No. 1's factory was closed and Chokidar who used to receive bills was not conversant that their chartered accountant was busy with work pertaining to Income Tax Department. Since, the delay is within 90 days of normal period, I condone delay in filing of appeals by these four Appellants and proceed to decide the appeals 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 issues to be decided in these appeals are as under :-

(a) Whether Appellant No.1 has concealingly manufactured and cleared finished excisable goods attracting CE duty of Rs. 52,09,032/- and whether they have undertaken the finished goods to short pay CE duty of Rs. 58,95,530/- and whether Rs. 1,62,54,786/- should be recovered from them along with interest or not;

(b) Whether penalty of Rs. 1,62,54,786/- should be imposed on Appellant No. 1 under Section 11A(i) of the Act read with Rule 25 of the CTR and also Rs. 16,27,102/- under Rule 26 (2) (i) of the CTR or not ;

(c) Whether penalty of Rs. 16,27,102/- is imposable on Appellant No. 1 under Rule 26(2) or not;



(d) Whether penalty of Rs. 76 Lakhs should be imposed upon Appellant No. 2 under Rule 26(1) and also Rs. 16,27,592/- under Rule 26(2) of the CEA or not;

(e) Whether penalty of Rs. 11,50,222/- under Rule 26(1) and also penalty of Rs. 16,27,592/- under Rule 26(2) of the CEA should be imposed on Appellant No. 3 or not;

(f) Whether penalty of Rs. 11,50,222/- under Rule 26(1) and also penalty of Rs. 16,27,592/- under Rule 26(2) of the CEA should be imposed on Appellant No. 4 or not.

3. I find that the officers of Directorate General of Central Excise Intelligence conducted coordinated search and inquiry at the offices of Appellants, various brokers, Authorised Signatory / Director, Transporters, Gujarat Maritime Board (GMB), Market research agencies, etc. from where incriminating documents like Diaries, Note books, Registers/Ship registers, etc. were recovered and statements of the concerned persons recorded under Section 14 of the Act.

6.3 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/inquiry that the manufacture and clearances of excisable goods, namely, Plates, Scrap, etc. to buyers were made against unaccounted / cash transactions. All appellants played a crucial role in all the said and executing unaccounted transactions explained the details of these private records and the transactions recorded in their private records recovered during search. Appellant No. 2 in his statement dated 25.2.2013, has *inter-alia*, categorically accepted that despite removal of the excisable goods by Appellant No. 1 as per order:-

(Signature)

2/23/2011

... of ship breaking materials especially Stainless Steel contents. Apart from taking the business of trading of ship breaking materials. They are also dealing of ship breaking materials in the name of M/s. Shree Krishna Enterprises.

Question - 9: What are the areas and conditions under which business dealings are done with Shri. Vinod Patel and Shri. Kishore Patel?

Answer - 9: As I stated above, we do not sell any goods through brokers. Our business is with Shri. Vinod Patel & Shri. Kishore Patel as a representative of M/s. Shree Krishna Enterprises for supply of ship breaking materials to the buyers.

Question - 10: The officers of NCCSI, Ahmedabad conducted search in the residence area/business premises of Shri. Vinod Patel and his brother Shri. Kishore Patel on 30.03.2010. During the search, various papers, records including diaries were recovered from the premises and other items by the officers. The details mentioned by Shri. Vinod Patel are written in captured and seized manner. To get the explanation about the details written in the said diaries, statements of Shri. Vinod Patel were recorded during the investigation. In this regard, certain documents like details written by him in the above said diaries, you are being shown as the statements of Shri. Vinod Patel dated 24.04.2010, 30.04.2010, 05.12.2010, 23.12.2010, 05.01.2011 and 26.02.2011. 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 sure signatures are genuine. I don't have any comments on this.

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

Answer - 11: I know Shri. Kishore Patel and he 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 had several consignments cleared through their dealing to various consignees.

Question - 12: Can you please elaborate on the transactions done with M/s. Shree Krishna Enterprises? Were normally placed order for purchase of materials in the name of M/s. Shree Krishna Enterprises?

Answer - 12: As I said, we had a number of 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. Kishore Patel.

Question - 13: You may please refer to the invoices dated 26.04.2010, 17.05.2010, 01.10.2010, 12.11.2010 and 29.03.2011 of Shri. Kishore Patel, Proprietor of M/s. Shree Krishna Enterprises wherein he claimed Shri. Vinod Patel as the connection in the business of M/s. Shree Krishna Enterprises. In your answer, you have mentioned the name of Shri. Vinod Patel also as broker for the consignments supplied to M/s. Shree Krishna Enterprises. Please clarify.