[illegible]

O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

क [illegible] Appeal /File No. [illegible] [illegible] O.I.O. No. [illegible] BHV-EXCUS-000-JC-[illegible]-2017-18 [illegible] Date 14.12.2017

ख [illegible]

BHV-EXCUSS-000-APP-43 to 45-2019

[illegible] / Date of Order: 13.02.2019 [illegible] / Date of issue: 21.02.2019

[illegible] /
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / ST / GST, Rajkot/Jamnagar/Gandhidham

घ [illegible] /Name & Address of the Appellants & Respondent :-

1. M/S BANSAL SHIP BREAKING PVT LTD, PLOT NO. 158, SOSIYO SHIP BREAKING YARD, BHAVNAGAR
2. SHRI VIJAY R. BANSAL, AUTHORISED SIGNATORY OF M/S BANSAL SHIP BREAKING PVT LTD, PLOT NO 158, SOSIYO SHIP BREAKING YARD, BHAVNAGAR
3. SHRI [illegible] PATEL, PLOT NO. 102, [illegible] MEGA CITY, OPPOSITE VICTORIA PARK, BHAVNAGAR

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) [illegible]
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) [illegible]
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at [illegible] Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para-(i) above

(iii) [illegible]
[illegible]

(B) [illegible]
[illegible]

:: ORDER IN APPEAL ::

The below 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. BHV-EXCUS-000-JC-37-2017-18 dated 14.12.2017 (hereinafter referred to as 'the impugned order') passed by Joint Commissioner, [illegible] Excise, Bhavnagar (hereinafter referred to as 'the adjudicating authority'):-

Sr. No.	Appeal No.	Appellant No.	Details of the Appellant
1	V2/522/BVR/2017	Appellant No. 1	M/s. [illegible] Shipping Pvt. Ltd., Plot no. 108 Sosiya Ship Breaking Yard, Bhavnagar.
2	V2/530/BVR/2017	Appellant No. 2	Shri [illegible], Authorised Signatory of M/s. [illegible] Shipping Pvt. Ltd., Plot No. 108, Sosiya Ship Breaking Yard, Bhavnagar.
3	V2/574/BVR/2017	Appellant No. 3	Shri [illegible] Patel, Plot No. [illegible], [illegible] Mega City, Opposite Victoria Park, Bhavnagar.

2. The brief facts of the case are that Directorate General of Central Excise Intelligence (hereinafter referred to as 'DGCEI'), issued Show Cause Notice F.No. DGCEI/AZU/36-97/2013-14 dated 12.9.2013 to the Appellant No.1 to Appellant No. 3 alleging clearances of M.S. Scrap/Plates etc. obtained from breaking of ships clandestinely without issuance of the invoices and without payment of CE duty to various customers and also undervaluing the goods. Proposed :-

(a) Central Excise duty of Rs. [illegible] for clandestine manufacture and clearance of [illegible] excisable goods and Central Excise duty of Rs.9[illegible],23,905/- on account undervaluation of goods should not be demanded from Appellant No.1 under Section 11A(4) of the Central Excise Act,1944 (hereinafter referred to as 'the Act'), interest should not be recovered from Appellant No.1 under Section 11AA of the Act;

(b) Penalty should not be imposed upon Appellant No.1 under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as the 'CER');

(c) Penalty should not be imposed upon Appellant No. 2 under Rule 26(1) & (2) of the CER.

(d) Penalty under Rule 26(1) of the CER should not be imposed upon Appellant No. 3 who concerned himself in selling of excisable goods in clandestine manner, which they knew and had reason to believe that the same were liable to confiscation.

Page [illegible]

2.1. The above SCN was adjudicated vide the impugned order as under :-

(i) confirmed demand of CE duty of Rs. 1,55,92,22[illegible]/- under Section 11A of the Act, along with interest under Section 11AA and imposed penalty of Rs. 1,55,92,27[illegible]/- 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. 10 lakh under Rule 26(1) of the CER on Appellant No. 2;

(iv) imposed penalty of Rs. 16,71,475/- on Appellant No. 3 under Rule 26(1) of the CER;

3. Being aggrieved with the impugned order, Appellant No.1 to Appellant No.3 preferred appeals, inter-alia, 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 private books, diaries, etc. seized under Panchnama dated 20.3.2010 from the office-cum-residence premises of Shri Vinod Patel and Shri Gaurav A. Patel; that statements of various owners / transport agencies cannot be relied upon without any corroborative evidence; that they relied upon the case laws as under :-

(i)	Mahalaxmi Dyeing M.	reported as 2016(340) ELT 133 (Tri-Ahd)
(ii)	Alliance Alloys Pvt. Ltd.	reported as 2016 (338) ELT 741 (Tri-Chd)
(iii)	Jindal Drugs Pvt. Ltd.	reported as 2016 (340) ELT 67 (P&H)

(ii) The lower adjudicating authority has erred in recording findings that the seized private records have been corroborated on the basis of statements of brokers, transporters, etc. as these are nothing but third party evidences; that without adducing evidence of [illegible] statement of authorized person of the Appellant is not admissible; that private records/diaries, trip registers, records and register of Gujarat Pollution Control Board, statements of brokers are not direct material evidence; that the charge of clandestine removal is required to be established along with proof of the production capacity and raw material from which the final product [illegible] manufactured, [illegible] to

cross-examine the witness had not been given and thus the impugned order has been passed only on the basis of presumption and assumption.

(ii) The excisable goods are 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 is no control of Appellant No. 1; that 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, [illegible] in similar issue of passing of the fraudulent Cenvat credit dropped penalty proposed under Rule 26(2) of the CER; that penalty of Rs. [illegible] under Section 11AC of the Act imposed on Appellant No. 1 is also required to be set aside; that the adjudicating authority has erred in observing that private records recovered from the brokers, transporters, etc. [illegible] evidences are third party evidences and cannot be relied upon; that specific records in the private records have not been corroborated with Daily Production Register maintained by Appellant No. 1; that statement of Authorised Signatory has been recorded and no investigation has been extended to dealers and buyers of the goods to sustain the charge of clandestine removal of the goods; that trip registers of transporters and Registers maintained by Gujarat Maritime Board are not direct tangible evidences to sustain the charge of clandestine removal; that the charge of clandestine removal has to be established based upon unaccounted records of production, manufacture, electricity consumption and cash flow etc. and no such evidences have been placed on record; that transportation of the goods was being managed by the buyer of the goods or by the concerned broker on behalf of the buyer itself; that after passing the loaded trucks from the factory gate of Appellant No. 1 there was no control over subsequent movement of the goods; that they have received sales proceeds from the concerned buyers of the said goods through cheques or through RTGS only; that they relied upon Order in Original No. [illegible] dated 28.2.2017 in the case of M/s. Jai Sai Udyog, [illegible]; that the adjudicating authority has wrongly imposed penalty of Rs. [illegible] lakhs under Rule 26(2) of the CER on Appellant No. 2 / Authorised Signatory of Appellant No. 1.

(iv) Regarding confirmation of differential CE duty (Annexure D-1 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 [illegible] any other agencies/person cannot be considered as actual rates; that differential duty invoices on the basis of price available in the goods is not proper; that the rates circulated by the market research agency [illegible] be taken as 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 [illegible] to the respective consignments and therefore, the impugned order confirming differential amount of CE duty on the charge of under-valuation based on the third party evidence is not correct.

(v) Regarding imposition of penalty of Rs. 1,23,32,223/- under Section 11AC of the Act the appellant reiterated above grounds and submitted that they have not suppressed any facts with intent to evade [illegible]; therefore, they are not liable to penalty of Rs. 1,23,32,223/- under Section 11AC of the Act.

Appellant No. 2 :-

3.1 Appellant No. 2 reiterated the contentions raised by Appellant No. 1 for non imposition of penalty of Rs. 17 [illegible] imposed on him under Rule 26(1) of the CER.

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 has 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 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 [illegible] whereas Show Cause Notice has been issued on 11.05.2013 for the period from 2008-09 to 2010-11 [illegible]; that the charge of under valuation cannot be confirmed without challenging assessment of monthly

returns and only on the basis of [illegible] inquiry; that they relied upon the decision of the Hon'ble CESTAT in the case of [illegible] Pvt. Ltd. reported as 2014 (311) ELT 354 (Tri.-Chennai); Pushpam Pharmaceuticals Co. reported as 1995(78)ELT401(SC) and [illegible] Trading - Order No. A/11022-11023/2015; that demand, interest and penalty confirmed vide the impugned order are required to be set aside.

Appellant No. 3 :-

Appellant No. 3 submitted grounds of appeal, which can be summarized as under :-

(i) that he 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 speaking; 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 gives inculpatory statement, he would not be penalized; that in this regard appellant relied upon the case laws as under :-

(a) Shalimar Agencies reported as 2000 (120) ELT 658 (T)
(b) L. Chandrasekhar reported as 1990 (48) ELT 129 (Tri.)
(c) Takshila Spinners reported as 2001 (131) ELT 568 (Tri.)
(d) Sharma Chemicals reported as 2001 (130) ELT 271 (Tri.)

(ii) that the impugned order is non speaking and non – reasoned inasmuch as the lower adjudicating authority has not dealt with the issues raised 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 opportunity of cross examination has not been provided and relied upon the decision of the Hon'ble CESTAT in the case of Shalimar Agencies reported as 2000 (120) ELT 658 (Tri.); that [illegible] retrieved from Appellant No. 1 during the search conducted by the officers of DGCEI were containing details of estimates and not bills; that no transaction

or buyer of goods has admitted that the goods have been cleared in the clandestine manner; that notice issuing authority has not proved identity of encoded entries and names appearing in diaries / [illegible] seized from Appellants; that it is erroneous to state that they have [illegible] supply of goods from Appellant No. 1 as no buyer has stated that they purchased dutiable goods clandestinely from Appellant No. 1; that statements recorded during the investigation/inquiry are not relevant as none of the transporters or purchasers or angadias has confessed that the Appellants cleared goods clandestinely.

(iii) that it is surprising that the lower adjudicating authority has considered tallying some entries in diaries with those in documents [illegible] as corroboration of clandestine removal of the goods.

(iv) that the removal of goods from a factory involved 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 contacted or colluded 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 be spelt 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. 11,50,772/-.

4. **Personal Hearing :-**

Personal hearing in respect of Appellant No. 1 and Appellant No. 2 was fixed on 06.11.2018, however vide their letter dated [illegible] they waived personal hearing and requested to decide the case on the basis of the grounds of appeals and written submissions made by them.

4.1 Personal hearing in respect of Appellant No. 3 was attended by Shri Madhav H. Vadodariya, 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 legal infirmities and order is passed hastily in violation of principles of natural justice; that only because Appellant No. 3; that entries made in the diaries and data retrieved from pen drive and CD recovered were only Entry Maybe survey and not [illegible] the lower adjudicating authority only tallied some data in diaries with those in electronic storage devices as corroboration; that matching such entries in records with the seized records cannot be considered as corroborative evidence of clandestine removal; that penalty is not imposable under Rule 26 of the CER on Appellant No. 3 as he has not dealt with any goods as prescribed under the said Rule.

4.3 Appellant No. 1 to Appellant No. 3 filed applications for condonation of delay in filing of appeals by 9 days, 9 days, and 26 days respectively beyond normal appeal period of 60 days on the ground that [illegible] that [illegible] accountant was busy with work pertaining to Income Tax Department. Since the delay is within 30 days of further period, I condone delay in filing of appeals by the 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 issue to be decided in these appeals are as under :-

(a) Whether Appellant No. 1 has cleared excisable manufactured and cleared finished excisable goods amounting to sum of Rs. [illegible] and whether they have undervalued the finished goods to short pay CE duty of Rs. 34,22,943/- and whether Rs. 1,55,82,225/- should be recovered from them along with interest or not;

(b) Whether penalty of Rs. 1,55,82,225/- should be imposed on Appellant No. 1 under Section 11AC of the Act or not.

(d) Whether penalty of Rs. 15 lakhs should be imposed upon Appellant No. 2 under Rule 26(1) of the CER or not;

(e) Whether penalty of Rs. 18,74,0[illegible] under Rule 26(1) of the CER should be imposed on Appellant No. 3 or not;

6. 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, Transporters, Gujarat Maritime Board (GMB), Market research agencies etc. from where incriminating documents like Diaries, Note books, Registers/diaries 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. 3 and the entries recorded in the Diaries, Note books, Registers, GMB records, etc. recovered during search/inquiry that the clandestine clearances of excisable goods, namely, [illegible] were made against [illegible] transactions. [illegible] 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 [illegible] has inter alia, categorically accepted clandestine removal of the excisable goods by Appellant No. 1 as under :-

Qty	Amount	Corresponding name of ledger accounts or summaries	Page no. of ledger
[illegible]	[illegible]	[illegible]	42
[illegible]	[illegible]	[illegible]	37
[illegible]	[illegible]	[illegible]	32
[illegible]	[illegible]	[illegible]	25
[illegible]	[illegible]	[illegible]	19
TOTAL	[illegible]		

Question - [illegible] [illegible] M/s. Bansal Shipping Pvt. Ltd. [illegible]
Answer - [illegible]
Question - 25: [illegible] M/s. Bansal Shipping Pvt. Ltd. [illegible]

Page No.	Date	Name of the Supplier/Firm	Amount in Rs.
22	[illegible]	Bansal Shipping Pvt. Ltd.	[illegible]
24	[illegible]	Bansal Shipping Pvt. Ltd.	[illegible]
19	[illegible]	Bansal Shipping Pvt. Ltd.	[illegible]
17	[illegible]	Bansal Shipping Pvt. Ltd.	[illegible]
17	[illegible]	Bansal Shipping Pvt. Ltd.	[illegible]
Total			[illegible]

[illegible]
Answer - 25: [illegible]
Question - 26: [illegible]
Answer - 26: [illegible]

Question - 27: [illegible] M/s. Bansal Shipping Pvt. Ltd. [illegible] information obtained from [illegible] CBI [illegible]
Answer - 27: [illegible]

Question - 28: [illegible]
Answer - 28: [illegible] such entries made in his diaries.
Question - 29: How do you price your goods?
...
Question - 31: [illegible]
Answer - 31: I have seen the above said printout. I have no comments to offer on such entries made in his diaries.

6.2 The statements of the brokers namely, Shri Bimal Joshi on 23.8.2011, Shri Satish Gupta on 24.8.2011, Shri Pawan Agarwal on 24.08.2011, Shri [illegible] Sanghvi on 25.08.2011 and Shri Manoj Gupta on 24.08.2011 were recorded under Section 14 of the Act (all these persons involved in the unaccounted clearances of the excisable goods of Appellant No. 1) wherein they all have admitted in their respective statements recorded under Section 14 of the Act that as soon as the deal for supply of scrap had been finalized with the ship-breaking unit & concerned buyers, they contacted transporters for arranging trucks and informed them about the quantity of scrap to be transported, destination, etc. I find that the lower adjudicating authority in this regard has recorded at Para 3.20 of the impugned order as under :-

> *"During the investigation, while recording the statements of Shri [illegible] Bansal, Authorised signatory of M/s. BSPL [illegible] confronted with regard to various evidences collected by DGCEI regarding issuance of only invoices or clandestine removal of Plates, however, did not deny the evidences. The examination and scrutiny of the said diary clearly reveals that ship-breaking units have supplied only invoices or cleared plates or other ship material clandestinely through brokers, Shri Anop Patel and Shri Kishore Patel had given cash amount received from the buyers to M/s. BSPL towards clandestine removal of the goods as well as to [illegible] units / [illegible] had received cheque amount towards procurement of above invoices. I further observe that many of the entries pertaining to clearance of goods available in seized records of Shri Anop Patel and Shri Kishore Patel are tallied with the [illegible] records of M/s. BSPL, however, he could not explain satisfactorily about remaining entries of illicit clearances. Therefore, it can be unequivocally concluded that in case of remaining entries pertaining to clearances from the unit of M/s. BSPL, no invoices are issued and no payment of duty was made..."*
>
> [Emphasis supplied]

6.3 The statements of transporters namely, M/s. Bharat Transport on 4.10.2010, 6.4.2010, 15.6.2011, M/s. Bhadrda Rampura Carriers on 5.4.2011 & 20.06.2011, M/s. Bikaner Punjab Haryana Roadlines on 6.4.2011 & 15.6.2011, M/s. [illegible] Gujarat Roadlines on 6.4.2011 and 15.6.2011, M/s. New Jai Shankar Transport Co. on 4.10.2010, 6.4.2011 and 6.7.2011, Shri Gurunanak Road Carriers on 24.2.2011 and 6.7.2011, M/s. Vardhman Transport on 6.4.2011 and 24.8.2011 and M/s. R. K. Transport on 7.4.2011 and 15.6.2011 were recorded under Section 14 of the Act and these statements revealed that Appellant No. 1 was involved in clearances of unaccounted and clandestinely made 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 no., [illegible] number of ship breaker, in their Booking / Trip Registers along with the corresponding

invoices, however, where no invoices was issued, [illegible] were mentioned in [illegible]. I find that the records recovered from [illegible] have been decoded, [illegible] and corroborated in very elaborate manner by incorporating scanned images of documents/columns from Para No. 4 to Para No. 10.2 of the Show Cause Notice. The investigator also gathered details from the registers maintained at the gate by [illegible] of Gujarat Maritime Board and the lower adjudicating authority has [illegible] as under:

"3.5 I further find that the DGCEI conducted search at the [illegible] of the major Broker at Bhavnagar and several incriminating documents substantiating the above intelligence were recovered. Searches were also conducted at the premises of [illegible] e.g. ship-breaking units, Rolling mills etc. The preliminary scrutiny of the documents resumed during searches had fully validated the intelligence.

3.6 The DGCEI also conducted investigation of the [illegible] maintained by Gujarat Maritime Board (GMB). The GMB is a statutory authority and maintain records of in and out movement of the vehicles at the ship breaking yard which consist details viz. Date, Vehicle Type, Vehicle No., Permit No., Purpose, In & Out time etc. in respect of vehicles to whom monthly permits were issued. On comparison of these details with trip / booking Registers of the above transporters, in respect of majority of case, the entry of the trucks in trip Registers are found tallied with the actual vehicular Record / Register of GMB.

3.7.1 The investigation conducted with transporters and from the statements recorded of different transport operators revealed that whenever the entries were made in the registers of transport operators, the goods were certainly loaded from the ship breaking plot. The details are entered in the trip/booking register maintained by the transporters and trucks provided by them to the ship breaking units, scrap having weights from 24 MT to 26 MT were transported. The booking of truck and its entry in Alang ship breaking yard was further confirmed by the registers maintained by the GMB. Shri Vijay [illegible], Authorised Signatory of M/s BSPL gave statement before DGCEI, [illegible] confronted with the entries found in the registers of the transporters where no corresponding invoices were found to be issued by them or by their group of companies but he could not [illegible] any tenable explanation.

3.7.2 As per the prevailing practice for transport of scrap from Alang, the drivers pay entry fees to GMB and bring their trucks inside ship breaking yard only when they are sure of getting full truck load and agreed freight charges. Further, from the statements of the transporters it is clear and undisputed fact that the indents for trucks were always placed after the sale deal was finalized so as to avoid any kind of unnecessary charge to be paid to the truck owners. Further, I find that there is no scope of any other truck to get the goods for making delivery 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

transport operators are contacted and [illegible] is booked for transport of goods from the intended ship recycling yard. The facts is further supported by the entry made in the GMB register and [illegible] by the truck driver for entering in the ship recycling yard. Also, The statements of transport operators are supported by the entries in the GMB registers and further corroborated by non satisfactory reply given by Shri Vijay K.Bansal in this regard. Further, Shri Vijay K. Bansal was not able to given any satisfactory [illegible] regarding correlation of trucks and deals with the buyers regarding entries that have not been correlated with the entries of GMB and entries in the register of transport operators. Thus from the annexure prepared on the basis of registers of transporters, registers of GMB and on the basis of [illegible] load carried by the truck from the premise of M/s. BSPL, I find that excisable goods as worked out in Annexure, obtained from ship breaking yard has removed clandestinely without issuance of proper Central Excise invoice and without payment of proper Central Excise duty.

[illegible] It is note-worthy to mention that the Trip/Booking Registers are maintained by the transporters in their ordinary course of business and Truck Number and Name of the Broker mentioned in the Trip Register are also tallied with the details of the invoices issued by the Ship Breakers. Thus, authenticity of Trip / Booking Registers maintained by them cannot be ruled out in view of its corroboration with the records of GMB. I, therefore, find that in respect of those entries available in Trip/booking Registers pertaining to M/s BSPL where no corresponding invoices are issued; goods have been cleared clandestinely without payment of Central Excise duty by M/s BSPL. Accordingly, allegation in the Show Cause Notice that M/s BSPL has cleared the ship-breaking goods is proved. I, therefore, find that in respect of those entries contained in Trip/Booking Registers pertaining to M/s BSPL where no corresponding invoices are issued; goods have been cleared clandestinely without payment of Central Excise duty by M/s BSPL. Therefore, from the outcome of the investigation with transporters and evidences obtained from GMB, I find that M/s. BSPL has evaded Central Excise Duty by clandestine removal of excisable goods."

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

"[illegible] 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 [illegible] (Madras) had 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 [illegible] (Mad) was distinguished by Hon'ble Tribunal Ahmedabad in ARYA FIBRES PVT. LTD. versus COMMISSIONER OF C. EX., AHMEDABAD-II reported in 2014 (311) E.L.T. 529 (Tri. - Ahmd.), wherein it was held as under:-

"33. In K Balan's case (supra), the Hon'ble Madras High Court stated 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 protracting the proceedings. The decision in GTC 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 16-10-2009 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 declined 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 [illegible] Pvt. Ltd. vs. Commr. of Cus. & C.Ex. Aurangabad reported at 2004 (177) ELT 1150 (Tri. Mumbai), Hon'ble Tribunal in their order, in para 8, has held as under:

"8. .... 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 fact that as the documents 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 Dyers v. CCE, Chennai reported in 2001 (136) ELT 359 (Tri.-Chennai) has observed that Non-availability of witnesses for cross- examination [illegible] when the findings are based on documents about which there is no credible explanation and nothing on record to show [illegible] written or effectively recorded within close proximity of the time those were recorded.

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

3.12 It is also worth noting that no person [illegible] DGGI [illegible] during investigation have retracted their statements. Therefore, testimony of persons in the private records of Shri Vinod Patel and Shri Kishore Patel cannot be doubted and the truth disclosed by witnesses during the course of investigation is valid and reliable for the proceedings before me in as much as the statements of various persons recorded by DGGI corroborate the transactions contained in private records seized from Shri Vinod Patel and Shri Kishore Patel."

(Emphasis supplied)

5.4.1 I find that the request for cross-examination of Shri [illegible], Partner of M/s. Maruti Metal Industries, Bhavnagar has been appropriately dealt with by the lower adjudicating authority, especially considering the fact that Appellant No. 1 and/or Appellant No. 2 have not even appeared before the adjudicating authority for personal hearing despite many opportunities given. Request for cross-examination loses legal sanctity when one is not keen to avail benefit of personal hearing where they could have even explained their point of view on why cross-examination was essential. This has not been explained even in Appeal Memorandum. In view of these facts, I find that the findings of the lower adjudicating authority do not merit any interference.

5.4.2 I find that Appellant No. 2 and Appellant No. 3 who tendered their voluntary statements under Section 14 of the Act during investigation have admitted, on being confronted with the incriminating Diaries/Notebooks etc., that the entries showing transactions and not tallying with their statutory records are related to the goods cleared by Appellant No. 1 in clandestine manner without issuance of invoices and without payment of CE duty. Further, records recovered from Gujarat Maritime Board, capturing movement of goods, also corroborate the details of transactions for which no CE duty was paid. I find that appellant no. 1 is trying to blow hot and cold together, inasmuch as on one hand they are admitting that they have cleared the impugned goods clandestinely and on the other hand, they are contesting duty evasion without any evidences in their favour. Therefore, I find that findings of the impugned order are appropriate and cross-examination do not have bearing on the outcome of the case, as because 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 M/s. Lawn Textile Mills Pvt. Ltd. reported as 2018-TIOL-1524-HC-MAD-CX, wherein it has been held that :

> *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 secrecy is 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 and Appellant No. 3 in their statements and also on records of Gujarat Maritime Board. I, therefore, uphold demand of Central Excise duty of Rs. [illegible] as detailed in Annexure TR-1.2 of the Show Cause Notice.

6.6 Regarding Central Excise duty of Rs. [illegible] as per Annexures NK-1 and NK-2 on the goods clandestinely removed, Appellant No. 1 [illegible] contended that the charge of clandestine removal of the goods could not be confirmed on the basis of statements and records recovered from third parties, without carrying out investigation at raw material suppliers and buyers' end and without proving financial flow back.

6.6.1 I find that the lower adjudicating authority has very correctly confirmed the demand of CE duty, inasmuch as the evaluating demand raised by the investigation has been carried out in depth, elaborate and holistic manner. Authenticity of the private diaries/notebook have ascertained and brokers involved i.e. Appellant No. 3 and Appellant No. 4 have been extensively interrogated and diaries decoded scrupulously to establish the charge of clandestine removal against Appellant No. 1. I find from Page No. 27 to 34 of the Show Cause Notice narrating Statements of Appellant No. 3 dated 19.4.2010, dated 20.4.2010, dated 27.12.2010, dated 05.1.2011 and dated 26.2.2011 wherein he has, in very clearly explained, decoded and accepted the details like Plot No., size of the goods, rate of goods, amount of sales proceeds recorded down in the private records/diaries in very exhaustive manner. Similarly, I find from Page No. 27 to 34 of the Show Cause Notice narrating Statements of Shri Kishore Pabe (i.e. brother of Appellant No. 3) dated 20.4.2010 and dated 17.09.2010 and [illegible].2010 wherein he also explained and corroborated details of clandestine removal in respect of Appellant No. 1.

6.7 I find demand of CE duty of Rs. [illegible] has been arrived at on the basis of Diaries and other private records recovered during investigation. The details contained in the said Diary mentions amongst other details, details of the buyers, 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 substantiated and corroborated in the present case vide statements of Appellant No. 3 and Shri Kishan Rao and answer to Question nos. 10 to Question No. 18 of the Statement of Appellant No. 2 dated 25.2.2013 also and credence to the authenticity of the unaccounted transactions in this regard. The inescapable inference that can be drawn from the above evidence is that the transactions recorded in the relevant diaries and other records are genuine and not imaginary or bogus ones, the estimates as have been alleged to be made out by Appellants and thereafter. Inculpatory 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 has arrived at his findings at Para 3.14 of the impugned order on the basis of appreciation of the relevant pages of the said diaries containing details of these diaries/life removals. Statements of Appellant No. 3 and Appellant No. 4 have also been recorded on 19.4.2010 and 20.4.2010 wherein it was admitted that [illegible] details of Diaries have been explained in detail.

8.7.1 In view of above evidences and statements of Appellant No. 2, Appellant No. 3, Appellant No. 4 and statement of Shri Narendra Singh Rana dated [illegible].2011, I find that demand of CE duty of Rs. 61,29,282/- (Rs. 10,77,939/- leviable to Rs.61,52,282/- has been correctly confirmed by the lower adjudicating authority as detailed in Para 3.25 of the impugned order.

8.8 I find that the statements recorded during course of investigation are admissible piece of evidence, duly corroborated, which have not been retracted at any stage by the statement makers and therefore, as per the settled legal position sanctity of the same cannot be undermined by later arguments only. I further find that the authenticity of the records which form the premises of Appellant No. 1 and other premises have been duly corroborated and tallied with the records of Noida Unit No. 1 and CE duly on the clandestine clearances of the goods not accounted for in the records of Appellant No. 1 have been tallied. The Hon'ble [illegible] in the case of Lawn Textile Mills Pvt. Ltd. reported as 2015-TIOL-1924-CESTAT-DEL has held as under :-

> *"20. This above facts will clearly show that any allegation is one of clandestine removal. It may be true that on the basis of private records allegation is on the Department. However, clandestine removal with an intention to evade payment of duty is always done in a secretive manner and not as an open transaction for the Department to investigate/detect*

the same. However, in case of clandestine removal, where secrecies involved, there may be cases where direct documentary evidence will not be available. However, burden on the seized records of the Department is not to entire fade 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.

31. As noticed above, the assessee has not disputed any of the allegations which were put forth except for simple and flimsy reasoning. The assessee had sufficient means to give their explanation, but they preferred the Managing Director to sign the statement. There was no attempt made by the assessee to prove their case by putting forward to give a plausible and probable answer. 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, on the scope of the power of the Court under Section 35G of the Central Excise Act to decide of a substantial question of law. We find there is no question of law, much less a substantial question of law warranting for consideration in the present case. Thus, the appeal filed by the assessee is dismissed."

[Highlighting added]

6.8 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 evidences like production details, statement of buyers, transporters, etc. in this regard, I find that both the key persons of Appellant No. 1, transporter, brokers, Authorised Signatory, writer of private diaries, Accountant etc. have categorically admitted and identified the entries in the private maintained records. Further, brokers and transporters have admitted to have sold / transported goods belonging to Appellant No. 1 without Central Excise invoices and without payment of CT duty. I also find that the demand has been computed on the basis of annexures prepared based on private incriminating records recovered during searches earlier, but at the premises of Appellant No. 1 and same have also been tallied with the statutory record of Appellant No. 1 and same were found to be correct. Appellant No. 1 has never denied the evidences gathered during investigation and Panchnama, hence cannot be said to be confirmed without concrete evidence and statements.

8.12 It is a fact that no statement has been retracted and hence, the statements have sufficient evidentiary value. I find that all evidences in the case are clear 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 Shri Prakash Agarwal, reported as 2017 (346) ELT 127 (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 cigarette items by the appellant was sought to be established. Admittedly, the case is not only based on the material evidence collected from the supplier's end and duly accepted/corroborated by the responsible persons of the supplier's end. The receipt and use of the such unaccounted raw materials for further manufacture has apparently been admitted by the appellants and the duty short paid has also been discharged during the course of investigation itself. The appellant's great emphasis on non-availability of the further corroboration by way of details of transport, money receipt, etc. In the present case, the evidences collected from the supplier's end is categorical and cannot be disputed. The private records of the supplier 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 cigarette items. However, he did not name the buyers to whom such goods were sold. Though, the appellant argued that the appellant has taken a plea that the department has not established the details of buyers and payment 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 for 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 appeal before the Tribunal, the 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 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 decision. As noted already, the clear private records at the supplier's side as affirmed by the person in-charge and further corroborated by the appellant cannot be discounted only on the ground of further evidences like transportation and receipt of money, etc. not been proved. In a clandestine manufacture and clearance, such proof of quantum 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 I also rely on the decision in the case of M/s. Haryana Steel & Alloys Ltd. reported as 2017 (356) ELT 451 (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 discussed by [illegible] of the factory tally with invoices / gate pass [illegible], that statement of employee running into several pages and containing detailed knowledge is to be considered reliable. I also rely on the decision in the case of M/s. Ramchandra Rexins Pvt. Ltd. reported as 2014 (302) ELT A?? (S.C.) wherein similar view has been taken by the Hon'ble Supreme Court.

6.12 It is settled law that in cases of clandestine removal, the Department is not required to prove duty evasion with mathematical precision. This view is duly supported by judgments of the Hon'ble Supreme Court in the cases of Shri Shah Guman Mal reported as 1983 (13) ELT 1631 (SC) & [illegible] Textiles (I) P. Ltd. reported as 2008 (235) ELT 587 (SC).

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. Sukhawani reported as 1996 (83) ELT 258 (SC) and Ramesh Kumar Garg reported as 2016 (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, therefore, admissible as held in the case of M/s. [illegible] Abrasives Ltd. reported as 2017 (348) ELT 506 (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 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 Appellant 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 in 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 studied or and examined independently. The appellant in this case has relied upon the confessional statement of the Deputy which is also supported by the incriminating entries in the private records. There is no evidence that the statements have been taken under duress. ..

15. In view of the foregoing, it has been 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 Kejriwal, who is said to be the author of the private records recovered has not been recorded, a stand accepted by Shri Tyagiraja, Director about the truth of the contents of the private note books. Consequently, I find no reason to disallow the plea of Department."

[emphasis supplied]

6.14 I am of the considered view that the confessional statement need not be proved as has been held by the Hon'ble CESTAT in the case of Alok Industries reported as 2009 (235) ELT 3073 (Tri-Mumbai) and Value Chains Solutions reported as 2009 (236) E.L.T. 1005 (Tri - Chennai). Hon'ble CESTAT in the case of M/s. Kanoi Engg Works reported as 2004 (166) E.L.T. 272 (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 the case as discussed above and in the impugned order. Hon'ble CESTAT in the case of M/s. P. S. Sponge P. Ltd reported as 2017 (328) ELT 103 (Tri. Del) has also held that when preponderance of probability was against the appellant, pleading of no statements recorded from buyers, no excise duty by consumption found, no raw material purchase found unaccounted and no input-output ratio prescribed by law is not tenable.

6.15 In view of above, I find that the contentions raised by Appellant No. 1 are devoid of merits and the Department has adduced sufficient and cogent corroborative evidences to demonstrate that the Appellant No. 1 was engaged in clandestine removal of the goods. I, therefore, find that the confirmation of demand of Central Excise duty of ₹1,65,232/- by the lower adjudicating authority is correct, legal and proper.

6.16 It is natural consequence that the confirmed demand of Rs. 61,55,232/- is required to be paid along with interest as applicable under Section 11AA of the Act. I, therefore, uphold order of recovery of interest under the impugned order.

6.1x I find that this is a case of clandestine clearances of the goods which has been established. The ingredient for invoking extended period of demand and imposing penalty under proviso to Section 11AC of the Act are clearly available in the case as held by the Hon'ble CESTAT in the case of [illegible] reported as 2016 (338) E.L.T. 475 (Tri. - Bang.) and hence, the impugned order has correctly imposed penalty of Rs. 61,88,152/- under Section 11AC(1) of the Act on Appellant No. 1. The lower adjudicating authority has already correctly granted option of reduced penalty of 25% to the Appellant No. 1 subject to the conditions, as per Section 11AC of the Act.

7. Regarding confirmation of demand of duty of Rs. 94,23,302/- (Annexure - UV-1 to the SCN) on the ground of undervaluation, Appellant No. 1 has submitted that the said charge has been confirmed on the basis of the rates obtained by them from various market research agencies which were higher than those 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 undervaluation inter alia, giving findings as under :-

> "15.x The Show Cause Notice alleges evasion of Central Excise duty by way of undervaluation 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 etc. 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 4.5mm (4 mm) to 25mm (14 mm) 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 DGCEI conducted inquiry with various marketing research agencies including M/s Major & Minor with reference to obtain data of various plates ranging that rate of one size of 12mm size of plate is always equivalent to the average price of all size in the range of 6mm to 25mm.*

3.16 On comparison of the price mentioned in the invoices of M/s. BSPL 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. BSPL were far less than the actual value prevailing in the market during the material period. The ship-breakers have, by not declaring the actual rate / true values of MS 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 over and above the declared invoice value, by way of unaccounted cash payments.

3.17 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 and 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 BSPL. Further, I also find that a large number ship breaking units, dealers from Alang and brokers were member of M/s Steel rates 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 Steelrates were obtaining the rates of MSME and managing analysis of the data gathered by them. The Ship breakers are in the know of the rates of the scrap generated from ship breaking and intentionally undervalued the goods with intent to evade payment of Central excise duty. Thus analysis of the rates provided by JPC Kolkata proves that M/s BSPL 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. BSPL have evaded Central Excise Duty of Rs. 64,73,997/-.

(emphasis supplied)

7.2 I find that demand of Rs. 64,73,997/- has been confirmed on the ground that Appellant No. 1 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.

7.2.1 I also find that the valuation of goods has been arrived at after detailed analysis of the data released by Joint Plant Committee, an institution empowered by Ministry of Steel, Govt. of India and market research agencies i.e. M/s. Major & Minor and M/s. Steelrates. Appellant has not disputed the said analysis, however, contested

that no excess payment over and above invoiced prices was received [illegible] and that Appellant No. 2 [illegible] in his statement dated 2[illegible] has admitted that they did not mention the thickness of the plates in the invoices. Relevant Q.5[illegible] and its answer reads as under :-

> *Q.5[illegible] Do you mention the thickness of plates on the invoice? If yes since when?*
> *A.5[illegible] During the earlier period we did not mention the thickness of the plates in the invoices. [illegible] we have started mentioning the thickness of the plates in the invoices."*

7.2.2 The contention that transaction value as provided in [illegible] Section 4 of the Act cannot be rejected does not have force, when Appellant No.1 is involved in clandestine clearances and they did not specify the grade/quality of the goods in the invoice and [illegible] seized from Appellant No. 3 and Shri [illegible] Kishore Patel, which contained details of cash transactions with various Brokers / Transporters [illegible]. Therefore, I am of the view that appellant failed to establish the grade and quality of the goods cleared to justify the lower prices adopted by them and hence, the impugned order is legal and proper in this regard. Hence, I uphold confirmation of CE duty of Rs. 9[illegible],23,993/- along with interest under Section 11AA of the Act.

7.3 I find that the impugned order has [illegible] and accordingly, upheld confirmation of CE duty of 9[illegible],23,993/- along with interest thereupon and equivalent penalty under Section 11AC of the Act relying upon the case laws as under :-

(i) [illegible] Ltd. 2016 ([illegible]) [illegible] 28[illegible] ([illegible])

> *"The Hon'ble High Court of Madras had an occasion to decide the issue whether discharge of duty before issuance of show cause notice would grant an immunity from penalty under Section 11AC of Central Excise Act, 1944, in the case of CCE, Madurai v. [illegible] (Mad.). It is held that the penalty [illegible] is mandatory for evasion of duty [illegible] by an assessee with the intent to evade duty by adopting any of the means mentioned in Section 11AC of the Central Excise Act, 1944. The facts and circumstances of the case [illegible] by the appellants in the present case [illegible] that they had [illegible] intention to evade duty without inclusion of [illegible] amount in the assessable value of goods. This could not have been noticed without investigation. Therefore, the appellant does not deserve any consideration of leniency. Accordingly, penalty imposed under Section 11AC is confirmed."*

[illegible]

(i) OKA Manufacturing P[illegible] 2017 (349) E.L.T. 309 (A[illegible])

"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. Dharamendra Textile Processors - 2008 (231) 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. OKA [illegible] cannot escape the penalty of Rs. 2.03.04,544/- 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 of Rs. [illegible] Appellant No. 2 under Rule 26(1) of the CER, I find that Appellant No. 2 has admitted his involvement in duty evasion in his statement dated 25.1.2011. 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."

8.1 Appellant No. 2 has concerned himself in removing and selling non duty paid goods, which were liable to confiscation and penalty imposed is also proportionate and reasonable. Therefore, I hold that penalty of Rs. [illegible] lakhs imposed on him under Rule 26(1) is justified and I uphold the penalty as legal and proper.

8.2 As discussed above from Para [illegible] to [illegible] of this order, Appellant No. 2 has indulged himself in issuance of excisable invoices without accompanying goods and with the aid of such invoices the user availed ineligible benefit of Cenvat credit and thus, penalty has been correctly imposed by the lower adjudicating authority and I uphold the same.

8.3 Regarding imposition of penalty of Rs. [illegible]74,[illegible]/- under Rule 26(1) of the CER on Appellant No. 3, I find that Appellant No. 3 has admitted his involvement in duty evasion vide his statements dated 19.04.2010, dated 21.4.2010, dated 20.10.2010, dated 23.12.2010, dated 3.1.2011 and 25.1.2011. I therefore, find that

Appellant No. 3 has very much concerned himself in dealing with such goods removed and sold clandestinely without CE invoices and without payment of CE duty, which were liable to confiscation and hence, I uphold penalty imposed on Appellant No. 3 under Rule 26(1) of the CER.

9. In view of my above findings, I uphold the impugned order and reject appeals filed by all three Appellants.

9.1 अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।

9.1. 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 Shipping Pvt. Ltd.
   Plot No. 158, Sosiya Ship Breaking Yard,
   Office: Plot No. 2137, Near Golden Arc,
   Atabhai Chowk, Sosiya/Alang, Bhavnagar
2. Shri Vijay K. Bansal, Authorised Signatory,
   M/s. Bansal Shipping Pvt. Ltd.
   Plot No. 158, Sosiya Ship Breaking Yard,
   Office: Plot No. 2137, Near Golden Arc,
   Atabhai Chowk, Sosiya/Alang, Bhavnagar.
3. Shri Vinodbhai Amarshibhai Patel,
   Plot No. 122,
   Iscon Mega City,
   Opposite Victoria Park, Bhavnagar.

प्रतिलिपि :-

1) [illegible] जानकारी हेतु।
2) [illegible] आवश्यक कार्यवाही हेतु।
3) [illegible]
4) गार्ड फ़ाइल.