ADHIKARI TAX MARKET

Appeal No.	Order No.	Date
V2(11)28/BVR/2018-19	46/EXCISE/DC/MAV/BHV/18	31.01.2019

BHV-EXCUS-000-APP-046-19-047-2019

Date of Order: 18.02.2019 Date of Issue: 22.02.2019

Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

1. Mis Nakhrani Steel Re-Rolling Mill, Survey No. 368/1, Bhavnagar Ratnol Highway, Sihor-364240, Dist. Bhavnagar.

2. Shri. Bhagubhai G. Sarvaiya, Partner of Mis Nakhrani Steel Re-Rolling Mill, Survey No. 368/1, Bhavnagar Ratnol Highway, Sihor-364240, Dist. Bhavnagar.

::ORDER IN APPEAL::

The present two appeals have been filed by the Appellants (hereinafter referred to as "Appellant No. 1 & Appellant No. 2") as detailed in the table below against Order-in-Original No. [illegible] dated [illegible] (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Central Excise, Rural Division, Bhavnagar (hereinafter referred to as "the lower adjudicating authority"):-

Sr. No.	Appellant	Appeal No.	Name of the applicant
1	[illegible]	Appellant No.1	[illegible] Survey No. [illegible] Survey No. 365/1, 3 Avenue Rajkot Highway, Sihor - 364 240 Dist: Bhavnagar.
2	[illegible]	Appellant No.2	[illegible] Survey No. [illegible] Survey No. 358/1, 2 Avenue Rajkot Highway, Sihor - 364 240 Dist: Bhavnagar

2. The brief facts of the case are that the officers of Directorate General of Central Excise, Intelligence (hereinafter referred to as "DGCEI") conducted search operation at the premises of some persons at Bhavnagar and recovered incriminating documents, other records etc. Search operations were also conducted at the premises of various manufacturers and transporters. After detailed investigation, Show Cause Notice No. [illegible] dated 06.03.2014 was issued proposing demand of recovery of Central Excise duty of Rs.[illegible] under the provisions of Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") along with interest under Section 11AA of the Act and imposition of penalty under Section 11AC(1)(a) of the Act and Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules") upon Appellant No.1; recovery of Cenvat credit amounting to Rs. 2,58,384/- wrongly taken and utilized under Rule 14 of the Cenvat Credit Rules, 2004 (hereinafter referred to as "the CCR") read with Section 11A(1) of the Act along with interest under Rule 14 of the CCR read with Section 11AA of the Act and proposed to impose penalty under Rule 15(2) of the CCR read with Section 11 A (1)(a) of the Act, on Appellant No.1. It was also proposed to impose penalty under Rule 26(1) of the Rules upon Appellant No. 1. It was also proposed to impose penalty under Rule 26(1) of the Rules upon Shri [illegible] Marfatia and Shri [illegible] Patel. The show cause notice was adjudicated by the lower adjudicating authority vide the impugned order, in which (i) Central Excise Duty of Rs. 10,41,332/- was confirmed under proviso

1.4(1) of the Act along with interest. Further Section 11A of the Act as to penalty of Rs. 10,01,382/- was imposed under Section 11AC(1)(a) of the Act with reduced penalty option upon Appellant No. 1; (ii) amount to recover Rs. 7,58,284/- under Proviso to the Old rule read with Section 11A(1) of the Act for wrongly taken credit and recovered under along with interest under Rule 14 of the Old Rules Section 11AA of the Act and imposed penalty of Rs. 2,50,264/- under Rule 26(2) of the OCP read with Section 11AC(1)(c) of the Act with reduced penalty option upon Appellant No. 1; (iii) Penalty of Rs. 2,00,000/- under Rule 26(2) of the Rules was imposed on Appellant No. 2 i.e. Shri Dayashankar Girdharilal Saraswat, Partner of Appellant No. 1 and (iv) Penalty of Rs. 20,000/- under Rule 26(2) and Rs. 10,000/- under Rule 26(2) of the Rules was imposed on Shri Kaushalkumar Ramanlal Shah, Broker.

2. Brief facts of the matter are that, Appellant No. 1 had filed appeal before Commissioner (Appeals), Rajkot against the impugned order, which was already been decided vide Order No. RAJ-EXCUS-000-APP-130-20-21 dated 07.09.2020.

3. Being aggrieved with the impugned order, Appellant No. 1 & 2 have preferred the appeal on various grounds as mainly:

Appellant No. 1:

(i) The lower adjudicating authority has issued the impugned order on presumption and premonitive without corroborative evidences as well as on the basis of the third party's statement only. The impugned order is issued on the basis of the private note books seized from the office and residence premises of Shri Bharat Shah, Broker, statements of the various Vehicle Owners/Transport Agencies, Angadias. These documents are not evidences without any corroborative evidences pertaining to the Central Excise records maintained by the appellant and the investigation not responded to the buyers to sustain the charge of clandestine receipt of the raw materials, compliance received of the so called goods and wrongly availment of Cenvat Credit by way of submission of the so called invoices without cover of Central Excise Invoices. The duty is levied on the excisable goods produced within the factory premises as provided under Section 3 of the Central Excise Act, 1944 read with the provisions of the Central Excise Valuation Rules, 2000 and the charges of clandestine production of the goods under dispute have not been established on the basis of the Central Excise Records maintained under the provisions of the said Section 3 of the Act and

with the Rules and Regulations mentioned therein.

(ii) The lower adjudicating authority has not considered the submissions of the appellant while passing the impugned order and the issues were decided in a manner contrary to the provisions of Rule 6(3) of the Cenvat Credit Rules, 2004.

(iii) The lower adjudicating authority has erred in not considering the fact that on the ground that the Appellant procured M.S. Scrap (i.e. Old and Used Parts of Ships) from the various Ship Breaking Units, as per the orders placed on them by various private parties and Ship Owners, but could not establish the correlation with the Central Excise Records in as much as the findings have been given in the impugned order that the verifying officers could not find the Ship Breaking Units at the addresses given in the invoices, which had been issued in their names. There is no provision/instructions placed on record regarding the concerned Ship Breaking Units to maintain the records of the Ship Breaking Units placed on record to prove that the Ship Breaking Units had deliberately removed their excisable goods/M.S. Scrap etc. from the premises to the Appellant. Therefore, the charge of non-receipt of the raw materials has been confirmed only on the basis of the third party evidences without corroborative evidences.

(iv) The lower adjudicating authority has also held that the Appellant manufactured M.S. Round Bars, totally weighing 97.164 M.T. from the said M.S. Scrap, by considering the input - output ratio, even for such so called clandestine receipt of raw material without any corroborative evidences, the statement of Appellant No. 2 - Shri Bhagirathsinh G. Sarvaiya, Partner of the Appellant firm, with reference to input - output ratio had test checked the input - output ratio of given, whereas input - output ratio is always depended upon the quality of the raw materials especially in the case of M.S. Scrap. Therefore, the determination of the so called clandestine removal is not justifiable on the part of Central Excise, the worksheet for the purpose of calculation of central excise duty under dispute was not available in the records of the adjudicating authority has not given any specific findings that the actual basis for calculation of duty/assessment of duty was in accordance with the provisions of Section 4 of the Central Excise Act, 1944.

(v) The lower adjudicating authority has erred in holding that the Appellant has deliberately removed the excisable goods i.e. [illegible]

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0,11,602/- immediately on the ground of clandestine manufacture and been named in the show cause notice. Penalty of Rs. 1 lakh also was established in case of st0/clearing/and/sale. The issue of any non-payment of so-called clandestine amount has been placed on record.

(d) The Appellant is not concerned with the claim of inventory goods and also not involved in receipt of raw materials whereupon Central Excise duties, the charge of clearance of the so-called excisable goods/invoice raised against the Appellant is not sustainable. The lower adjudicating authority wrongly demanded Cenvat Credit of Rs. 2,56,336/- by alleging wrongly ineligible/ineligible of the invoices issued by the Ship Breakers to the appellant who duly supply raw materials, however, no corroborated evidence placed by the department. The lower adjudicating authority failed to establish that how the Appellant got opportunity of raw material with reference to the consignment receipt of the excisable goods in the circumstances that the department has alleged that the Appellant had availed Cenvat Credit without receipt of the relevant/the goods.

(e) Subsequent to the show cause notice has shown that the appellant made purchase transactions of Rs. 19,51,200/- whereby the availment of the goods was examined as per the figures of Rs. 22,80,200/- for remaining amount of Central Excise duty. From these figures, the allegation of transaction which is required to be illegal and not proved and also at the standard in removal of the goods not justifiable.

(f) In view of above, the lower adjudicating authority wrongly confirmed the demand based only and wrongly disallowed the Cenvat Credit without any corroborative evidences and based the impugned order on assumptions and presumptions. Therefore, the Appellant is not required to pay the demand as well as penalty/fine to pay the Cenvat credit has wrongly availed. Accordingly, Appellant submits that Appellant is not liable to pay amount as wrongly imposed which may corroborative evidences and relied upon following case laws:

- [illegible]
- [illegible]
- [illegible]
- [illegible]

- (2011) 2 SCC 754 – Appellate Authority for Advance Ruling, Maharashtra v. M/s. [illegible]
- 1997 (90) ELT 313 (Tri.) – Commissioner of Central Excise, Bangalore v. [illegible]
- 1990 (50) ELT 160 (T) – Associated Cement Companies Ltd. v. [illegible]
- 2004 (170) ELT 135 (Del.) – Schlumberger Asia Services Ltd. v. [illegible]
- 2007 (215) ELT 291 (Tri. Chennai) – Essar Telecom Ltd. v. [illegible]
- 2003 (156) ELT 213 (Tri. Del.) – Commissioner of Central Excise, [illegible]
- 2008 (224) ELT 3 (Tri. Del.) – Commissioner of Central Excise, Ghaziabad v. Bhushan Steel [illegible]
- 1995 (106) ELT 316 (Tri. Del.) – [illegible]
- 2014 (312) ELT 258 (Tri. Ahmd.) – Alkyl Amines Chemicals Ltd. v. [illegible]
- In Interim Order/Stay – Application for pre-deposit of duty, interest and penalty
- Order-in-Original No. [illegible] in the case of Ballarpur Cellulose Unit [illegible]
- 2015 (39) STR 1197 (Tri. Ahmedabad) – Vinod K. Gupta v. [illegible]
- 2016 (44) STR 1010 (Tri. Kolkata) – Shyam Steel Corporation v. [illegible]
- 2017 (358) ELT 1174 (Tri. Del.) – Modern Laboratories v. [illegible]
- 2017 (358) ELT 570 (Tri. Del.) – Magnum Power Pvt. Ltd. v. [illegible]

Appellant No.2

Appellant No. 2 contested the allegations in para 3 of the Appeal Memorandum by stating that the grounds mentioned by Appellant No. 1 and the Department has not produced any positive evidence to prove that Appellant No. 2 actively involved himself in so called clandestine removal of the goods and therefore, penalty imposed on him is bad in law.

4. Personal hearing in the matter was attended by Shri B. K. Mehta, Consultant and Smt. [illegible] Qureshi, Advocate on behalf of Appellant No. 1 & Appellant No. 2, who reiterated grounds of appeals and submitted that it is established as stated in additional written submission dated [illegible] that there is no evidence against the assessee for any clandestine removal of Steel Products by the Respondent only on the basis of statement of Shri Bharat Shah, Chartered Accountant, which is not legally sustained.

4.1 Appellant No. 1 vide letter dated 27.12.2018 and Appellant No. 2 vide letter dated 12.12.2018, made their submissions wherein they have inter alia stated that grounds of appeal are as detailed above.

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 is whether the impugned order, in the facts of the case, confirming demand and imposing penalty on both the appellants is correct and legal or not.

6. I find that the officers of DGCEI, Ahmedabad conducted search operations at the premises of various brokers and transporters [illegible]

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in writing, documents by various dates, i.e., loose papers, computer slips, computer print out and any notings, cash/bank registers etc., were removed, it is submitted by the appellant as per the adjudicating authority, while passing the impugned order has ignored the submissions made by the Appellants, however, in the Show Cause notice adjudicating authority has mentioned defence submissions of the Appellants at various instances() of the impugned order and has given its finding contrary to the submissions of the Appellants.

6.1 I find that Appellant No. 1 (Partner of Appellant No.2) was shown all the documents in the form of computer printout from the premises of Appellant No.2 during investigation and after recording of his statements, that he was specifically asked that he was each Panchnama dated 30.03.2010 drawn at the premises of Appellants No.1 and the statements given by Shri Bharat Nanalal Shah, Broker and Shri Mahendra Kumar Mohanlal Patel, Accountant of Shri Bharat Nanalal Shah, that he was given full opportunities to peruse the documents seized and all enquiries were made by officers before giving testimony and the truthfulness and correctness of the facts from the statements of Shri Mahendra Kumar Mohanlal Patel, Accountant of Shri Kishor Manharlal Shah that the documents that were in the form of diary maintained by him for and on behalf of Shri Bharat Nanalal Shah. Appellant No.2 was also given full opportunity to cross examine various documentary evidences duly corroborated by the statements given by Shri Bharat Nanalal Shah and Shri Mahendra Kumar Mohanlal Patel, as a result of the same he was not in a position to controvert the facts and the various statements given by Shri Bharat Nanalal Shah and Mahendra Kumar Mohanlal Patel, accountant of Shri Kishor Manharlal Shah that he was also shown Annexure wise papers of the loose sheets/diary maintained in respect of transactions done Appellant No.1 and Shri Bharat Nanalal Shah, Broker showing details of the transactions carried out through Shri Bharat Nanalal Shah, Broker by Appellant No.1. In the light of the stated facts of the Shri Bharat Nanalal Shah, Broker and statements of party wise ledgers the Appellant No. has admitted the credit into the bank of Appellant also and also that of Kanhaiya Shah, Broker beneficiaries, as there is well as transporters have admitted transfer of cash. There are available evidences in the form of documentary and oral evidences on record recovered during search. I find that the investigation has clearly corroborated evidences as regards evasion of Service Tax duty by Appellant

No.1 while acting in pursuance of appellant No.2, broker, deceitfully proceeded beyond doubt that Appellant No.1 has evaded duty on certain goods as mentioned in Annexure of the Show Cause Notice. The evidence given by Shri Rohit Mangalbhai Shetty, Partner and Accountant of Appellant No.1 firm and Shri Amrutlal Popat whose statements were perused by appellant No.1 before giving his own statements, have revealed the relationship between them. The above evidences substantiate the charges against Appellant No.1 & 2 and are very much admissible as per relevant provisions of law.

5.2 It appears that Appellant No.1 & Appellant No.2 have intentional, planned unlawful means to evade payment of certain excise duty and their evasive mind and deliberate acts are clearly established. Therefore, I hold that Appellant No.1 & 2 have rendered themselves liable for penalty under the provisions of Rule 26 of the Central Excise Rules, 2002 read with Section 11AC of the Act and appropriate penalty should be imposed on them under Rule 26 of the Central Excise Rules, 2002 read with Section 11AC of the Act.

6.1 As regarding demand of duty on the basis of Cenvat recovered from the buyers, Shri Bharat Kantilal Shah, Director, Appellant No.1 has stated that the duty was made on the basis of Jan paper documents and accordingly, the entries were made manually. But it was found that the invoices and many transactions recorded in the ledgers, registers were not duly recorded by Appellant No.1 which establishes that the ledgers and other records retrieved from the said premises by the Central Excise officers were admitted to have purchased the goods from Appellant without invoices. They have also admitted that in many cases in order to pass on Cenvat credit fraudulently, they had shipped material to other parts of the goods from the premises to other parties. Thus, the material recovered from the party premises are corroborated by other evidences. The statement of Appellant No.1 firm's responsible persons admitted the receipt of the goods without invoices or Cenvat Excise invoices and without payment of Central excise duty. Such statements were duly recorded and hence, were admissible in law. The corroborative evidences establish the evasion of Central Excise

such transactions and the Appellants have indulged themselves in it. The details [illegible] by Shri Bharat Ramnikbhai Patel were confirmed by Shri Dhaval Manubhai Shah and has never been retracted. It is on record that all transactions were recorded in ciphered and coded manner, and the same was made out after deciphering and decoding the same. The transactions recorded in the files seized from Shri Dhaval Manubhai Shah were further corroborated with relevant records. Therefore, these are valid and cogent evidence as per the Indian Evidence Act, 1872 and are sufficiently proving the case against the Appellants.

24. In view of above, I find that Appellant No. 1 with active support of Appellant No. 2 has evaded payment of [illegible] duty by way of [illegible] removal of goods as well as by undervaluation of the goods and hence, the order has to be held as correct, legal and proper in respect of both these Appellants.

25. [illegible] strongly [illegible] the appellants, the [illegible] Shri Sanjay Manubhai Shah, Broker revealed that ship breaking units used to issue invoices in favour of [illegible] without actual supply of goods and goods corresponding to the quantity mentioned in the invoices was supplied clandestinely to the rolling mill units including Appellant No. 1 with help of Shri Dhaval Manubhai Shah, broker. I would like to reproduce paragraph 21.4 of the impugned order, which [illegible] as under :-

> "[illegible]
>
> [illegible]
>
> [illegible]"

Noted No. 2 issued fraudulent passing of Cenvat credit in violation of Rs. 2,30,000/- by way of passing invoices.

5.5 In view of above, I find that Appellant No. 1 availed only inadmissible Cenvat credit without actual receipt of goods. Appellant No. 1 availed Cenvat credit amounting to Rs. 2,30,000/-, which was then utilized to pay duty/ payment of central excise duty on goods cleared to another manufacturer/dealer. Cenvat credit on central excise duty paid on inputs may be availed only if such inputs are received in the factory and used in manufacture of the final product. In the instant case, I find that the inputs were actually not received by Appellant No. 1 in their premises and therefore, the Cenvat credit availed amounting to Rs. 2,30,000/- availed by Appellant No. 1 had wrongly taken and utilized during the period, which is required to be recovered from them and is held liable for the impugned order is correct, proper and legal to this extent.

7. Appellant No. 2 has contended that the show cause notice is not clear to establish the manner in which he has abetted in commission of offence and hence, no penalty is imposed penalty under Rule 26(1) on the basis of that Appellant No. 2 was the key person of Appellant No. 1 and was directly involved in fictitious purchase of inputs/ taxable goods. He was looking after day-to-day functions of Appellant No. 1 and had carried forward all matters relating to purchase/ sales, including the fictitious purchase/ sales. All bills of such goods, which he was knowing or had reason to believe that they were liable to confiscation under the Central Excise Act, 1944 and rules made there under.

7.1 Rules 26 (1) read as under:

"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 section 11 or under the provisions of this Chapter or the rules made thereunder, shall be liable to a penalty not exceeding the duty on the excisable goods or two thousand rupees, whichever is greater."

7.2 I do not find merit in the submissions made by the appellant in as much as the evidences recorded, statements recorded by Appellant No. 2 himself and also by Shri Dinesh Nanubhai Patel, Authorised Signatory of Shri Ambica Synthetics and Shri Ramesh Himmatlal Patel, Authorised Signatory of Shri Ambica Synthetics

transporter of ... involvement of Appellant No. 2, who had actively involved in removing, depositing, selling of clandestinely removed excisable goods of Appellant No. 1. Hence, imposition of penalty on Appellant No. 2 under Rule 26(1) is justified, legal and proper.

8. In view of above, I uphold the impugned order and dismiss appeals of both appellants.

9. अपीलकर्ता द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

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

[illegible]
आयुक्त (अपील्स)

By RPAD

To,

1.	M/s. [illegible] Re-Rolling Mills, Survey No. 285/1, [illegible] Bhavnagar-Rajkot Highway, [illegible] Bhavnagar	मेसर्स [illegible] रि-रोलिंग मिल्स, सर्वे नं. 285/1, [illegible] भावनगर-राजकोट हाईवे, [illegible] भावनगर
2	Shri [illegible] G. Sarvaiya, Partner of M/s. [illegible] Steel Re-Rolling Mill, Survey No. [illegible], Bhavnagar-Rajkot Highway, [illegible] Bhavnagar	श्री [illegible] जी. सरवैया, पार्टनर मेसर्स [illegible] स्टील रि-रोलिंग मिल, सर्वे नं. [illegible], भावनगर-राजकोट हाईवे, [illegible] भावनगर

Copy for information and necessary action:

1) The Chief Commissioner, CGST & Central Excise, Ahmedabad Zone for his kind information please.
2) The Commissioner, CGST & Central Excise, Bhavnagar Commissionerate, Bhavnagar.
3) The Assistant Commissioner, CGST & Central Excise Division, Bhavnagar-[illegible], Bhavnagar.
4) Guard File.
5) [illegible]