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श्री. जयदेवीका अन्वयित्वमा

क्र.सं.	विवरण	मूल्य	विवरण
१	वस्तु/सं. नं. १०१/१०१/१०१/१०१	१०१/१०१/१०१/१०१	१०१/१०१/१०१/१०१
२	वस्तु/सं. नं. १०१/१०१/१०१/१०१	१०१/१०१/१०१/१०१	१०१/१०१/१०१/१०१

श्री. जयदेवीका अन्वयित्वमा (Sri Jayadevi's Government)

SHV-EXCLN-000-APP-048-TO-1153-2019

मिति/दिनांक: २५.०२.२०१९ जारी गर्ने मिति/दिनांक: २७.०२.२०१९
Date of Issue: 25.02.2019 Date of Issue: 27.02.2019

पुनरावेक्षण गर्ने/गर्ने (अन्वयित्वीय संस्था/संस्था)
Placed by Sri Kumar Suresh, Principal Commissioner (Appeals), Bajra

१. वस्तु/सं. नं. १०१/१०१/१०१/१०१ (वस्तु/सं. नं. १०१/१०१/१०१/१०१) (वस्तु/सं. नं. १०१/१०१/१०१/१०१)

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II ORDERS IN APPEAL :-

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as Appellant No.1 to Appellant No. 6) as detailed in the Table against Order-In-Original No. BHV-EXCUS-000-00-42 2017-18 dated 27.12.2017 (hereinafter referred to as the impugned order) passed by the Joint Commissioner, CGST and Central Excise, Bhavnagar (hereinafter referred to as the lower adjudicating authority) :-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/536/BVR/2017	Appellant No. 1 (SSIP)	M/s. Shree Saibaba Inpat India Pvt. Ltd. Plot No. 125, Soshiya, Dist Bhavnagar. Office at - Plot No. 2137, Near Colson Arc, Altabhai Chowk, Bhavnagar.
2	V2/537/BVR/2017 (against penalty of Rs.7,50,000/-)	Appellant No. 2	Sri Vijay Kakaram Bansal, Authorised Signatory of M/s. Shree Saibaba Inpat India Pvt. Ltd. Plot No. 125, Soshiya, Dist. Bhavnagar, Office at - Plot No. 2137, Near Colson Arc, Altabhai Chowk, Bhavnagar.
3	V2/540/BVR/2017 (against penalty of Rs.3,72,578/-)		
4	V2/553/BVR/2017 (against penalty of Rs.3,72,578/-)		
5	V2/32/BVR/2018-19	Appellant No. 5	Sri Vinodhrai Anandshibho. Patel, Plot No. 105, Iscon Mega City, Opposite Victoria Park / Plot No. 20, Santosh Park Society, Subhashnagar, Bhavnagar.
6	V2/25/BVR/2018-19	Appellant No. 4	Sri Kishore Anandji Patel, Proprietor of M/s. Shree Krishna Enterprises, 304, Shoppers Plaza, Panma, Chavak, Meghawadi Road, Bhavnagar - 364 001.

1.1 Appeal No. 2 filed Appellant No. V2/540/BVR/2017 (Sr. No. 3 of the above Table) by Authorised Representative of M/s. **Bassal International Ltd., Bhavnagar** against the impugned order for imposition of penalty of Rs. 3,72,578/- under Rule 26(2) of Central Excise Rules, 2002. The lower adjudicating authority subsequently issued Clarification dated 23.7.2018 in respect of the impugned order dated 27.12.2017, correcting mistake of addressing appellant No. 2 as "Sri Vijay K. Bansal, Authorised Representative of M/s. Bassal International Ltd., Bhavnagar" in the Order part of at Para

4(vii) to 1994 Vijaya K. Doraswamy, Appellate Representative of M/s. Suresh Saibaba Ispat India Pvt. Ltd. (Appellant) Versus M/s. Suresh Saibaba Corrigendum dated 23.1.2018. The Appellate Court issued an order (No. No. V2/563/BYR/2017) by which it allowed the Appellant to file a revised Representative of M/s. Suresh Saibaba India Pvt. Ltd.'s Petition for appeal. Hence, Appo. No. V2/563/BYR/17 is hereby allowed with costs.

2. The brief facts of the case are that the Appellate Court had earlier issued Intelligence issued Show Cause Notice No. W252/171/2016-17 dated 14.12.2016 & 17.9.2018 to the Appellant No. 1 as above and No. 2 regarding possession of MS Scrap/Plates etc. obtained from processing of MS scrap purchased by the Appellant of CE duty to various customers and also in respect of the goods of the Appellant.

(a) Centra. Excise duty of Rs. 20,57,294/- to be remitted in manufacture and clearance of finished excisable goods and Centra. Excise duty of Rs. 54,20,573/- on account of non-remission of taxes and to not be demanded from Appellant No. 1 under Section 11A(i) of the Act.

Excise Act, 1944 (to read as amended) as the Act;

(b) Interest should not be demanded from Appellant No. 1 under Section 11AA of the Act;

(c) Penalty should not be imposed upon Appellant No. 1 under Section 11AC of the Act;

(d) Penalty of Rs. 13,27,573/- should not be imposed on Appellant No. 1 under Rule 25(2) of the CEA for paying on fraudulent Show Cause credit by issuing excisable invoices without actually paying the goods;

(e) Penalty should not be imposed upon Appellant No. 2 under Rule 26(1) & 26(2) of the CEA;

(f) Penalty under Rule 26(1) & Rule 26(2) of the CEA should not be imposed upon Appellant No. 1 and Appellant No. 2 who were concerned themselves in selling of excisable goods in a regular manner, but on they were not in a position to be held liable as they were liable to contribute.

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2.2 The above SO4 was adjudicated vide the impugned order as under :-

- (i) confirmed demand of CE duty of Rs. 75,13,872/- under Section 11A of the Act, along with interest under Section 14A and also imposed penalty of Rs. 75,13,872/- upon Appellant No. 1 under Section 11AC of the Act and gave order to pay 75 % penalty, if demand along with interest is paid within 30 days of the receipt of the impugned order;
- (ii) imposed penalty of Rs. 3,72,579/- under Rule 26(2)(i) of the CER on Appellant No. 1;
- (iii) imposed penalty of Rs. 7.50 lakhs under Rule 25(2) of the CER and Rs. 3,72,579/- under Rule (2)(i) of CER on Appellant No. 2;
- (iv) imposed penalty of Rs. 4,57,053/- on Appellant No. 3 and Appellant No. 4 each under Rule 26(1) of the CER;
- (v) imposed penalty of Rs. 3,72,579/- under Rule 25(2) of the CER on Appellant No. 3 and Appellant No. 4 each.

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 :-

(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. Appellant under the pocket books, diaries, etc. seized under Panchinama dated 01/3/2016 from the office-cum-residence premises of Appellant No. 3 (Shri. Janta Hotel) and Appellant No. 4 (Shri. Manore Patel); that statements of reliable sources / transport agencies cannot be relied upon without any corroborative evidence; that the impugned order has been passed without the following provisions of Section 93 of the Central Excise Act, 1944 that they relied upon the case-laws as under :-

- (i) *Manisham Dyeing Mill* reported as 2016 (343) T T 453 (T-4hd)
- (ii) *Manore & Co. Pvt. Ltd.* reported as 2016 (336) ELT 749 (Tri-Che)
- (iii) *Janta Drugs Pvt. Ltd.* reported as 2016 (343) ELT 67 (P9H)

(Signature)

(ii) The lower judicial wing authority has perused records that include the seized private records of the appellant on the basis of statements of brokers, transporters and others having nothing to do with the party evidences; tax without producing evidence with them and without the statement of director of the Appellant, the superintendent of the records/clerks, the vigilance records and legislation of Gujarat Economic Board. Statements of officers are not given in state evidence. Change of the deadline removal is required to produce evidence. In the case of the production and sale records from the Appellant, it is produced that manufactured; that permission to cross export, no such document has been granted and thus the impugned order has been passed only on the basis of presumption and assumption.

(iii) The excisable goods are sold at the factory gate and transportation of the sold goods used to be managed by the buyer of the goods and the brokers and the freight charges were also paid by the buyers. After passing of the trucks loaded with goods from the factory gate there was no control of Appellant No. 1; that is a fact that goods received and received sales proceeds of the goods from the concerned buyers either through cheques or through notes that they received from the officer of Commissioner, Central Excise, Vadod/Girvanas who had in similar case of passing of the fraudulent Levies made imposed penalty under Rule 26(2) of the CER, 1944 (Penalty of Rs. 75,13,577) under Section 114C of the Act imposed on Appellant No. 1 is also required to be set aside.

(iv) Regarding confirmation of differential CE duty (Annexure 10 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 cannot be considered as actual rates for selling different price than that of invoices on the basis of price list of M/s. Major and Minor is not correct and the prices disclosed by the market research agencies cannot be taken as acceptable transaction value under Section 4 of the Act for the goods sold by the appellant; that the

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lower adjudicating authority has not established that Appellant No. 1 has received money over and above the amount shown in the respective consignment and therefore, the impugned order confirming differential amount of Rs. 50/- on the charge of Under-valuation is not correct. legal and correct.

(v) Regarding imposition of penalty of Rs. 75,13,872/-, the appellant submitted that the lower adjudicating authority has not mentioned any section or rule of the Central Excise Law under which this penalty is imposed and therefore, they could not defend this charge; that there is no rate of interest and therefore, imposition of penalty of Rs. 75,13,872/- under Section 114C of the Act is not correct.

Appellant No. 2 :-

3.1 Appellant No. 2 reiterated submissions made by Appellant No. 1 against imposition of penalty of Rs. 7.50 Lakhs under Rule 26(1) of the CER and imposition of penalty of Rs. 3,72,576/- under Rule 26(2) of the CER. Appellant No. 2 reiterated submissions raised made by Appellant No. 1.

Appellant No. 3 & Appellant No. 4 :-

(i) Appellant No. 3 and Appellant No. 4 stated that relied upon documents have not been supplied to them and therefore, principles of natural justice have been denied; that the impugned order is non speaking and not reasoned inasmuch as the lower adjudicating authority has not dealt with the objections raised by them in their written submission and judgments rendered by them were completely ignored; that the impugned order is issued against principle of natural justice as during personal hearing also they requested to supply relied upon documents to defend their case, which was not entertained by the adjudicating authority; that data recovered from Appellant No. 2 during the search conducted by the officers of DCCEI were containing rough details/estimates; that entries made in AEC (Account Name : BSNL) were retrieved from the pen drive

and CD were made by Appellant No. 3 for a period of 7 days and 3) on Sundays for collecting payment of duties. It was also concluded that the det. driver of CD vehicle drove to the points removal of the goods, that Appellant No. 3 has not brought the transactions under which the goods were cleared (documents of Appellant No. 4 (Shri Mahendra Singh) and stated that he has not cleared goods cleared clandestinely with Appellant No. 3; that statements of transporters and brokers and Appellant's deposition of 10.12.2018 that the goods have not been recorded that should be sold under Appellant No. 4 have aided in removing the goods without payment of CD of Rs. 4,57,054/- as calculated in Annexure A801 and A802 of the Court Cause Notice; that there is no evidence regarding transaction of Rs. 54,56,596/- for purchase of goods without receipt of the goods and therefore, they are not liable to pay penalty under Rule 26(1) of the Rules; that penalty imposed on Authorized Signatory of Appellant No. 3 is Rs. 1.50 lakhs, out of total duty evaded of Rs. 28,24,439/- and therefore, imposition of penalty of Rs. 1,50,000/- on him works out to 5% of the duty evasion of Rs. 4,57,053/- and therefore, it is not found to be reasonable; that Appellant No. 3 and Appellant No. 4 are not liable to penalty under Rule 26(1) of the Rules.

4. Submissions during Personal Hearings :

Personal hearing in respect of Appellant No. 3 and Appellant No. 4 was fixed on 11.10.2018, 22.11.2018 and 14.12.2018. However, they neither appeared for hearing, nor sought any adjournment and the matter proceeded to decide the case on the basis of grounds of their appeals.

4.1 Personal hearing in respect of Appellant No. 3 and Appellant No. 4 was attended by Shri Madhavi K. Kulkarniya, Chartered Accountant who reiterated the grounds of both appeals and submitted written submissions dated 27.12.2018 wherein he, amongst, contended that relevant documents have not been supplied. That their requests to cross-examine transporters has also been denied and hence, principles of natural justice denied. Only because Appellant No. 3 and Appellant No. 4 lived in same

(Signature) Page No. 01

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House, it does not mean that both were conducting business together and both were liable to penalty under Rule 26 of the CER; that tallying of some entries with entries with storage devices did not mean corroboration of the evidences; that data on pen drive and CD recovered from Appellants were not incriminating; that investigation failed to prove any physical transportation, purchase of goods allegedly cleared clandestinely; that they have not dealt with any goods which they knew were liable for confiscation and therefore, no penalty is imposable upon them under Rule 26(1) of the CER; that Appellants have not issued invoices without physical delivery of goods as they had no personal interest; that they relied upon judgment in the case of Kapoor Alloy Castings Ltd. reported as 2502 (142) EIT 513 (SC), in their regard.

Conclusion:

5. I have gone through the Appeal papers and find that Appellant No. 1 to Appellant No. 4 filed applications for condonation of delay in filing of appeals by 2 days, 19 days, 21 days and 24 days respectively beyond normal appeal period of 60 days, but within further period of 30 days and given various reasons for filing of appeals late. I condone delay in filing of appeals by these four appellants and proceed to dispose all 4 appeals on merits.

6. I have carefully gone through the facts of the case, the impugned order, the Appeal Memorandum 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 clandestinely manufactured and cleared foreign excisable goods attracting CE duty of Rs. 75,13,872/- and should to be recovered from them along with interest?
- (b) Whether penalty of Rs. 75,13,872/- should be imposed upon Appellant No. 1 under Section 4 AC of the Act read with Rule 25 of the CER?
- (c) Whether penalty of Rs. 1,72,570/- again imposed on Appellant No. 1 under Rule 26(2)(i) of the CER is correct?



(d) Whether penalty of Rs. 1,00,000/- imposed under 20(1) of the Act and Sec. 3,72,379/- under Rule 20(1)(b) of the Act imposed on Appellant No. 1 is correct?

(e) Whether penalty of Rs. 4,37,500/- imposed on Appellant No. 1 as well as Appellant No. 4 each under Rule 20(1) of the Act is correct or not?

(f) Whether penalty of Rs. 1,00,000/- imposed on Appellant No. 3 and Appellant No. 4 under Rule 20(1) of the Act is correct or not?

6. I find that the officers of TDCET conducted coordinate search and inquiry at the offices of the appellants, various Banks, Authorized Signatory/Director, Transacters, Gujarat Marketing Board, FIFTI, various research agencies, etc. They were various books pertaining documents like District Note books, Registers, etc. in registers, etc., etc. etc. etc. and statements of concerned persons are recorded under Section 14 of the Act.

6.1 I find from the statements of Appellant No. 2, Appellant No. 3 & Appellant No. 4 and the entries recorded in the District Note books/Registers/permits, etc. recovered during search and the transactions and clearances of Excise duty goods, namely, H.S. Maida, M.S. Sugar, etc. etc. etc. were made against unaccounted / cash transactions. The Appellants recorded unaccounted transactions in their private records and equally in the files of those private records and the transactions recorded therein. Appellant No. 2, Authorized Signatory of Appellant No. 1 through statement dated 1.8.2002, has *inter-alia* accepted clearance removal of the Excise duty goods by Appellant No. 1 as reproduced at Para 6.1.3 of the Show Cause Notice and these are as under :-

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Question - 8: Do you know Shri Vinod Patel and Shri Kishore Patel of whom your wife are engaged in business of ship broking materials as brokers/dealers?

Answer - 8: Yes, I do know them. Out of them the brokers engaged in business of ship broking materials especially Steel/Non Steel materials.

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

Answer - 9: As I stated already we do not sell ship goods through brokers. But brokers such as Shri Vinod Patel & Shri Kishore Patel as a representative of buyers/merchants will act for supply of ship broking materials to the buyers.

Question - 10: The officers of DCIT, Ahmedabad conducted search in the residence cum business premises of Shri Vinod Patel and his brother Shri Kishore Patel on 03.02.2011. During the search, certain private records including diaries were recovered from his premises and withdrawn by the officers. The details maintained by Shri Vinod Patel are written in ciphers and coded manner. To get the explanation about the details written in the said diaries, statements of Shri Vinod Patel were recorded during the search. A list of many cases employed the diaries written by him in the above said diaries. You are being shown all the statements of Shri Vinod Patel dated 14-04-2010, 20-04-2010, 20-12-2010, 28-12-2010, 03-01-2011 and 24-02-2011. After going through the same, please give your comments.

Answer - 10: I have seen the above said statements of Shri Vinod Patel and I did not see any signatures thereon. I don't have any comments to offer.

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 who is the brother of Shri Vinod Patel. He is in the broking business of ship broking materials for many years. As per my knowledge dealing with them is concerned, we had several consignments cleared through their dealing in various customers.

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

Answer - 12: As I said, we had supplied many 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 comment dated 20-04-2010, 17-09-2010, 01-12-2010, 12-01-2011, and 26-04-2011 of Shri Kishore Patel, Proprietor of M/s. Shree Krishna Enterprises wherein he claimed Shri Vinod Patel has no role in the business of M/s. Shree Krishna Enterprises. But in your records, you have mentioned the name of Shri Vinod Patel also as broker for the consignment cleared to M/s. Shree Krishna Enterprises. Please clarify on the issue?

Answer - 13: I have seen the above statements of Shri Kishore Patel. I still don't know who is the owner of M/s. Shree Krishna Enterprises. However, owner of the company is not relevant for me to carry out business transactions. As far as my dealings are concerned, we used to get orders from both Shri Vinod Patel and Shri Kishore Patel for supply of materials to M/s. Shree Krishna Enterprises.

Question - 14: You may please refer copy of Page No. 20 and 41 of Packet Entry Booklet of Shri Vinod Patel wherein it is mentioned that your company used to pay cash amount mentioned therein. The details of cash payment made to Shri Vinod Patel are:

1. 10/01/2011

[Handwritten signature]

Can you please clarify why the above said amounts were paid by Mr. Singh to your company? And is against receipt of goods simultaneously. These bill and delivery documents of goods were given?

Answer - 14: I have seen the above papers. I have no comments on such such entries made in his diaries.

Question - 15: You may please explain to A.S.I prepared on 11/03/2010 of the police diaries SL No 479, 479 and 4710 raised from the receipt of Mr. Singh dated on 30-04-2010 showing the details of consignments received made by your company. These entries show the date also goods supplied by your company where Star Hotel Patel, Rishere Hotel was broker. Have you supplied these goods under invoices? If so please give the details of invoices issued by your company?

Answer - 16: I have seen the diaries - 479. I have no comments on such such entries made in his diaries.

Question - 17: You may please explain to A.S.I prepared on 11/03/2010 of the police diaries by Mr. D.P.B, Directorate of Forensic Sciences, Chandigarh from the perambles seized from Star Hotel Patel on 03-03-2010 showing the details of consignments received made by your company. These diaries show the date also goods supplied by your company where Star Hotel Patel, Rishere Hotel was broker. Have you supplied these goods under invoices? If so please give the details of invoices issued by your company?

Answer - 17: I have seen the diaries - 479. I have no comments on such such entries made in his diaries.

Question - 18: Please please photocopy of Page No. 11 of Police Diaries marked as A/8 of Star Hotel Patel where the cash amount of Rs 15,48,950/- was shown to have been paid by your company to Star Hotel Patel on 03-02-2010 allegedly against the receipt of cheque amount of Rs 15,48,950/- without supply of material after deduction of the agreed commission as per condition.

This transaction is also reflected in the ledger of 2009-10 of Star Hotel Patel on 03-02-2010 (code used for entering transactions entered with Punjab State Computers) printed from the seized perambles of Star Hotel Patel on 03-02-2010.

Sl. No.	Date	Particulars	Amount
17	07.12.2009	From Mr. Singh to Star Hotel Patel	Rs 125
18	27.12.2009	From Mr. Singh to Star Hotel Patel	Rs 125
19	08.01.2010	From Mr. Singh to Star Hotel Patel	Rs 125
20	28.02.2010	From Mr. Singh to Star Hotel Patel	Rs 125
21	15.02.2010	From Mr. Singh to Star Hotel Patel	Rs 125
TOTAL			500

P No. 2011/23/24 dt 23.08.2011

... 2011/23/24 continued to arrange the transactions with Jitendra and his family without supply of goods. In fact, it is admitted to buy on this account - 18. I have still the cheque and page and ledger. I have no evidence to show on your records made in his ledger. I have no evidence to show on your records of issue of money and supply of material. ...

Sl. No.	Date	Weight in MT	Accountable Value	Journal Entry Date	Qty. and charge	Amount in Rs.
1	20.12.2009	1.19	750270	18.05.10	75000	1,00,000
2	20.12.2009	4.32	424800	20.10	1,00,000	47,000
TOTAL						2,00,000
Cheque made by Shri. Suresh Babbar Agarwal, P. No. 11, ...						1,00,000
Cheque made by M/s. Shree Balbhar Agarwal (P. No. 11) ...						71,400
Cheque made by M/s. Shree Balbhar Agarwal, P. No. 11 ...						1,50,000
Cheque made by M/s. Shree Balbhar Agarwal ...						2,00,000
Cheque made by M/s. Shree Balbhar Agarwal ...						1,00,000
TOTAL						2,00,000
Cheque made by M/s. Shree Balbhar Agarwal (P. No. 11) ...						2,00,000

The above information clearly establishes that your company had only issued cheques without actually supplying goods. In order to show it as genuine transaction, cheque payment was made by M/s. Shree Krishna Enterprises ...

... I have seen the above said page and ledger. I have no evidence to show on your records of issue of money and supply of material. ...

... I have seen the above said page and ledger. I have no evidence to show on your records of issue of money and supply of material. ...

The 5 statements of brokers, namely, Shri Hira Jain on 23.8.2011, Shri Ganesh Chada on 24.8.2011, Shri Kaven Agarwal on 24.8.2011, Shri Dharmendra K. Sangani on 24.8.2011, Shri Ashok Agarwal on 25.12.2010 were recorded under Section 11

of the Act who were involved in the transportation of goods of the appellant No. 1, whereas they have given their own respective statements recorded under Section 14 of the Act, though as per clause (a) of the impugned order, "The deposition of various witnesses, the various entries in their registers / sale of goods is finalized, the details showing that books accounts are maintained on phone and other like books are recorded and also inform the amount the quantity and the destination, the transactions, on the basis of these records, after the details in the registers, confirmed the fact that the ship breakers were used during the course of recording the statements along with copies of the statements. Their registers were also shown to the officers and all have confirmed the details mentioned in the registers as correct. The reliability of the entries contained in the statements of the transporters and carriers in the registers as well as the Registers by the transporters are correct."

5.3 The statements of M/s. Anand S. Daryal, M/s. K. Tripathi, dated on 7.4.2011 and 15.6.2011; M/s. Sharda Transport on 4.10.2010, 14.11.11 & 13.11.11; and M/s. Ekater Punjab Hariana Roadways on 3.4.2011, 15.6.2011, 16.11.2010, Rampura Carriers on 6.4.2011 and 19.6.2011, M/s. New Jantar Transport Co. on 4.10.2010, 6.4.2011 and 5.7.2011, M/s. Veerpal Transport on 24.7.2011, 24.6.2011, Shri Gurnagark Road Carriers on 23.7.2011 and 6.7.2011 etc. were recorded under Section 14 of the Act and these statements revealed that appellant No. 1 was involved in dispatches of unbranded and non-duty paid taxable goods; that the transporters did not have their own trucks and they loaded goods to Appellant No. 1 on commission basis; that they noted down their number per number of ship breaker, in their Booking, Trip / Day Register along with the corresponding invoices, however, where no invoice was issued, nothing was mentioned in their registers and that the records recovered with them after have been decoded, examined and substantiated in very elaborate manner by incorporating scanned images of documents/reports from Page 1 to Page No. 60 of the Show Cause Notice. The investigation also generated evidence from the register maintained at the gate by the officers of Regional Office, Guwahati and the lower adjudicating authority has recorded as follows:-

3.7.1 The investigation conducted with transporters and carriers the statements recorded of different transport operators revealed that whenever the entries were made in the registers of the said operators, the goods were certainly loaded from the ship breaking yard. This is clear



are entered in the trip/booking register maintained by the transporters and trucks provided by them to the ship breaking units, scrap having weights of 24 MT to 28 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 K. Bansal, Authorized Signatory of M/s. SSPL gave statement before DYCEI, he was 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 subsidiaries but he could not tender any tenable explanation.

3.7.2 As per the prevailing practice for transport of scrap from Alang, the driver pay entry fees to GMB and bring their trucks inside ship recycling yard only when they are sure of getting full truck load and agreed freight charges. Further from the statement of the transporters it is clear and undisputed fact that the incidents for trucks were always planned when the sale deal was finalized so as to avoid any kind of unnecessary charges to be paid to the truck owners. Further, I find that there is no scope of any other truck to get the goods for loading directly 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 transporter operators are contacted and truck is booked for transport of goods from the selected ship recycling yard. The facts is further supported by the entry made in the GMB register and fees paid by the transporter for unloading in the ship recycling yard, Alang. The statements of transporter 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 give any satisfactory proof regarding cancellation of trucks and deals with the driver regarding entries that have not been reconciled with the entries of bills and entries in the register of transporter operators. Thus, from the entries prepared on the basis of register of transporters, registers of GMB and on the basis of average load carried by the truck from the premises of M/s. SSPL, I find that considerable goods as worked out in Annexure, scavenged from ship breaking yard was removed clandestinely without issuance of proper Central Excise invoice and without payment of proper Central Excise duty.

3.7.3 It is not worthy to mention that the Trip/Booking Registers are maintained by the transporters in their ordinary course of business and their number and name of the Broker mentioned in the Trip Register are also linked 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 DYCEI, therefore, find that in respect of those entries contained in Trip/Booking Registers, pertaining to M/s SSPL where no corresponding invoices are issued, goods have been cleared clandestinely without payment of Central Excise duty by M/s SSPL. Accordingly, allegation in the Show Cause Notice that M/s SSPL 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. SSPL where no corresponding invoices are issued, goods have been cleared clandestinely without payment of Central Excise duty by M/s SSPL. Therefore, from

the cut out of the bill by the Government of Madhya Pradesh and the fact that from 5/10/57 and till 1/9/58, the said Government had been demanding certain duties on the goods.

3.8 The DGCEI also examined certain other documents, such as State authorities, records kept by the Government of Madhya Pradesh and Notice No. 110, issued to the Government of Madhya Pradesh in 1956 of goods supply of a long distance consignment of goods for under-treatment or goods for transportation, supplied by the transporters mentioned in the list of vehicles for loading at various ship breaking yards. The register introduced by the appellant containing details of entries of vehicles of the respondents in the port area entries available in the shipping registers maintained by the Transporters and Shippers regarding the entries mentioned in the registers.

3.10.6 I further find that many transactions contained in the bill of lading of Sri Khand Raj and Sri Hansa Raj, have been duly compared with the record of ship-breaking yards and other firms which transporters or other parties mentioned in the bill of lading of the transactions contained in the bill of lading have been furnished by the DGCEI by way of separate statements in the form of various copies of Registers, Inquiry into bills of lading.

(Emphasis added)

6.4 Appellant No. 1 has contended that the lower adjudicating authority has not allowed cross-examination and therefore, the principle of natural justice has been violated. I find that the lower adjudicating authority has given its findings on the issue as under :-

"3.11.1 I further find that there is no provision in the Customs Act or the Law for seeking cross-examination. Madhu Mehta vs. High Court in the case of K. Baloo vs. Govt. of Madhya Pradesh (1957) 11 SCR 217 (1957) 11 SCR 217, Madras, has 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 law of evidence, but such who must offer such opportunity in the said circumstances, as would assure him proper opportunity to defend himself. The case of K. Baloo vs. Govt. of India reported in 1952 ELR (110) 106 was decided by the Hon'ble Tribunal Appointed in 1954 FORTS 297 279. AGRICULTURAL COMMISSIONER OF D.E., AHMEDABAD vs. Appellant reported in 1954 ELR 529 (17 - Ahmed, Madras) it was held as follows:

"13. In K. Baloo's case (supra) the Hon'ble Madras High Court has stated that the necessity of cross-examination depends upon the facts and circumstances of each case. The Adjudicating authority has to give an opportunity in any party concerned as would assure him proper opportunity to defend himself. Opportunity for cross-examination is given wherever it is relevant, useful and genuine and is not for proving the proceedings. The order

In *ITC 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 also in the letter of 10-10-2006 are also to similar effect - that cross examination is not always a mandatory procedure to be accorded in all cases. The request should not be dismissed arbitrarily or without enquiring its desirability in the facts of each case. The Adjudicating Authority may refuse cross examination for justifiable reasons... (17)

3.11.2 Similarly, in the case of *Akankshaam Ply-M-Wood Pvt. Ltd vs. Director of Tax & C&A, Ahmedabad* reported at 2004 (177) ELT 1150 (Trib. Mumbai), Hon'ble Tribunal, in their order, in para 6, has held as under:

3.11.2.1 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 facts that all the statements relied upon were placed before them. They had all the opportunity to demolish these statements during the proceedings. Cross-examination cannot be denied as a matter of right in departmental proceedings.

3.11.3 Further, the Hon'ble Tribunal, in the case of *M/s. Shreey Zeeva & Co., Chennai* reported in 2001 (136) ELT 339 (Trib. Chennai) has observed that non-availability of witnesses for cross-examination is a valid plea when the findings are based on documents about which there is no credible explanation and nothing on record to show witnesses not voluntarily or effectively restricted within close proximity of the time these were obtained.

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

[Enclasis supplied]

3.4.7 In fact, when Appellant No. 2, Appellant No. 3 and Appellant No. 4 were rendered their elaborate statements under Section 14 of the Act during investigation (they admitted for being confronted with the incriminating Diaries/Notebooks etc.) which contained showing transactions and not tallying with their statutory records and related to the goods cleared in clandestine manner without payment of CE duty and probable concealment of CE invoices. Further, records recovered from Gujarat Motorway Board, capturing movement of trucks, also corroborate the details of transactions to which no CE duty was paid. Therefore, I find that findings of the lower adjudicating authority are appropriate in this regard as there are overwhelming documentary and oral evidences against Appellant No. 2. I would like



to rely upon judgment of a Probable Cause Officer in the absence of any facts. Tuskie Hills Pw, L. reported as 2008-2009 was the case - 2017, 2018, 2019. It has been held as under:

"20. The above facts will satisfy the test for the allegation of purpose of confidential removal if any inquiry into the sources of goods with an allegation as to their origin, quantity, provenance or characteristics, or an intention to evade payment of tax, or some other duty or tax, and not as a post-removal check on the quantity of goods, is the same. Therefore, in all such cases, all persons whose names are involved, there may be some suspicion of an offence, and there may not be available. However, based on the above facts, the evidence is sufficient to give rise to the suspicion that the person concerned is not able to give a satisfactory explanation for the removal of the allegation of confidential removal, and can be held liable under section 170A. In other words, the standard which the law requires to be satisfied in such cases may not be the same, as in some cases, there may be a suspicion of confidential removal."

Section 170A(a)

6.5 In the present case the incriminating private records seized during investigation have been duly re-introduced. Appellant No. 1, Appellant No. 2, Appellant No. 4 brokers, transporters, records of 2, 7 and 8 items seized, therefore, upheld demand of Cent of Excise duty of Rs. 6,57,353/- against the said goods as TR 1.2 of the Show Cause Notice.

6.6 I find demand of CE duty of Rs. 6,57,353/- as shown in TR 1 and Annexure WK-2 to the Show Cause Notice has been entered as on the basis of entries found in Notebooks / Diaries marked 901, 902, 903, 904, Fol. 13, 9, 9, and 905, 906, 907, Shr. Vinod Patel (Appellant No.1) and Smt. Rajendra Kumbhar (Appellant No. 4). The details contained in the said Diaries mentions amongst other details name of HSN/Codes, quantity, rate, address of bill number of Appellant's name as Rajendra Patel from where the said transactions of movements removed the A. Authenticity and veracity of the diaries and private records were duly amply established and corroborated in the affidavits and statements of pages 4 to 10, 5 dated 19.04.2010, dated 25.4.2010, dated 20.12.2010, dated 23.12.2010, dated 3.1.2011 and dated 25.2.2011. 8. Appellant No. 2 stated 20.4.2011 dated 15.11.2011 and dated 1.12.2015 and answer to Question No. 18 to Question No. 23 of Statement of Appellant No. 2 (Authorized signatory) dated 7.12.2015, where by, he has and credence to the authenticity of the unaccompanied as mentioned in the affidavits. The inescapable inference that can be drawn from the depositions recorded in the recovered Notebooks/Diaries/Item Lists is that the evidence is sufficient and not

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Magistrate or High Court as has been attempted to be made out by Appellants and therefore, importance of private diaries, etc. and confessional statements recorded in connection with these diaries and other evidences cannot be whittled down by said submissions of the Appellant No. 1. The lower adjudicating authority derived his findings on the basis of appreciation of the relevant pages of diaries/notebooks concerning dates of clandestine removal at Para 9 to Para 10.2.3 and Para 10.2 to Para 10.2.5 of the Show Cause Notice. Statements of Appellant No. 3, broker have also been recorded on 15.4.2018 and 30.12.2018 wherein locus control and decision on details of Diaries has been explained at length.

6.2.1 In view of above oral and documentary evidences and statements of Appellant No. 2, Appellant No. 3 and Appellant No. 4, I find that demand of CE duty of Rs. 4,57,053/- in respect of 19 entries and 13 entries has been correctly confirmed by the lower adjudicating authority as detailed in Annexure – VK-1 and Annexure – VK-2 to the Show Cause Notice.

6.2 To sum up, CE duty demand of Rs. 70,93,720/- on account of clandestine removal at Para Annexure TR-2.2 and Annexure VK-1 and Annexure VK-2, I find that the statements recorded during course of investigation are substantial piece of evidences not contradicted which have not been refuted at any stage by the Appellant No. 1 and therefore, as per the settled legal position sanctity of the same cannot be undermined by said arguments only. I further find that the authenticity of the records seized from the premises of Appellant No. 1 and other premises have been duly corroborated and tallied with the records of Appellant No. 2 and CE duty on the clandestine disappearance of the goods non accounted for in the record of Appellant No. 1 have been raised. The Honble CESTAT in the case of Luvn Textile Mills Pvt. Ltd. recorded as 2018-TIOU-1524-IC-MAD-CX has held as under :-

101. 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 in an open manner for the Department to conveniently detect the same. Therefore, in case of clandestine removal, where secrets involved, there may be cases where direct documentary evidence will not be available. However, based on the circumstantial evidence, 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 required in such cases, may not be the same as in other cases where there is an allegation of open removal.

31. As noted above, the fact that the assessee had a number of bank accounts which were not disclosed to the Assessing Officer is not sufficient to conclude that the assessee had sufficient means to discharge the tax liability. The fact that the assessee had a number of bank accounts which were not disclosed to the Assessing Officer is not sufficient to conclude that the assessee had sufficient means to discharge the tax liability. There was no evidence to show that the assessee had sufficient means to discharge the tax liability. The fact that the assessee had a number of bank accounts which were not disclosed to the Assessing Officer is not sufficient to conclude that the assessee had sufficient means to discharge the tax liability. The fact that the assessee had a number of bank accounts which were not disclosed to the Assessing Officer is not sufficient to conclude that the assessee had sufficient means to discharge the tax liability.

32. Thus, in the absence of any proof of the finding, the Court is not inclined to interfere with the finding recorded by the Assessing Officer as set out in the Tribunal, as the scope of the appeal before the Court is limited to Section 35G of the Central Excise Act, 1944. The substantial question of law is: Whether there is any question of law arising out of the findings of the Assessing Officer? We find that there is no question of law arising out of the findings of the Assessing Officer. The fact that the assessee had a number of bank accounts which were not disclosed to the Assessing Officer is not sufficient to conclude that the assessee had sufficient means to discharge the tax liability.

(Emphasis added)

6.8 Appellant No. 1 has argued that the facts of the case cannot be ascertained on the basis of private records and third party bank records. However, a large number of documents, statements of officers, representations, etc. from the agents and from both the key persons of Appellant No. 1 as well as the accountants, Chartered Accountants, Director, writer or private clerks of Appellant No. 1 have been produced admitted clandestine clearance and also identified the evidence including the incriminating records during investigation. Further, brokers and intermediaries have also admitted to have sold / transported goods belonging to Appellant No. 1 without CE invoices and without payment of duty. It is also found that the revenue has been computed on the basis of Annexures received during investigation of Appellant No. 1. Incriminating records recovered during enquiries carried out at the premises of Appellant No. 1 and same have also been taken with the assistance of Appellant No. 2 and all important links involved in the case have been traced. The evidences gathered during investigation and therefore, demand cannot be said to be confirmed without concrete evidence and sufficient circumstances.

6.9 It is fact that no statement has been requested or made and the authorities concerned have sufficient material on record and that all evidences in the case are sufficient and are sufficiently proving the case against the appellants. In this regard, it is not necessary to rely upon the decision of the Hon'ble GSTAT in the case of Shri. Prakash, reported as 2017 (346) ELT 125 (T-De) wherein it has been held as under:-

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"5. It now remains to be seen that in both the proceedings almost identical set of facts were involved. The allegation was that based on evidence collected from the suppliers' side, unaccounted receipt and further manufacture of taxable items by the appellant were sought to be sustained. Admittedly, the case is not only based on the material evidence collected from the suppliers' end and also as corroborated by the responsible persons of the supplier's end. The receipt and use of the said unaccounted raw materials for further manufacture has apparently been admitted by the appellants and due duty short paid has also been admitted during the course of investigation itself. The appellants' great emphasis on non-availability of the further corroborations by way of details of transaction, invoices receipt, etc. in the present case, the expenses collected from the supplier's side is categorical and cannot be disputed. The private records of the suppliers have been corroborated and admitted for the correctness of their contents by the persons who were in-charge of the supplier's units. When such evidence was brought before the partner of the appellants' unit, he categorically admitted unaccounted clearance of taxable items. However, he did not name the buyers to whom such products were sold. In such situation, it is enough that the appellant has taken a plea that the department has not established the details of buyers and category of the taxable goods to such extent. It is seen that the records maintained by the suppliers prior were offered by the persons in-charge cannot be brushed aside. It is also the case of the appellant that the suppliers maintained such records only to falsely mislead the officials. In fact the supply of unaccounted raw materials has been corroborated by the partner of the supplier's firm. In such situation, it is not tenable for the appellant to, now in the appeal stage, raise the point by requirement of cross-examination, etc. Admittedly, none of the private records of the appellants given have been submitted or later contested for their authenticity. In the appeal before the Tribunal, the appellant is making a categorical assertion that the statement by the partner of the supplier's 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 on its own. As a rule always, the first party's records of 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 other evidence like transportation and receipt of money has not been proved. In a clandestine manufacture and clearance, each stage of transaction 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 appeal are dismissed."

[Emphasis supplied]

8.10. It is well known that in cases of clandestine removal, the Department is not required to prove duty evasion with mathematical precision. My this view is duly supported by judgments of the Hon'ble Supreme Court in the cases of *Srin Shah*

Srin Shah

Gurmatra reported as 1973 (13) ELT 188 (30) (T-1) and of 1980 as reported as 2006 (235) ELT 387 (30).

6.11 The statement, corroborated by the evidence available, has to be considered and examined in reference to the findings of the J. Sukhwani reported as 2016 (31) ELT 321 (30) and taken into consideration as 2016 (331) ELT 321 (30-Denial) and the corroborative evidence of goods without payment of Central excise duty and 10% duty on the value of inculpatory and specific articles had been recovered in the case of M/s. Hi Tech Aereives Ltd. reported as 2007 (346) ELT 658 (30) (11).

"14. On careful consideration of the facts and circumstances stated above, I find that the statement of Director is the basis for the demand and seizure is inoperative and is void. The Director clearly admitted that the documents/private records recovered from the shops contained bills of proceeds of such materials as well as details of finished goods sold and without payment of duty. The fact is further strengthened by the observation that many bills of the private documents are covered by the invoices issued by the assessee on which duty stands paid. The Director has clearly admitted the truth of the facts as well as documents, receipts and bills covered by the bills in the private records which are recovered by the invoices. Such statements are available as evidence as per section 114 of the Act. The activities of construction cannot be required to be proved by sufficient positive evidence. However, the facts stated in each individual case are required to be scrutinized and established independently. The description in this case has relied upon the private records of the Director and is also supported by the material records in the private records. There is no evidence that the statement has been taken into account.

15. In view of the facts and circumstances, I find that the Commissioner's demand has been made in taking the view that there is not enough evidence to establish demand of goods. Even though the statement of Mr. Gurmatra reported as 2016 (31) ELT 321 (30) is said to be the author of the private records recovered has not been recorded, it stands admitted by Mr. Gurmatra, Director about the truth of the contents of the private records. Consequently, I find no reason to disallow this plea of evidence."

(Signature)

6.12 I also rely on the decision in the case of M/s. Marvans Steel Industries Ltd., reported as 2017 (355) ELT 451 (T-1) (Denial) wherein it has been held that private records seized from the possession of appellants employed as the time of seizure, showing entries for accounts as well as unaccounted goods which have been explained in detail and disclosed by GM of the factory with production records is trustworthy; that statement of appellants during the hearing is legal and

containing detailed knowledge to be considered reliable. I also rely on the decision in the case of *M/s. Ramcharan Ravindra Pvt. Ltd.* reported as 2014 (302) E.L.T. 481 (S.C.) where similar view has been taken by the Hon'ble Supreme Court.

6.10 Part of the considered view that the admitted facts need not be proved as has been held by the Hon'ble CESTAT in the cases of *Alex Industries* reported as 2008 (230) E.L.T. 3073 (Tri-Mumbai); and *M/s. Shani Solutions* reported as 2006 (202) E.L.T. 1003 (Tri. Chennai). Hon'ble CESTAT in the case of *M/s. Karol Engg. Works* reported as 2004 (300) E.L.T. 373 (Tri. Del.) has also held that admission/Confession is a substantial piece of evidence, which can be used against the maker. Hence, the Appellant's reliance on various case laws are not applicable in light of the positive evidences available in this case as discussed above and in the impugned order. Hon'ble CESTAT in the case of *M/s. N R Sange P Ltd* reported as 2015 (328) E.L.T. 453 (Tri-Del.) has also held that when preponderance of probability was against the Appellant, absence of any statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted for, no input output ratio prescribed by law is of no use.

6.11 In view of above, I find that the contentions raised by Appellant No. 1 are not viable in law and the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that the Appellants were engaged in clandestine removal of the goods. I, therefore, find that the confirmation of demand of Rs. 14,20,140/- and Rs. 4,57,073/- (Total: Rs. 20,93,220/-) by the lower adjudicating authority is correct, legal and proper.

6.12 It is noted in consequence that the confirmed demand of Rs. 20,93,220/- is paid along with interest at applicable rates under Section 12AA of the Act, and therefore, no order of recovery of interest under the impugned order.

6.13 In view of this being a case of clandestine removals of the goods which has been established. The ingredients for invoking extended period of demand and imposition penalty under provided to Section 11AC of the Act are also available in the case as held by the Hon'ble CESTAT in the case of *Sun Microsystems India P. Ltd.* reported as 2015 (349) E.L.T. 475 (Tri - Bang.) and hence, the impugned order has correctly imposed equal penalty of Rs. 20,93,220/- under Section 11AC(1) of the Act on Appellant No. 1. The lower adjudicating authority has also correctly granted

option of reduced penalty of 2% for the period of 30 days commencing from 15.12.2017 till 15.01.2018 to Appellant No. 1.

7. Regarding computation of duty on MS plates of 2mm thickness (MS plates - JM-4) to the SSPL on the ground of a false invoice being submitted that the said charge has been levied on the basis of the rates prescribed by various market research agencies and it is higher than rates evolved by Appellant No. 1 in its Central Invoices on the basis of market rates prevailing at the time and shown in the invoice for the purpose of payment of duty and the transaction value charged to different customers for assessment purpose must be accepted for the determination of duty payable by rejecting the transaction value on the basis of rates evolved by market research agencies liable to be assessed.

7.1 The lower authority has considered all the material charges in invoice under inter alia, giving findings as under:-

7.15 The Show Cause Notice charges levied on appellant are assessed by way of undervaluation of the goods, viz MS plates and MS sheets of ships. It is not in dispute that various Government Agencies like the price controlling all the factors of demand and supply and that it is no reason that prices evolved by such agencies are unreasonable. It is in this backdrop that even MS Freshers/ 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 market rate. It is also not in dispute that the re-rollable plates of size 8mm (4 Ang) to 25mm (14Ang) are employed for the hulling of ships and the majority of re-rollable plates employed in hulling of ships are of 12mm size. In order to substantiate this fact, the DCAE conducted inquiry with various re-rollable plate suppliers including M/s Major & Minor with reference to pricing data of plates which revealed that day to day price of 12mm size of plates is almost equivalent to the average price of all sizes within the range of 8mm to 25mm.

7.16 On comparison of the price mentioned in the invoice of MS SSPL vis-à-vis of the prices evolved by the market research agencies, it was also revealed that in many cases the transaction value declared in the MS SSPL were far less than the actual value prevailing in the market during the respective period. The ship-breakers have by recording the actual size / thickness of MS Plates created by them, resorted to MS Re-rollable plates so as to evade duty by declaring only part of the value of such goods in the invoices and making the difference as a cost and above the declared invoice value, by way of recording some cash amounts.



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 amt. 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 one variation of (+/- 2%) i.e. rates of Rates and Scrap 2% lesser than the rate of M/s. Major and Minor is reasonable. I, therefore, fully agree with the view adopted by DGCEI that duty short paid on account of variation of price more than 2% is an amount of undervaluation of the goods which is recoverable from M/s. SSIP. 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. Sankharia were adopting the most scientific and appropriate analysis of the data gathered by them. The Ship Breakers were fully aware of the rates of the scrap generated from ship breaking and intentionally undervalued the goods with intent to evade payment of Central Excise duty. Further inquiry was conducted with Joint Vigil Committee, Kolkata and I find that in India, Joint Vigil Committee is the only institution which is empowered by the Ministry of Steel for the purpose of formulating guidelines for production, allocation, pricing and distribution of iron & steel materials in the country as well as to function as the official authority of the industry. JVC was constituted in 1964 by the Government of India under the powers conferred by clause 17 of the Iron & Steel Control Order, 1956. JVC consist of members and representatives from the Ministry of Steel, steel Authority of India Ltd., Tata Steel Ltd., Rastriya Ispat Nigam Ltd., etc. With its authority and vast experience, JVC has maintained a comprehensive database which is considered to be the most extensive and reliable information on Indian steel industry. This database includes capacity, production and stock of all the major steel producers of the country, domestic market price of iron & steel, FOB and CIF prices and landed cost of steel products, export-credit rates on iron & steel products, production and prices, resources for select materials for steel making, state-wise and category wise details of dispatches of iron & steel, etc. Apart from the regular use by researchers, academicians, marketing/business strategists, entrepreneurs, financial analysts by the FIs and banks, some of the key uses of the JVC database includes duty formulation on customs, excise, export, formulation of GDP, Industrial Production Index, understanding of price trends, deflated base rates, formulation of Five Year Plans, economic surveys and union budgets, state-wise flow of materials and logistics, etc. In view of the domestic price data on iron & steel products maintained by JVC is considered as the most authoritative of the type for the

steel industry in India and the fact that the goods were
exported under the provisions of the Export Control Act
and the fact that the goods were not of the type which
the SSRI have provided for in the schedule of goods
Exported under the provisions of the Export Control Act.

7.2 I find that demand of Rs. 20,00,000 by the assessee is not on the ground that the Appellants were liable to pay a price in excess of the price of the goods at the time of breaking and Internationally accepted for the purpose of the demand. The payment of 20% duty, the sales tax and the interest thereon are a matter of the relation as per rates ascertainable from the records of the assessing agency.

7.2.1 I also find that valuation of goods has been arrived at by a comparison of the data released by Joint Plan Committee of the Indian Iron and Steel Industry of Steel, Govt. of India and the research conducted by M/s. Steelcast and M/s. Steerace. Appellant has not disputed the said analysis. He has only stated that no excess payment over and above the stated prices was received by him. I find that Appellant No. 2 in his statement dated 7.5.2003 has said that he may not mention the thickness of the plates in the invoices because of this reason, read as under :-

Q:40 Do you mention the thickness of plates in the invoices issued since when?

A:45 We were not mentioning the thickness of the plates in the invoices issued by under Section 4. However from August 21, 2002 onwards, we have started declaring the thickness of the plates in our invoices under Section 4 of our business.

7.2.2 The contention that reference to weight of plates in the invoices under Section 4 of the Act is not to be rejected does not have force, when from the facts, including Appellant No. 1, the invoices in question do not mention the grade and they did not specify the grade/quality of the goods. The invoices of diaries seized from Shri Appellant No. 1 (Karnal Paper) and Appellant No. 2 (i.e. Karnal Paper) already comprising details of sales transactions with various Brokers / Transporters. I am therefore of the view that evidence is not to establish the grade and quality of the goods in question to justify the rates adopted by them and hence, the demand of Rs. 59,20,000 along with interest and equal penalty under Section 11AC is not due.

ORDER

12/05/2004

12/05/2004

12/05/2004

12/05/2004

12/05/2004

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12/05/2004

7.3 In view of above, I uphold the order of the duty of Rs. 54,70,673/- also along with interest thereupon and equivalent penalty under Section 11AC of the Act. In this regard, I rely upon the case laws as under :-

(i) SMT Uo. v. Commissioner of Customs, 2017(8) GSTL 798 (Tri-Mum)

The Hon'ble High Court of Madras had an occasion to decide the issue whether exchange of duty before issuance of show cause notice shall grant immunity from penalty under Section 11AC of Central Excise Act, 1944, in the case of CCE, Madurai v. Metal Powder Co. Ltd., 2014 (263) E.L.T. 71 (Mad). It is held that the penalty is imposed for an act of deliberate default by an assessee with the intent to evade duty adopting any of the means mentioned in Section 11AC of the Central Excise Act, 1944. The facts and circumstances of the case as well as the nexus operated followed by the assessee in the present case demonstrate that they had deliberate intention to evade duty without inclusion of debt note amount in the assessable value of goods. This could not have been noticed without culpability. Therefore, the appellant does not deserve any consideration of an Amicus Amicus, penalty imposed under Section 11AC is confirmed."

(ii) DW Manufacturing P.L.L., 2017 (356) E.L.T. 363 (All.)

The Hon'ble Court found that the invocation of extended period is justified, the provisions of Section 11AC will automatically require to be invoked and hence penalty shall be levied on the duty or differential duty determined will necessarily have to be imposed. In arriving at this conclusion, we draw inspiration from the ratio laid down by the Hon'ble Apex Court in the landmark judgment of UOI v. Unaramendra Textile Processors - 2008 (231) E.L.T. 3 (S.C.) and the subsequent judgment in UOI v. Rajasthan Spinning & Weaving Mills - 2009 (235) E.L.T. 3 (S.C.). Accordingly, we hold that appellants i.e. DW Herbol Manufacturing cannot escape the penalty of Rs. 2,03,64,544/- imposed on them under Section 11AC of the Central Excise Act, 1944 as ordered by the adjudicating authority. The appeal is hereby dismissed."

(Signature)

8. Regarding Implication of Section 13(1) of Central Excise Act, 1944 (CEA), under Rule 26(2)(i) of CCRS. Appellant No. 1, who is presently residing at Dhule, Dist. Jalgaon, Appellant No. 1 has submitted various documents including bill of lading, bill of exchange, factory gate and delivery order, consignment bill of lading, Appellant No. 1 has submitted that it is consignment of goods which is subsequently received in the responsibility of Appellant No. 2 as they have received delivery of goods from buyers at factory gate.

8.1 Para 3.14.1 of the impugned order has been reproduced as under:-

"3.14.1 From the information available in bill of lading of ABC ledger account with serial 8541, bill of lading marked with number 155, showing the entry of goods transaction with serial 155, it appears that these goods were moved without bill of lading mentioned therein in order to facilitate fraudulent debit of CBVAT credit on the buyer bills transactions involving issue of invoices without supply of goods as mentioned in paragraph 12 of the notice. I find that there are cases where similar tax issue: Central Excise invoice without supply of goods as per Three Mynes Enterprises and M/s. Anup's Engineering Co. Ltd. entry to buyers and thereby passed as fraudulent Central Excise invoice No. 3.72.5/84; (Central Excise No. Fa. 7, 75, 777), Education Case No 7,215/- & ST/ Case No. 2,617/-) (Rupees Three Lakh Fifty One Thousand Seven Hundred Twenty Seven only) as depicted in the said annexure."

: Evidence 80/104

8.7 Para 12.15 to Para 12.15.3 of the Show cause notice has been reproduced as under:-



State of Florida Department of Transportation Bureau of Transportation Planning and Research	
Final Invoice Project: Statewide Transportation Planning and Research Fiscal Year: 1977-1978	
Invoice No. 100-100-100-100-100-100	Date 10/1/77
Contract No. 100-100-100-100-100-100	Contract Description Statewide Transportation Planning and Research
Invoice Period 10/1/77 - 10/1/77	Invoice Amount \$100,000.00
Invoice Description Consultant's services for the preparation of the Statewide Transportation Planning and Research Report.	Invoice Status Final
Invoice Terms Net 30	Invoice Due Date 11/1/77
Invoice Contact Mr. J. M. Smith, Director of Planning and Research	Invoice Address Department of Transportation Bureau of Transportation Planning and Research Tallahassee, Florida 32304
Invoice Signature J. M. Smith, Director of Planning and Research	Invoice Stamp State of Florida Department of Transportation Bureau of Transportation Planning and Research Tallahassee, Florida 32304

10.15.2010) from the scanned image of Invoice No. 514 & 515 both dated 30.12.2009, it can be seen that this invoice was issued by M/s. Shree Balhaha Paper Mills Pvt. Ltd to M/s. Shree Krishna Enterprises, Bhavnagar, which is a registered trading firm owned by Shri Kishore Patel. Transactions relating to this invoice is entered on 06.02.2010 as shown in the ABC Ledger under Serial Number B27. Sr No 105 to 109 relates to settlement of payment for Invoice No. 514 & 515 both dated 30.12.2009. In Sr. No. 108 of ledger, word 'CASH' is mentioned. In the course of investigation, it is found that wherever word 'CASH' is mentioned, such transactions were fictitious transactions and in such cases only invoices were issued without supply of goods and thereby resulted in receipt of invoice to take CENVAT credit fraudulently. Since the transaction relating to Sr. No. 106 of the ledger entry dated 03.02.2010 mentioned Serial.

10.15.6 For above mentioned transaction relating to issue of fraudulent invoice without supply of goods and the mode of withdrawal of payment relating to such transaction is explained herein below. This transaction is recorded in ABC ledger account of BSNL (Part No.135). As evidence of issue of invoice without supply of material during factoring transaction, credit and debit CENVAT credit to M/s. Shree Krishna Enterprises, serial made in Sr. Page No. 21 of Sr. checked Invoice - B/S, information provided in invoice No. 514 & 515 both dated 30.12.2009 and corresponding entries in ledger with account number of BSNL for the year 2009-10 given and taken from Sr. positive) seized from Shri. Vinod Patel under provisions dated 04.02.2010 are recorded and analyzed herein below. Value of purchase made and details of payments made for these purchases by cheque and subsequent receipt of payment through cash / journal entry, is recorded as follows:-

(Amount in Rs.)

S.No. DDO/AAZ/85-98/2010

Sr No	Date	Weight in MT	Assessable Value	Central Excise Duty	VAT/ other charges	Grand total of GST
514	30.12.2009	10.00	558217	130457	73000	1392574
515	30.12.2009	7.85	424820	75019	40592	1154211
Total						2546785
Payment made by cheque to M/s. Shree Balhaha Paper Mills Pvt. Ltd on 03.02.2010						2060146
Cash paid made by M/s. Shree Balhaha Paper Mills Pvt. Ltd to Shri Vinod Patel on 03.02.2010						486639
Debit made by M/s. Shree Balhaha Paper Mills Pvt. Ltd to Shri Vinod Patel for account of Shri Vinod Patel on 03.02.2010						1740740
As per evidence of total received by M/s. Shree Balhaha Paper Mills Pvt. Ltd						2176185
Amount as per Shri Vinod Patel in this for account payable by M/s. Shree Balhaha Paper Mills Pvt. Ltd						612852
Total						2269146
Net amount to M/s. Shree Balhaha Paper Mills Pvt. Ltd (Net of purchase after paying brokerage)						2060146

The above information clearly establishes that M/s. BSNL had only issued invoice without actually supplying goods. In order to know if as per the provisions, any payment was made by M/s. Shree Krishna Enterprises which was not made in cash or adjusted after deduction of agreed amount of purchase.

8.3 In view of above, I find that the Revenue authorities have not discharged their duty of proving passing of cash value for the goods of Rs. 3,77,578/- on the basis of documentary evidences in the discharge order. The cash value of goods as per invoice - VK 3 and 315 as combined is Rs. 3,77,578/- as per the separate invoice prepared by the appellant - VK 3 & 4, without any supporting goods. Therefore, imposition of penalty of Rs. 3,77,578/- under Rule 26(2) of the CE Act is not justified.

8.4 Regarding imposition of penalty of Rs. 1,41,00,000/- on appellant No. 2 under Rule 26(1) of the CE Act, I find that appellant No. 2 has not discharged his burden of guilty evasion in his statement dated 28.02.2008. Therefore, 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, conveying, keeping, concealing, or in any other manner disposing of any excisable goods which he knows or has reason to believe are liable to forfeiture or under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or five thousand rupees, whichever is greater."

8.4.1 Appellant No. 2 has not only dishonestly received and selling non-duty paid goods, which were liable to consumption tax and thereby involved in tax evasion, but also and reasonable. Therefore, I find that penalty of Rs. 7,50 lakhs imposed on appellant under Rule 26(1) is justified and I would find the same as legal and correct.

8.5 Regarding imposition of penalty of Rs. 3,77,578/- (lacks) on appellant No. 2 under Rule 26(2) of the CE Act, I would like to reproduce Rule 26(2) of the CE Act which reads as follows :-

"Rule 26. Penalty for certain offences :-

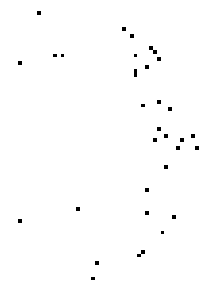
(2) -----

(2) Any person who issues - (i) an invoice or bill without payment of the goods specified therein or abets in issuing such invoice or

(ii) any other document or being in charge, such document, in violation of article the user of said invoice or document is likely to take or has taken any illegitimate benefit under the Act or the rules made there under like claiming of CENVAT credit under the CENVAT Credit Rules, 2004 for refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."

[Signature]

[Signature]



8.5.1 has discussed. In Para 5 to 5.4 of this order, Appellant No. 2 has indulged himself in issuance of exposable invoices without accompanying goods and with the aid of such invoices the user availed ineligible benefit of Convat credit and thus, wrongly has got, currently impugned, set off and 1 uphold the same.

9. Regarding imposition of penalty of Rs. 4,57,053/- under Rule 26(1) of the CER and Rs. 3,77,379/- under Rule 26(2) of the CER each on Appellant No. 3 and Appellant No. 4. I find that Appellant No. 2 has admitted his involvement in duty evasion vide his statements dated 19.04.2015, dated 20.4.2010, dated 22.12.2010, dated 23.12.2010, dated 3.1.2011 and 26.2.2011. I also find that Appellant No. 4 has also admitted that he aided and abetted Appellant No. 2 in CE duty evasion and his confessional statements dated 23.4.2010, dated 17.9.2010, dated 1.12.2010 and 25.2.2011 bear ample testimony to this fact. The passing of fraudulent Convat credit has also been established. I, therefore, find that Appellant No. 3 and Appellant No. 4 have concerned themselves in removing and selling the non-duty paid goods, which were liable to confiscation and hence I uphold penalty imposed on Appellant No. 3 (Shri. K. K. Pare) and on Appellant No. 4 (Shri. Kishore Patel) under Rule 26(1) and also under Rule 26(2) of the CER.

10. In view of above, I uphold the impugned order read with Corrigendum and set off of 3 Appeals filed by the Appellants and dismiss Appeal No. V2/543/SVR/2017 as inadmissible & invalid.

11. ऑर्डर द्वारा दल को गैर उचित का निगदात आरोपित नहीं है कि किया जाता है.

12. Appeals filed by the Appellants are disposed off in above terms.





(कुमार संतोष)

उ. 74 आयुक्त (अपील्स)

By & for C

To,
 1. M. S. & Co. Balbaba Ispat India Pvt. Ltd. Plot No. 123, Sector, Dist Bhavnagar.
 Office No. : Plot No. 2137, Near Golden Arch, Alubhai Chowk, Bhavnagar.

2. Sri Vijay Karkhanavala, Director, Department of Mys. Shree Sai Baba, Dept. 100, P.O. No. 135, Sojya, Dist. Shivamogga, Shivamogga, P.O. No. 2137, Near Uaidan, A.C. Station, Shivamogga, Shivamogga.

3. Sri Vinodhrai Amarnathji Baba, P.O. No. 100, Iscon Mega City, Opposite, P.O. No. 100, P.O. No. 20, Santosh Park Society, Shivamogga, Shivamogga.

4. Sri Kishore Amarnathji Baba, P.O. No. 100, Shree Krishna Enterprises, 304, Shree Sai Road, Parimal Chowk, Shivamogga Road, Shivamogga - 564 301.

प्रति :-

- 1) प्रधान मुख्य अधिकृत वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, गुजरात अथवा उत्तराखण्ड को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क कच्छ अथवा अन्य संरक्षित क्षेत्रों को जहाँ आवश्यक कोषांतर्गत हेतु।
- 3) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केंद्रीय उत्पाद शुल्क, गण्डल - ...
शिवमोगगा।

की कार्य फाइल।

