



दिल्ली का राजस्व विभाग / Revenue Dept. Delhi
10, 10/1, 10/2, 10/3, 10/4, 10/5, 10/6, 10/7, 10/8, 10/9, 10/10, 10/11, 10/12, 10/13, 10/14, 10/15, 10/16, 10/17, 10/18, 10/19, 10/20, 10/21, 10/22, 10/23, 10/24, 10/25, 10/26, 10/27, 10/28, 10/29, 10/30, 10/31, 10/32, 10/33, 10/34, 10/35, 10/36, 10/37, 10/38, 10/39, 10/40, 10/41, 10/42, 10/43, 10/44, 10/45, 10/46, 10/47, 10/48, 10/49, 10/50, 10/51, 10/52, 10/53, 10/54, 10/55, 10/56, 10/57, 10/58, 10/59, 10/60, 10/61, 10/62, 10/63, 10/64, 10/65, 10/66, 10/67, 10/68, 10/69, 10/70, 10/71, 10/72, 10/73, 10/74, 10/75, 10/76, 10/77, 10/78, 10/79, 10/80, 10/81, 10/82, 10/83, 10/84, 10/85, 10/86, 10/87, 10/88, 10/89, 10/90, 10/91, 10/92, 10/93, 10/94, 10/95, 10/96, 10/97, 10/98, 10/99, 10/100

Tel: Fax No.: 2381 247902-2441142 Email: appeal@nic.nic.in

दस्तावेज संख्या का अर्थ है -

1	अपील संख्या / Appeal No.	आदेश संख्या / Order No.	दिनांक / Date
	2381/2019/10	670/20	21/02/19
	12-16, 39, 41, 4	1015-KN12.8-101-24-45-2019-18	
	9-873/2019-19		

2 अपील संख्या का अर्थ है - (Appeal/Order No.)

BHV-EXCIS-006-APP-055-TO-058-2019

अपील का दिनांक : 27.02.2019 आदेश का दिनांक : 28.02.2019
Date of Appeal: 27.02.2019 Date of order: 28.02.2019

दस्तावेज संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

1. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)
2. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

3. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

1. M/S Marandina Ship Breakers Pvt. Ltd., Plot No. 7, Ship Breaking Yard, Alang, Bhavnagar.
2. Shri. Kamal Khanna (D.O. Of M/s. Marandina Ship Breakers Pvt. Ltd., Plot No. 7, Ship Breaking, Yard, Alang, Bhavnagar)
3. Shri. Vinod A. Patel, Plot No. 102, Eastwaga City, Motin Park, Bhavnagar 364002
4. Shri. Kishor A. Patel, 208, Shopping Point, Farid Canal, Waghoddi Road, Bhavnagar.

5. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

6. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

7. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

8. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

9. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

10. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

11. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

12. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

13. अपील संख्या का अर्थ है - (Appeal/Order No.) का अर्थ है - (Appeal/Order No.)

IN ORDER IN APPEAL

The present four appeals have been filed by the Appellants (herein after referred to as 'Appellant No. 1 to Appellant No. 4') as detailed in the Table below against Court-in-Original No. BHV-EXCUS-000-JC-52-2017-18 dated 15.02.2018 (hereinafter referred to as 'the impugned order') passed by the Joint Commissioner, Central GST and Central Excise, Bhavnagar (hereinafter referred to as 'the court adjudicating authority'):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	1000/2018-19	Appellant No. 1	M/s. Mannalnes Ship Breakers Pvt. Ltd., Plot No. 47, Ship Breaking Yard, Aang, District: Bhavnagar
2	1000/2018-19	Appellant No. 2	Shri Kamal Kherke, Director of M/s. Mannalnes Ship Breakers Pvt. Ltd., Plot No. 47, Ship Breaking Yard, Aang, District: Bhavnagar
3	1000/2018-19	Appellant No. 3	Shri Vinod Patel, Plot No. 102, Floor: First City, Loc: Victoria Park, Bhavnagar- 364002
4	1000/2018-19	Appellant No. 4	Shri Kishor Patel, Proprietor of Shree Krishna Enterprise, Plot No. 102, Esoon Mega City, Opp: Victoria Park, Bhavnagar- 364002

The brief facts of the case are that officers of the Directorate General of Central Excise Intelligence (hereinafter referred to as 'DGCEI') conducted coordinated search at the premises of some brokers at Bhavnagar, of various manufacturers and transporters. After detailed investigation, Show Cause Notice No. DLCE/AZU/36-88/2013-14 dated 18.12.2017 was issued proposing demand of recovery of Central Excise duty of Rs. 23,90,932/- for clandestine manufacture and clearance of finished excisable goods and Central Excise duty of Rs. 54,46,704/- on account undervaluation of goods should not be demanded from Appellant No. 1 under the proviso to Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') along with Interest under Section 11AA of the Act; Imposition of penalty on Appellant No. 1 under Section 11AC(1)(a) of the Act and also under Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rule'); Imposition of penalty of Rs. 1,00,562/-, as per investigation conducted in respect of Shri Bharat Shetty, under Rule 26(2) of the Rules and imposition of penalty of Rs. 3,97,356/- as per investigation conducted in respect of Shri Vinod Patel & Shri Kishor Patel, under Rules 26(2) of the Rules upon Appellant No. 1. The DCI also proposed to impose penalty under Rule 26(1) and Rule 26(2) of the Rules upon Appellant No. 2, 3 & 4. The Show Cause Notice was adjudicated by the lower adjudicating authority, vide the impugned order, in which (i) Central Excise duty of Rs. 82,37,626/- was

confirmed under Section 11A(1)(a) of the Act along with interest under Section 11AA of the Act and penalty of Rs.52,37,636/- was imposed under Section 11A(1)(a) of the Act with reduced penalty upon Appellant No. 1. (i) penalty of Rs. 7,79,138/- (Rs. 3,80,582/- and Rs. 3,97,556/-) under Rule 19(a) of the Rules was imposed upon Appellant No.1. (iii) penalty of Rs. 5,00,000/- under Rule 20(1) of the Rules and penalty of Rs. 1,30,000/- under Rule 20(2) was imposed on Appellant No. 2 i.e. Shri Kamal Sharma, Director of Appellant No. 1. (iv) penalty of Rs. 3,53,932/- and Rs. 2,37,630/- under Rule 25(i) & 26(2) of the Rules, respectively, was imposed each on Appellant No. 3 and Appellant No. 4.

2.1 Sri Bharat Sheth, Broker filed appeal papers against the impugned order, which was not admitted as the condition of mandatory pre-deposit in terms of Section 35F of the Act has not been fulfilled.

3. Being aggrieved with the impugned order, Appellant No.1 to 4 have preferred this appeal on various grounds as under:-

(A) Appellant No. 1:

(i) The lower adjudicating authority failed to consider the material facts of the case and not paid proper attention towards statutory provisions particularly laid down in the Act and the Rules submitted by the appellants and upheld the impugned order without considering their written reply and various orders/judgements cited by them;

(ii) That they never cleared the excisable goods in clandestine manner as alleged in the show cause notice and upheld in the impugned order, to evade payment of excise duty; that the subject case has been developed on imaginary and base on assumptions and presumptions;

(iii) That the allegation of evasion of central excise duty of Rs. 11,11,675/- during the period after verification of records carried out at the reporters; that the allegation of evasion of central excise duty of Rs. 3,25,325/- as per outcome of verification of seized records of Shri Bharat Sheth, Broker; that the allegation of evasion of central excise duty of Rs. 58,45,761/- on ground of under valuation of the excisable goods sold by the appellants; that the investigation was conducted by DCOFI that the appellant evaded central excise duty of Rs. 3,53,932/- in coordination with Shri Vinod Patel, Broker; i.e., alleging joint evasion to the tune of Rs. 82,37,630/-.

(iv) The authority failed to collect corroborative documentary evidences from

the appellant to obtain useful backing of his action. The appellant noted that the subject case is purely based upon the records/documents/diaries and misc. papers seized from the premises of Sri Bharat Sheth, Broker and their statements as well as statements of his accountant Shri Manish Pate; that DGCEI interacted with Transporters/ Truck Owners/ Weigh Bridge In-charge/ Agencies, Permit company, GMB-Ahmed authority as well as In-charge of main gate persons of GMB-Ahmed; and recorded statements wherever required or collected as report; that DGCEI said to have visited certain private agencies situated at Panaji, Gandigarh, Gurgaon etc., for collecting price data of old period in respect of the scrap/paste items generated during ship breaking activities. Such agencies include, which generally collect the day to day price data of iron & Steel pieces and molten scrap generated during ship breaking activities and circulate to their dedicated subscribers through e-mail or SMS so that their subscribers (Ship Brokers) can be acquainted with day to day existing price situation prevailing in steel market and can also use it while dealing & selling their desirable goods.

(v) The DGCEI on completion of investigation issued the SCN and developed the various charges; that the Impugned order issued on the basis of diaries/note books/ bills etc. recovered from Sri Bharat Sheth, and allegation advanced bases on assumptions and presumptions; that the impugned order not disclosed any material evidence and it is well established fact that demand issued on assumptions and presumptions cannot sustainable; that they relied upon following case laws:-

- 2005 (156) EL - 146 (Chennai), Mys. J. (Tribunal), Pw. Ltd.
- 2007 (176) EL - 106 (Chennai), Mys. Varni Casting
- 2007 (177) - T - 305 (Tribunal), Mys. National Aluminium Co. Ltd.

(vi) It is settled position in law that penalty is not imposeable on the basis of statements of co-accused without any corroborative evidences, which the department is free to provide and produce especially with regard to movement of goods between consignor and consignee. In support to their claim the appellant relied upon following case laws:-

- 2006 (138) ELT - 124 (Tribunal), Mys. Legendall Premnath;
- 2005 (147) EL - 101 (Tribunal), Mr. Pradeep Sani;
- 2004 (145) EL - 581 (Tribunal), Mys. Anwar M. Pate;
- 2011 (273) LLT - 113 (Tribunal), Mys. Sulekha and Sankh Pvt. Ltd.

That cessable removal allegations cannot be fastened against the appellant based upon recovery of some private records from the premises of a Broker as the same were required to be supported with material corroborating and corroborative evidences; that in this no such evidence is available.

(vi) The DGCEI has developed the charges on the appellant simply and solely relying upon the records/documents/files & other info. papers etc... recovered/seized from the possession of the brokers, transporter companies, GMB entry register and various statements of in-charge persons of the above and valuation obtained from private institutions situated outside Gujarat; that the recovery of certain hand written documents from the brokers and transporters relied upon by DGCEI for construction of the subject case; that these seized documents are not relevant for the appellants or with their business activities as they had not carried out such illegal business with anyone; that such documents might be maintained by the above said transporter & others as a protective measure and just to accommodate and facilitate their false business with others or defect or fault at any stage or to save their business interests so that their illegal activities can be suppressed easily; that the department has totally ignored to verify their genuine and bonafide business activities and relevant records but simply and solely relied upon records of others and other private persons or private Institute's records and their statements; that no such provisions exist in entire text of C. Ex. Act/Law to blindly rely upon the private records of others and to issue notice to bonafide prudent registered unit; that they had never collaborated with the business of other brokers/persons or allowed them to maintain the records in such a fashion or manner being the appellant had never attempted to defraud with the Government revenue; that the said goods were seized from the transporter companies have no nexus with the appellants business activities present or past; that they had dealt with an exclusive long time member so far as the transactions relating to sell of excisable goods carried out with their various customers is concerned as it is evident on records of the department that there was no excise case booked against them before; that they have never agreed with such unfounded charges raised by the impugned SCN and confirmed in the Impugned order; that the appellant has been unnecessarily linked and victimized with the present case; that they completely deny to accepting such fabricated, false and ludicrous story;

(viii) That they rely upon the following judgements:

- M/s. Paras Industries P. Ltd., 2005 (100) LLJ-73 (77) as confirmed by the Hon'ble Supreme Court reported in 2006 (195)ELT 4182 (87);
- M/s. R. Jay Chhotas P. Ltd., 2005 (209) LLJ-307 (311) (Guj);
- M/s. D.P. Industries, 2007 (218) FT 242 (T.L. Board);
- M/s. Laxmi Engg. Works, 2000 (254) ELT-205 (381);

(ix) That department has relied upon committed statements of others and records maintained by other unregistered and casual business unit/person, no



Page 6 of 23

the law permits to book a case with serious charge & to issue SCN with a proposal of punitive action; that without proper verification of the appellant's business records no authority is permitted to issue and confirm serious charges of clandestine clearance; that the investigating officers had scrutinized our various seized records purely with bias mind.

(x) That the CIO has been issued on assumptions and presumptions without any objective corroborative evidences; that the case appears simply and totally stands on the legs of others i.e. say on the basis of records/documents/diaries etc. recovered from unregistered casual business House/persons. Further, the concerned persons (like Broker, Transporters, Angadia Pans, weigh bridge owners etc.) whose statements were recorded have no knowledge of excise law, therefore they simply accepted the story and sign the statements and others documents as per will, wish and requirements of the inquiry officers; that such statements can never be considered to be valid, trust worthy and relied upon document for the purpose of issuance of SCN; that the charges are required to be proved by the Department by adducing cogent, convincing and tangible evidences and not merely on assumptions and presumptions; that they rely on following case laws:-

- (a) Govt Foods India Pvt. Ltd., 2006 (152) E.L.T. 131 (T);
- (b) Pooja Textile, 2000 (226) E.L.T. 1079;
- (c) Cash Super Mills Ltd., 1978 (2) E.L.T. 172 (SC).

(xi) That merely confirmative statements recorded with mental pressure should not be sole reason and ground to confirm participation in clandestine removal and to confirm the duty demanded and also imposition of penalty; that the reliance was put by order of M/s. Orient Enterprises reported as 1988 (23) E.L.T. 507 (T); that they demanded cross examination of such persons but it was not allowed without providing any specific reasons for not allowing.

(xii) That the Department has till date not detected a single incident of seizure of cash amount, which helps to prove that the appellant had in any fraudulent manner surreptitiously excisable goods as alleged; that the present case exclusively relied upon various circumstantial evidence from the premises of the Branch & others as well as various statements so recorded by the DGOET; that they rely on the following pronouncements of the higher judicial forums:-

- 2001 (209) E.L.T. 100 (13100), M/s. Beekalyal Synthetics;
- 1998 (23) E.L.T. 210 (DECAT), M/s. Kishan Lhamo & Co.;
- 2005 (273) E.L.T. 113 (CFSTAT), M/s. Amr Pharamatics;
- 1987 (10) 203-507, M/s. Ubenzer Rubbers Ltd.
- 2000 (223) E.L.T. 121 (H.P.), M/s. A & S Casting Pvt. Ltd.



(xii) That the Impugned order that the Appellant had selling 2000 nos of excisable goods had shown low sale price than it was actually prevailing in the market and demanded differential excise duty, which has been determined & confirmed in the Impugned order (which comes to Rs. 28,46,704/-); that the said agencies as listed in the SOM/DPO are run purely on private basis. that the said agencies do not possess any documents clearly showing that it has been registered with the Govt. for the purpose of price determination or not referred by the respondent authority in the impugned order; that the text of union excise law or C. Ex. Valuation Rules does not indicate and control the assessee that the price declared by such private institutes should be implemented strictly failing which the concerned assessee will have to undergo and face the consequences of process of penal provisions; that CBEC, New Delhi or COMMISSIONERS has so far not issued any circular/instruction/trade notice etc., directing them to implement the prices determined by the said private institutes during the course of selling and clearing the excisable goods to the customers.

(xiii) That it is a possible mistake of the DCEM authority to challenge sale price determined by the appellant through prior date of the private institute as the excise laws and valuation rule do not support such unauthorized step to challenge the transaction value; that whatever price of excisable final products determines and declared during sale of our products, the department cannot challenge it without proper valid documentary evidence.

(xiv) That as per provision of any law, before, imposing any penal action upon a company/registered unit or a person, the following three vital elements should be present in the case to and justify for such action of the authority concerned:-

- a. Establishment of mens-rea
- b. Mala Fide intention
- c. Deliberate defiance of law to defraud Govt. revenue.

That when all the above ingredients are present in a case then invocation of penal clause is justified; that in the present case, none of the above elements are found present; that in the instant case nowhere it is found/proved that the appellant including partner had at any stage acted with guilty mind; that there was no deliberate intention to act in a subtle manner that the appellant has done nothing wrong at any stage of entire transaction but cleared duty said excisable goods with proper valuation of excisable goods, description of excisable goods under proper excise invoices to all the unit including the appellant has discharged all the statutory facilities as prescribed under the excise law. Only

and accurately before dealing with the excisable goods; that the department has taken a part of private records/documents and other loose papers seized from others with exclusive intention to give colour to the subject notice and to achieve target allotted by the higher officers of the department; that this is not a fit case of clandestine removal and thereby invoking Section 11 AC of the Act is not justified in this case;

(xv) They also rely upon following dictums issued by the Hon. Tribunal with regard to imposition of penalty;

- (1) 51 ALJ 311 (18 November 2010 P.367 2013/297) ELT-887 (Tri. De.)
- (2) The word 'fit' in Section 11 AC of the Act is not to be construed by the CIE. Hyderabad Bench, GSTN: a final order No. 642-648/2010 dated 21.03.2010 (2010 (246) LT-545 (Tr. Bench)) (for legal aid) F.T. 140 dated 2015 Vol. 317 Pt. 3 Page No. 4023 - 21).
- (3) 1991 Comptroller Finance Corporation - 1991 [24] LL-433 (SC).
- (4) 2002 Debur Inds Ltd., referred in Aik-1980 (SC) 1819.

(xvi) In light of above lawful submissions and also the circumstances of the entire case, they feel that the balance of convenience is in their favour and thereby no action is required against them and they request to drop the impugned order.

(3) Appellant No. 2:

Appellant No. 2 contested imposition of penalty of Rs. 5,00,000/- under Rule 26(1) of the Rules and Rs. 1,00,000/- under Rule 26(2) of the Rules on him on the grounds mentioned by Appellant No. 1; that the lower adjudicating authority has not dealt with the pleas made by him (Appellant No. 2) in written copy and has not recorded any findings on the arguments raised before him; that the lower adjudicating authority has shown judicial discipline in not abiding by the writ/judicial pronouncements relied upon by Appellant No. 2; that no evidence that the appellant was one of the beneficiaries in so much as being Director of Appellant No. 1 had not acted with any personal motive or benefit and hence, personal penalty imposed upon him is not proven; that a penalty could be imposed on a person who acquired possession of, or otherwise physically dealt with, any excisable goods which, according to him belief or knowledge, was liable to confiscation and hence, penalty under Rule 26 was not invocable against him, that penalties under Rules 26(1) and 26(2) of the Rules imposed upon the appellant as well as penalty under Section 11AC imposed on the appellant's company i.e. Appellant No. 1, simultaneous penalty on him is not impossible; that the appellant has not produced any positive evidence to prove that Appellant No. 2 actively involved himself in so called clandestine removal of the excisable goods and therefore, penalty imposed on him is not in law; that he relied upon

the following decisions:-

- Karnataka Smelting & Refining - 2009 (160) ELT 915 (Trib. Bangalore)
- Five Blue Industries Ltd. - 2013 (276) ELT 100 (Trib. Bangalore)
- Suresh Hotel Tubes Pvt. Ltd. - 2009 (240) ELT 37 (Trib. Bangalore)
- Gokul Indo Chemicals Pvt. Ltd. - 2009 (238) ELT 100 (Trib. Bangalore)
- Shree Krishna Pipe Industries - 2007 (100) ELT 504 (Trib. Bangalore)
- Roshniya Metal Works Ltd. - 2010 (180) ELT 108 (Trib. Bangalore)
- Celva Industries - 2004 (65) ELT 171 (Trib. Bangalore)

(C) Appellant No. 3 & 4: being aggrieved with the impugned order, Appellant No. 3 & 4 filed appeals on the following grounds:

(i) Both appellants argued that their requests for cross examination of Shri Mahendrachal Ambal Kone, Partner of Mahal Metal Industries, Bhu. Nagar have not been entertained; that the department has not supplied the named loan documents to them so as to file defense reply; that the impugned order was issued in violation of principles of natural justice; that whoever makes an accusation, has to supply the necessary ingredients to support that charge and for this they relied upon the following case laws:

- Shalimar Agencies - 2000 (140) ELT 156 (Trib. Bangalore)
- Chandrasekar - 1990 (48) ELT 239 (Trib. Bangalore)
- Telsala Sammers - 2001 (131) ELT 566 (Trib. Bangalore)
- Rama Chemicals - 2001 (150) ELT 271 (Trib. Bangalore)

(ii) They further argued that they are not liable to penalty under Rule 26(1) of the Rules in as much the findings of the lower adjudicating authority that the documents and diaries seized from the appellants contain details of all illicit transactions, however, the entry made in diary recovered from the appellants are estimates written by the appellant after inquiry with the concerned ship breaker; no evidence produced by the department of alleged illicit transactions and burden of proof is lying on the department and they carry all the findings recorded against them; that they refer to their submissions made in their reply to Show Cause Notice and reiterated the same for the purpose of present appeal; that the depositions made by different persons in their statements are not relevant to him; that none of the transporters has confessed that the goods cleared by the ship breaker clandestinely had been transported by them or none of the anglades confessed that the said goods were purchased by them or none of the anglades confessed that any amount has been paid to the appellant; that the case does not fall under any person under Rule 26(1) & that either he has acquired possession of any excisable goods or he has knowledge or belief that the goods are liable to confiscation under the Act or that he has been in any way concerned in transporting, receiving, exporting, loading, consoling, selling or purchasing or has in any other manner dealt with any

excisable goods with such knowledge or belief; that he had not dealt with excisable goods in any manner whatsoever; that acquisition of possession of goods is, invariably, a physical act, and so is each of the various ways of dealing with goods, specifically mentioned in the rule; that they rely on the decision in case of *Gujraj Boyce & Mills, Co.* reported as 2002 (148) ELT 161 (T), *A. K. Kulkarni* reported as 2003 (56) ELT 5/3 (CEGAJ/Mum.) and *Ram Hari Singh* reported as 2003 (151) ELT 451 (T-1-DEL.).

(i.) Regarding penalty under Rule 26(2) of the Rules, both appellants submitted that the lower adjudicating authority not discussed the various grounds and pleas taken by the appellants in support of their contention that M/s. Nandanam Export Paris Services Pvt. Ltd., Mahabub, New Mumbai through the appellants had not taken credit on the invoices issued by the ship broker: minimal receipt of the excisable goods mentioned therein; that no corroborative evidence has been produced in the impugned order in this regard for imposing penalty under said 26 (2) of the Rules.

(ii.) Both appellants filed application for condonation of delay by stating that there is a delay of 27 days as they received the impugned order on 22.02.2018 and they filed appeal on 17.05.2018 and 21.05.2018 respectively; that their condonation was busy with various adjudication proceedings due to drive of education; that their consultancy, being a Chartered Accountant firm, was busy with the heavy work of audits issued by income tax department due to general election; statutory audit work of nationalized banks and migration and transfer work of USI and hence, they could not prepare appeal in time; that there was no intention or delay on their part; that they rely on the decision of *Koodi S. Others* reported as 1987 (28) ELT 185 (SC), *Bhag Singh & Others* reported as 1987 (32) ELT 258 (SC), *Vedant* reported as 2001 (132) ELT 15 (SC), *S. D. Kulkarni (P) Ho.* reported as 2003 (155) ELT 931 (T-1-Ko-kata).

4. Persons hearing in the matter was attended by Shri A. H. Ozar, Consultant of Appellant No. 1 and Appellant No. 2, who reiterated grounds of appeals and submitted that the demand of duty is not justifiable as there is no evidence in this case against them; that penalty imposed on company under Section 114C and also under Rule 26(2) is not correct and only one penalty should sustain and not duty; that these penalties have been imposed on company, which is not legal as he cannot be penalized twice once under Rule 26(1) and again under Rule 26(2) of the Rules; that only one penalty should be

imposed on Director and not on the appellants.

4.1. Personal hearing to the matter was provided by Shri V. V. Vasudeva, Chartered Accountant, on behalf of appellants No. 3 and Appellant No. 4. He reiterated the grounds of appeal and mentioned the grounds concerning grounds of appeal that he had nothing more to add.

4.1.1. Appellant No. 3 & 4 vide their letter dated 20.01.2016 to the learned P.H. Submitters wherein they stated that they made a request for supply of relied upon documents on the demand reply, which was not provided, and the impugned order has been passed irregularly; that the lowest adjudicating authority completed the proceedings hastily and passed the order in a hurried manner and thus the order suffers the infirmity being passed violating the principles of natural justice; that para 13.2 of the show cause notice states that outcome of investigation in respect of Shri Vinod Patel and evidence in form of private records recovered from Shri. Vinodines Shri. V. Vasudeva & Co. Ltd. appear to have evaded central excise duty, whereas para 18 of the show cause notice stated that their client Shri Vinod Patel and Kishor Patel had obtained the possession of goods i.e., 18736200 Kg of stainless steel scrap valued at Rs. 25,86,755/- involving duty of Rs. 3,53,021/- without cover of any invoice from the ship breaker; that the department is not sure whether their clients were involved in so called clandestine transaction or both Shri Vinod & their clients were involved; that the so called evidence for alleged clandestine removal is pen drive or CDs; that the adjudicating authority has ignored their submissions that many entries were estimates/invoice of the goods lying at various areas of ship breaking yard at Alang/Sosiya; that the adjudicating authority failed to appreciate the submission made by them without any reason and neither any investigation was carried out by the department with vehicle owners nor with any entries to whom such so called clandestine removes goods were made; that penalty can be imposed under Rule 26 of the Rules only if a person knowingly deals with any goods which he knows are liable for confiscation; that Appellant No. 3 and 4 neither purchased nor dealt with the goods knowingly and these were liable to confiscation and as such no penalty is imposable on both of them; that Appellant No. 3 and 4 never managed supply of goods clandestinely cleared by the ship breaker as alleged in the Show Cause Notice and had nothing to do with the sale of the excisable goods; that there is no evidence on record that Appellant No. 3 and 4 in any way conspired or colluded with the ship breakers to facilitate evasion of excise duty as they had nothing to do with the clearance of

Invoices' that the judgment relied upon by the lower adjudicating authority are not relevant in the facts of this case.

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 this case, confirming demand and imposing penalties on the Appellants is correct or otherwise.

6. I find that Appellant No. 3 and Appellant No. 4 filed appeals beyond period of 30 days but within further period of 30 days giving acceptable reasons. Since both appeals have been filed within further period of 30 days prescribed under Section 75 of the Act, I condone delay in filing appeals.

7. I find that the officers of DGCEI conducted coordinated searches at the places of various brokers and transporters, from where various incriminating documents like various diaries, files, loose papers, compact disk, pen drive, etc. and other receipts, booking/OT registers etc., were recovered. Further, investigations including search conducted at the premises of ship broking units and billing units revealed that the Appellants had indulged themselves in violation of Central Excise law as detailed in the Show Cause Notice and the impugned order. It is submitted by them that the lower adjudicating authority, while passing the impugned order, has ignored the submissions made by the Appellants. However, I find that the lower adjudicating authority has discussed defence submissions of the Appellants in detail at Para 4.7 & 4.7.1 and Para 4.11 to 4.13 and Para 4.15 to 4.18 and Para 4.18.1 to 4.20 of the impugned order and has also given his detailed findings at Para 4.7, 4.7.1 & 4.7.2 and Para 4.8 to 4.9 and Para 4.15 to 4.20 on the submissions of the Appellants. Hence, this contention of the Appellants is devoid of merits.

7. I find that Appellant No.2. (Director of Appellant No.1) was shown all the evidences in the form of documents recovered from the premises of Appellant No.1, 3 & 4 during investigation before recording of his statements; that he was shown Pen Drive as shown at the premises of Appellants No. 1 and Shri Bharat Sheth, Broker and the statements given by Shri Bharat Sheth, Broker and Shri Manish Patel, Accountant of Shri Bharat Sheth, Appellant No. 3 & 4. Similarly, Appellant No. 3 & 4 have been given full opportunities to peruse the documents seized and also statements made by others before giving testimony about the veracity and correctness thereof. It is seen from the statements of Shri

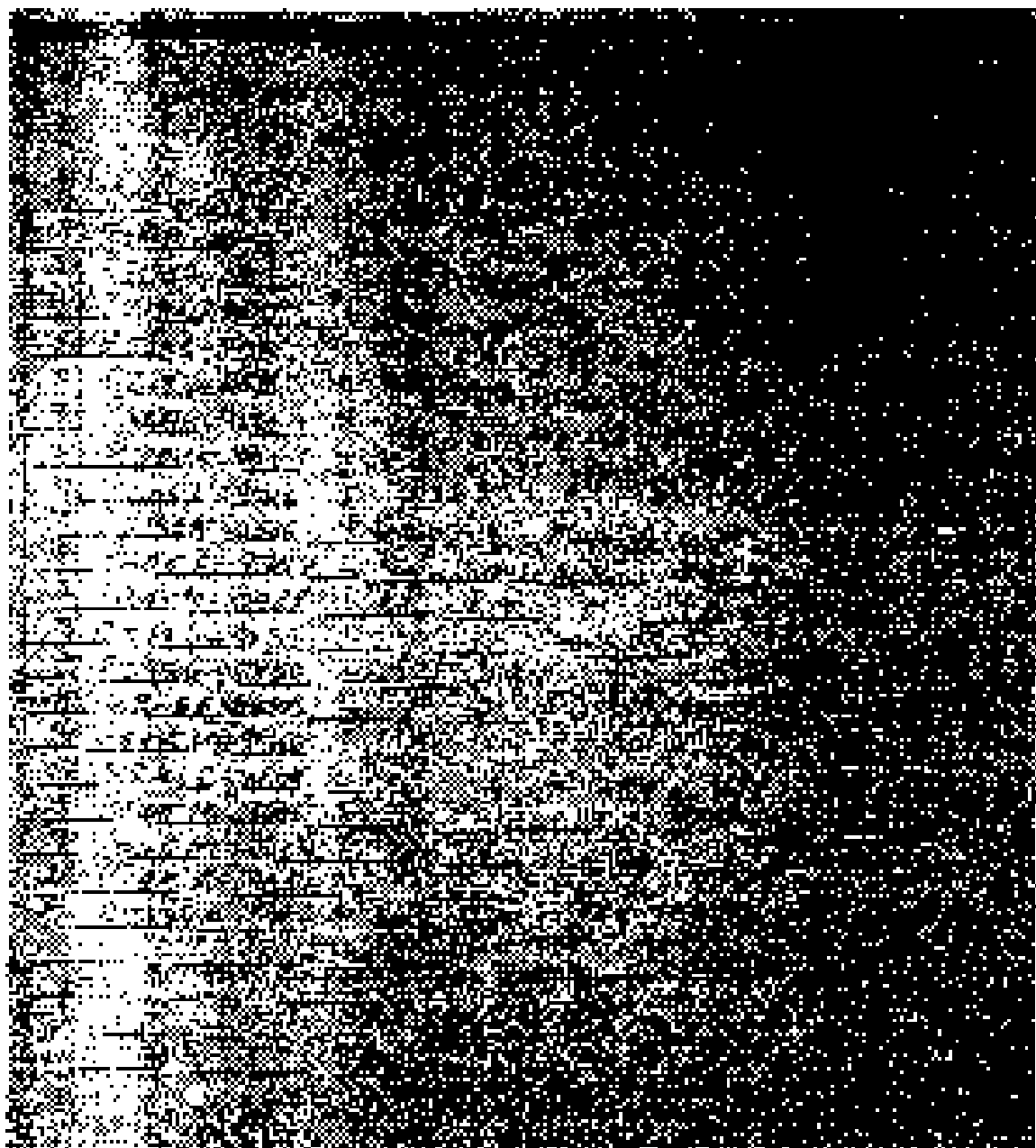
Munish Patel, Accountant of Sri Bharat Sheth Broker's office documents were in form of diaries maintained by him for and on behalf of Sri Bharat Sheth, Appellant No. 2 was also given full opportunity to examine various documentary evidences duly corroborated with oral evidence collected from Sri Bharat Sheth, Broker, his accountant as well as Appellant No. 3 & 4, Appellant No. 1. At the time of recording of statements of Appellant No. 2, he was also shown the Panjikamas and also various exhibits given by Sri Bharat Sheth, accountant of Sri Bharat Sheth, Appellant No. 2 & 4, & appraiser's valuation is also shown. Annexures prepared on the basis of investigation conducted in respect of records seized from the premises of Appellant No. 1, Sri Bharat Sheth and Appellant No. 3 & 4 showing details of the transactions carried out through Sri Bharat Sheth, Broker and Appellant No. 3 & 4 by Appellant No. 1 find that from the documentary evidences viz. seized diary of Sri Bharat Sheth, Broker and Appellant No. 3 & 4 and statements of witnesses and it is proved that Appellant No. 1 had removed the goods with the help of Appellant No. 2, 3 & 4 and Sri Bharat Sheth, Broker clandestinely. These transactions have tallied with the records of Appellant No. 3 & 4 and Sri Bharat Sheth, Broker and are also corroborated with the records of Appellant No. 1 and transport documents have admitted regarding transfer of goods. These are substantial evidence in the form of documentary and oral evidences or records obtained from the third and persons indulged in transactions with Appellant No. 1. I find that the investigation was clearly corroborated various evidences to require Assessor of Central Excise duty by Appellant No. 1 with active support of Appellant No. 2. Therefore, it is proved beyond doubt that Appellant No. 1 has evaded duty of Central Excise of Rs.67,37,636/- as detailed in Annexure of the Show Cause Notice. The records show that Sri Bharat Sheth, Broker and his accountant as well as Appellant No. 3 & 4, whose statements were perused by Appellant No. 2 before giving his own statements, have never filed any retraction at any point of time. Therefore, all these evidences substantiate the charges against Appellant No. 1, 2, 3 and are valid, admissible and legal evidences in the eyes of law.

7.2 I also find that DGCEI proved the authenticity of records seized from Sri Bharat Sheth, Broker and also duly corroborated the same with records seized from other premises. Para 6.4 to 6.8, 6.10, 6.12 to 6.13, 6.17 to 6.18 of the impugned order have illustrated the facts and details as to how the investigation of records seized from Appellant No. 1, 2 & 4 and Sri Bharat Sheth, Broker has also admitted that Appellant No. 1 removed the excisable goods clandestinely to

Various buyers.

7.3 Regarding demand based on loading registers of the transporters, it has been contended that the department has not adduced evidences with regard to quantity of goods and buyers of the goods. They have also raised questions on the authenticity of the register maintained by OMB at the gate of ship breaking yard. In this regard, Third Para No. 3 of the Show Cause Notice have detailed documentary evidences in the form of scanned images of registers maintained by the various transporters.

7.3.1 Scanned image of a page of loading register maintained by M/s. Bikaner Punjab Refractory Roadlines, Bhawanagar is as under:



In the above image, the entry marked with arrow shows that on 24.02.2009, Shri Vipul Saxena (Broker) loaded and supplied one truck No. PB 04X 2932 to load goods from Plot No. 47 (L) unit of M/s. Manufacturers - Applicant No. 1.

2016-02-24

in the above image, the entry marked with arrow shows that on 04/07/2019, Shri Santosh Jain (Broker) booked and supplied one Truck No. HA 58K 2230 to load goods from Plot No. 47 of Alang I.e. unit of M/s. Mannalines - Mode and No. 1 to transport the goods to Manali.

7.3.3 Thus, authenticity of the booking registers of the transporters is well established. Regarding register maintained by the GMB at the gate of a/c breaking yard, I find that such register provides corroborative evidences to establish that the registration numbers of trucks mentioned in the booking registers of the transporters actually entered the premises of a/c breaking yard on the given dates and time. The contention of the Appellants that the trucks might have gone for some other loading site is just a speculation and get out of clutches of law when they have not challenged the fact that only after finalization of the deal, the trucks had been engaged, in order to not cry out to cancellation of booking of trucks. Therefore, there is no doubt that the entries of booking registers of the transporters as well as entries in registers maintained by GMB are authentic. Regarding buyers of such goods, it is seen that the booking

registers do not show names of the buyers but show only destination for which truck was used. Therefore, no investigation could be conducted as the end of buyers and this in itself does not absolve the Appellants from their guilt of not and not indulgence of evasion of Central Excise duty by clandestinely remove the excisable goods without central excise invoices and without payment of Central Excise duty. It is settled law that in cases of clandestine removal, department is not required to prove the cases with mathematical precision as have been held by the Hon'ble Apex Court and Hon'ble High Courts in many judgments including in the cases of *Sri Gurnan Mal* reported as 1983 (13) ELT 1546 (SC) and *Acflor Textiles (India) Pvt. Ltd.* reported as 2000 (235) ELT 587 (SC).

7.1 In view of above, I find that the department has adduced sufficient evidences to establish that Appellant No. 1 & 2 were actively engaged in clandestine removal of the goods and therefore, the case laws cited by them are of no help to them.

7.2 Regarding demand of duty on the basis of diaries recovered from the brokers Sri Sharat M. Sheth, Shri Vinod Patel and Sri Kishore Patel, it has been contended that the demand made on the basis of third party documents is not sustainable. After careful and detail study, I find that the diaries maintained by the brokers have records of licit and as well as illicit transactions and in many transactions of the diaries, invoices have been issued by Appellant No. 1 and central excise duty has not been demanded on these transactions in the SO/Intelligence order. Thus, the authenticity of the diaries and other records recovered from the brokers is well established. The brokers have admitted to have purchased the goods from Appellant No. 1 & 2 without central excise invoices, they have also admitted that in many cases, in order to pass on Central excise fraudulently, they had supplied invoices to one party and the goods under these invoices to other parties. Thus, the case is based not only on third party documents but duly corroborated by the statements of the persons, who authored these entries. The records show that the statements of Shri Sharat Sheth, broker and his accountant Shri Manishbhai Harnatal Patel were gone through by Appellant No. 2 before giving his own statements and he never filed any objection at any point of time and hence, these statements have high evidentiary value. All these evidences together substantiate the charges of clandestine clearance against Appellant No. 1 & 2 and these are valid, admissible and legal evidences in the eyes of law. The combined effect of all such evidences is that the evasion of Central Excise duty has taken place and the Appellants

have indulged themselves in such a fashion of central excise duty payments. The contentions made by Shri Vinod Patel and confirmed by Shri Shurel M. Sheth and have never been refuted. It is the record that all transactions were recorded in diaries and copied in diaries and the case was closed after deciphering and deposit on the books after that Shri Vinod Patel and Shri Kishor Patel did not cooperate during investigation. The transactions recorded in diaries and storage devices like Pen Drive and CDs seized and Shri Shurel M. Sheth and Shri Vinod A. Patel and Shri Kishor A. Patel were further corroborated with relevant records. Therefore, these are vital and crucial evidence as per the Indian Evidence Act, 1972 and are sufficient to prove the case against the Appellants.

7.6 It is further and that Appellant No.1 & Appellant No. 2 have intentionally adopted unlawful means to evade payment of central excise duty and their evasive mind and measures are clearly established. Therefore, I hold that Appellant No. 1 & 2 have indulged themselves in removal or excessive goods in clandestine manner without payment of central excise duty and without preparing central excise invoices only with intent to evade payment of central excise duty, as also held by the Impugned order. In view of aforesaid, I hold that Appellant No. 1 is liable to pay Central excise duty of Rs. 21,00,932/- for clandestine manufacture and clearance of finished taxable goods and Central Excise duty of Rs. 58,46,704/- on account undervaluation of goods under Section 11A(9) of the Act along with interest at applicable rate under Section 11AA of the Act and Appellant No.2 is liable to pay duty equal to Central Excise duty under Rule 25 of the Rules read with Section 11A(9) of the Act.

7.7 Regarding undervaluation, it has been contended that the scrap obtained from the scrap at competitive rate based on material emerging from breaking up of the strips and thus, the valuation was dependent on many factors like age of strip, quality of material, etc. and therefore, the price furnished by Mrs. Major and Minor's cannot be taken in the era of assessment. Taxes on transaction value especially when the department has not proved receipt of more than buyers over and above invoiced value. I find that the statements of various Appellants were recorded, wherein it clearly transpired that the transactions in unaccounted cash over and above the invoice value took place. The prices paid by Mrs. Major and Minor's are relied upon by the strip breaking yards of Jang and the goods emerging out of breaking up of strip are sold at or about the same prices. I find that in order to be just and fair, the Investigation has a proved valuation.

upto 20% in the price published by M/s. Major and Minors. It is but natural that in a case where the appellants have indulged themselves in clandestine clearance as well as under-valuation of goods produced by them, no one can establish one-to-one correlation of goods sold and payments received in cash or through agencies. In my view, sufficient evidences are available in this case as per the deities recovered from brokers, cash transactions took place between various trading mill/sumac units and the appellant through the brokers. Therefore, I find that ascertainment of prices prevailing in Strip Broaching units is correct in view of Rule 11 of Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2006 as well as Section 4 of the Central Excise Act, 1944.

7.3 In view of above, I find that Appellant No. 1 with active support of Appellant No. 2 has evaded payment of Central Excise duty by way of clandestine 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.

7.5 Regarding penalty imposed under Rule 26(1) and Rule 26(2) of the Rules on the appellants, I would like to reproduce Rule 26(1) and Rule 26(2) of the Rules, which are as under:

Rule 26. Penalty for certain offences. — (1) Any person who acquires possession of or in any way concerned in transporting, forwarding, depositing, storing, conveying, selling, or disposing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or ten thousand rupees, whichever is greater.

Provided that where any proceeding for the person liable to pay duty have been conducted under clause (a) or clause (b) of sub-section (1) of section 11A of this Act in respect of duty, interest and penalty, no proceedings in respect of penalty against other persons (if any) in the said proceedings shall also be initiated to be conducted.

(2) Any person who moves —

(a) any goods that are not without delivery of the goods accepted thereon or which is manifestly damaged; or

(b) any other document or assets in making such document, on the basis of which the user of such goods or document or duty is taken or has taken any benefit under the Act or the rules made thereunder the claim of CEN/IT credit under the 2006 Credit Rules, 2006 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater.

(Emphasis supplied)

7.6 I find that Appellant No. 1 has passed on fraudulent credit to various units by issuing central excise invoices but without actually delivering the goods as per the lower adjudicating authority. Thus, Appellant No. 1 renders themselves for penal action under Rule 26(2) of the Rules. I hold that the Appellant No. 1 is liable for penal action under Rule 26(2) of the Rules and the impugned order is legal, correct and proper to this extent.

8. Appellant No. 2 has contended that the lower adjudicating authority failed to establish the manner in which he has cleared the excisable goods from Central Excise duty and thus evaded the excise duty under Rule 25(1) & 26(1) of the Rules. I find that Appellant No. 2 was the sole proprietor of Apparels No. 1 and was directly involved in clandestine removal of goods as well as concealment of the goods by Appellant No. 1. He was working day-to-day for removal of Appellant No. 1 and has concerned items of the nature related to excisable goods including manufacture, storage, removal, removal of tax, selling etc. of such goods, which he was knowing and had reason to believe that they were liable to confiscation under the Central Excise Act, 1944 and rule made thereunder. Therefore, I find that imposition of penalty under Appellant No. 2 under Rule 25(1) and also under Rule 26(2) of the Rules is proper and justified.

8.1. Shri Vinod Patel and Shri Kishor Patel, brokers in the case have contended that they had not dealt with the goods in the manner prescribed under Rule 26 of the Rules and therefore, they are not liable to penalty. I find that the diary maintained by Shri Vinod Patel in coded language contained details of the goods as well as illicit clearances of the goods. When asked about the same, he provided evasive replies like the accounts were imaginary, he was practicing accounts on Sundays etc. He never co-operated the investigation. However, investigation decoded the coded data and all transactions of clandestine removal were unearthed. The decoded data matched with the data maintained in electronic form and for some transactions, Appellant No. 1 has issued invoices, and this fact authenticates data maintained by Shri Vinod Patel. Shri Kishor Patel was handling business of registered dealer and was involved in facilitating clandestine removal through his dealer firm. The records also showed cash transactions with various buyers and sellers through agencies.

8.3. Appellant No. 3 & 4 have contended that they have not indulged themselves into clandestine activities and accounts found in Pen Drive/Hard Drive/Hard Disk/Computer laptop were written for learning accounting/software etc. I find that they had not only indulged themselves in clandestine clearances of the goods but had also indulged themselves in abetment Appellant No. 1 & 2 in clandestine removal of the finished excisable goods. The data recovered from Pen Drive/Hard Disk/ Computer laptop establish that engagement of learning accounting/software is nothing but an attempt to mislead the Taxation and get out of clutches of law. It is a common practice that software is not installed either in computer desktop or laptop and not in Pen-drive.

3.1 Appellant No. 3 & 4 also argued that they has given explanations for documents to the Investigating officers during the search itself. It is on record that Appellant No. 3 & 4 had not co-operated with the investigation and had continued to give evasive replies. Therefore, their role is very much covered under Rule 28 of the Rules and penalty imposed on them by the Impugned order is legal and proper and there is no need to interfere with the impugned order.

3.2 I find that the facts of this case are different from the judgments relied upon by the appellants in as much as the documents resumed, analysis thereof and data storage devices have been corroborated by the statements of Appellant No. 2, 3 & 4 and Sri Bharat Sheth, Broker and Shri Manish Patel, Accountant of Shri Sharan Sheth, Broker, statements of transporters and these statements have never been retracted and also duly corroborated by the records obtained from the GMS authorities. It is proved that the Appellants No. 2, 3 & 4 have closely monitored, arranged and managed affairs of clandestine clearances made by Appellant No. 1.

3.3 I also find that no statements have been retracted by any person and the facts recorded in Benchmarks and contents of seized items are accepted by all Appellants and Sri Bharat Sheth & his accountant in their statements. It is not a case that a single statement has been recorded and relied upon but various statements of Appellant No. 2, 3 & 4 and Sri Bharat Sheth & his accountant establishing clandestine removal of the products by Appellant No. 1. In the circumstances, I am of the considered view that the statements recorded at different time and of different persons are not recorded under duress or threat.


3.7 Appellant No. 2, 3 & 4 have argued that the demand raised on data recovered from third party and seized on assumption and presumption only; that the impugned order is based on conjectures etc. In this regard, I find that the details maintained by the brokers (i.e. Appellant No. 3 & 4 and Sri Bharat Sheth) regarding 68 as well as illicit transactions of Appellant No. 1. Thus, truthfulness of diaries/notebooks and other private records recovered from the brokers during search is clearly established, also the Appellants have admitted to have dealt with the goods belonging to Appellant No. 1 without invoices and also sold such goods without invoices. I also find that demand has been computed on the basis of Antecedents based on the searches carried out at the premises of brokers and at the premises of Appellant No. 1. I further find that all links involved in the case, i.e. brokers, Appellant No. 1 and transporters etc. have

been corroborated by evidence which shows that the demand cannot be said to have been a demand for duty. The basic fact is not based only on direct evidence but also on circumstantial and other evidences. If the law mandatorily requires would nullify the concept of the third party. In the instant case the evidence of documents received have been gathered by the investigating officer successfully in a proper place and therefore, it cannot be said that the evidences are corroborative and supporting evidences. In fact the Appellants No. 2, 3, 4 have attempted to misguide the department as far as the data were procured from their premises in consonance with rule framed by the Transport as well as GME in collaboration of each other. In view of above facts, the original case is based on full of documentary evidences duly supported by many evidences and statements of the persons involved and cannot be formed on basis of assumptions and presumptions, as the appellants have attempted to do point.

9. In view of above, I uphold the impugned order and discharge the appeals of above four Appellants.

२४ अदिलखानाके द्वारा दिये गये अपील उन्नीस को निम्न उल्लेखित तरीके से खारिज किया है:

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


 प्रथम आदेश अधिकारी

BY: PCC
TO:

1.	M/s. Maral Ship Breakers Pvt. Ltd, Plot No. 47, Ship Breaking Yard, Anand, District Bhavnagar.	श्री. कल्याणजी जिन शिप ब्रेकिंग प्रा. लि. प्लॉट नं. 47, शिप ब्रेकिंग यार्ड, अनंद, जिला भावनगर
2.	श्री. केशव शंकर, Director of M/s. Maral Ship Breakers Pvt. Ltd, Plot No. 47, Ship Breaking, Yard, Anand District Bhavnagar.	श्री. कल्याण शंकर, निदेशक, एम. एम. एल. शिप ब्रेकिंग प्रा. लि. प्लॉट नं. 47, शिप ब्रेकिंग यार्ड, अनंद जिला - भावनगर
3.	Shri Vinod Amarnathal Patel, Plot No. 102, F-5001 Mega City, Opp: Victoria Park, Bhavnagar-364002	श्री. विनोद अमरनाथ, प्लॉट नं. 102, एफ-5001 मेगा सिटी, विक्टोरिया पार्क के सामने, भावनगर - 364002
4.	Shri Kesor Amarnathal Patel, Proprietor of Shree Krishna Enterprises, Plot No. 102, Eden Mega City, Opp: Victoria Park, Bhavnagar-364002	श्री. केशव अमरनाथ, प्रोप्रायटरी, श्री. कृष्ण एंटरप्राइज, प्लॉट नं. 102, एडन मेगा सिटी, विक्टोरिया पार्क के सामने - 364002

- Copy for information and necessary action:
- 1. The Principal Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for taking information, if any.
 - 2. The Commissioner, GST & Central Excise, Statewide Commissioner, Bhavnagar
 - 3. The Joint Commissioner, GST & Central Excise Bhavnagar, Zonal/Zone Office Bhavnagar.
 - 4. Guard file.
 - 5. F. No. V2/30/64/2018-19. 6. F. No. V2/30/64/2018-19
 - 6. F. No. V2/64/64/2018-19.