



राज्य प्रमुख (अपील) का कार्यालय, राजकोट, राजकोट नगर क्षेत्र केन्द्रीय उत्पाद शुल्क  
 OFFICE OF THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE



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सविस्तर तब तक प्र. सं. प्रकाशित

1. आदेश संख्या: 06/03/2019  
 2. आदेश दिनांक: 11/03/2019  
 3. आदेश संख्या: 06/03/2019  
 4. आदेश दिनांक: 11/03/2019

2. आदेश संख्या: 06/03/2019

**BHV-EXCUS-000-APP-062-TC-065-2019**

आदेश का दिनांक: 06/03/2019  
 आदेश का दिनांक: 11/03/2019

कमल संतोष, प्रधान आयुक्त (अपील), राजकोट क्षेत्र, राजकोट  
 Issued by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

3. आदेश संख्या: 06/03/2019  
 आदेश दिनांक: 11/03/2019

4. आदेश संख्या: 06/03/2019

1. Mr. Laxmi Chaitanya Harshvardhan Pvt. Ltd., 2nd Floor, 9th Phase, Near Mahabharata Bhawangan-360002.
2. Shri. Kishorji Ramji Kulkarni (Chairman and Managing Director), M/s. Laxmi Ship Recycling Pvt. Ltd., 1st Floor, Kankar, B-Block, B-Block, Near Ashwamedh Bhawangan-360002.
3. Shri. V. and Patel, Plot No. 102, Eam Mega City, Opp. Vinod Park, Bhanu Nagar.
4. Sunil Katar Jyoti, Proprietor of M/s. Shree Krishna Enterprises, 304, Sloopers Point, Farial Chakra, Wagdarwadi Road, Bhanu Nagar.

5. आदेश संख्या: 06/03/2019  
 आदेश दिनांक: 11/03/2019

6. आदेश संख्या: 06/03/2019  
 आदेश दिनांक: 11/03/2019

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12. आदेश संख्या: 06/03/2019  
 आदेश दिनांक: 11/03/2019



**ORDER-IN-APPEAL**

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1 to Appellant No.4", as detailed in Table below, against Order-In-Original No. BHV-EXCUS-000-JC-46 2017 1B dated 23.7.2018 (hereinafter referred to as "impugned order") passed by the Joint Commissioner, Central GST and Central Excise, Bhavnagar (hereinafter referred to as "lower adjudicating authority") :-

Sl. No.	Appeal No.	Appellants	Name & Address of the Appellant
1.	V2/4/BVR/2018-19	Appellant No.1	M/s Leela Ship Recycling Pvt Ltd, Plot No. 2, Alang Ship yard, Alang, Dist. Bhavnagar.
2.	V2/3/BVR/2018-19	Appellant No.2	Shri Komalkant Sharma, Chairman and Managing Director, M/s Leela Ship Recycling Pvt Ltd, Plot No. 2, Alang Ship yard, Alang, Dist. Bhavnagar.
3.	V2/43/BVR/2018-19	Appellant No.3	Shri Vinod Patel, Plot No. 102, Iscon Mega City, Opp. Victoria Park, Bhavnagar.
4.	V2/44/BVR/2018-19	Appellant No.4	Shri Kishor Patel, Proprietor of M/s Shree Krishna Enterprise, 304, Shoppers Point, Parimal Chowk, Waghavadi Road, Bhavnagar.

2. The facts of the case are that Appellant No. 1 (holding Central Excise Registration No. AAACL8753GXM001) was engaged in breaking of ships impounded for breaking purpose at their plot at the Ship Breaking Yard, Alang. Intelligence gathered by the Directorate General of Central Excise Intelligence indicated that most of the Shipbreaking units of Alang/Sosiyo of Bhavnagar District were evading payment of Central Excise duty by resorting to clandestine removal and lower valuation of their finished goods viz. MS plates and scrap as well as issuing fake Convat Invoices without physical supply of goods. Investigation carried out by the officers of DGCEI revealed that Appellant No. 1 evaded payment of Central

Excise duty by receiving or dispatching any of their finished goods, with active support of appellants No. 2 & 3, Shri Bharat Sheth, all brokers. The investigation also stated that Appellant No. 1 indulged in under valuation of their goods and thereby evaded payment of Central Excise duty. The Appellant No. 1 also procured Central Credit without delivery of goods in collusion with appellants No. 2 & 3 and Shri Bharat Sheth, all brokers.

2.1 Show Cause Notice No. 100251-10/26-22/2013-14 dated 27.4.2013 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty of Rs. 62,34,943/- should not be demanded and recovered from them under provision of Section 113(1)(a) of the Central Excise Act, 1944 (hereinafter referred to as 'Act') along with interest under Section 113B read with Section 114A of the Act and also proposing imposition of penalty under Section 114C of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'Rules') and penalty equal to Central Excise duty of Rs. 62,34,943/- under Rule 26(2)(i) of the Rules. The Show Cause Notice also proposed imposition of penalty, inter alia, upon Appellant No. 2 & 3 under Rule 26(1) and Rule 26(2) of the Rules.

2.2 The above said Show Cause Notice was adjudicated vide the impugned order which demanded Central Excise duty of Rs. 62,34,943/- under Section 113(1)(a) along with interest under Section 114A of the Act and imposed penalty of Rs. 62,34,943/- under Section 114C(1)(a) of the Act upon Appellant No. 1 with option of reduced penalty as envisaged under provisions of Section 114C of the Act, penalty of Rs. 32,47,684/- under Rule 26(2)(i) of the Rules for non-compliance of Central Credit, by issuing only invoices without delivery of goods. The impugned order also imposed penalty of Rs. 6,65,200/- under Rule 26(1) of the Rules and Rs. 32,47,684/- under Rule 26(2) of the Rules upon Appellant No. 2 and penalty of Rs. 9,49,824/- each under Rule 26(1) and Rs. 8,14,277/- each under Rule 26(2)(i) upon appellants No. 2 & 3.

3. Being aggrieved with the impugned order, Appellants No. 1 to 3 have preferred appeals as under, respectively, inter alia, as below :-

(3)

Appellant No. 1 :-

(1) The impugned order is passed in gross violation of principles of natural justice. The Appellant was provided copy of Statement dated 18.3.2013 of Shri Naveen Kumar Jain, Works in charge of the Appellant, and statements dated 17.3.2013 and 18.3.2013 of Appellant No. 7 but they have not been provided certified copies of other relied upon documents of Show Cause Notice despite specifically asking several times. It is settled position of law that order passed without furnishing relied upon documents is caused severe prejudice to the rights of the party and he relied upon following case laws:

- (1) Parmarth Iron Pvt Ltd 2010 (255) E.T 496;
- (2) Rajani Industries Pvt Ltd- 2010 (255) ELT 161;
- (3) Videcon Internacional Ltd- 2010 (250) ELT 553;

(1) The adjudicating authority has failed to follow provisions of Section 9D of the Act while passing impugned order; that he was required to follow the procedure envisaged under Section 9D of the Act when so called incriminating documents were not seized from their possession and its authenticity was disputed by the Appellants; that not a single buyer of the Appellant was examined during investigation; that the statements of brokers, transporters, dealers relied upon against the Appellant are general in nature and not specific. Since makers of these statements were not examined during adjudication and were not offered for cross examination by the Appellant, such statements are not admissible as evidence in the impugned case and hence, the impugned order deserves to be set aside as per following case laws:

- (1) Andaman Timber Excs-7015-TIOL-755-Supreme Court
- (2) Jayshree Vyapar Ltd- 2015 (327) ELT 380
- (3) Nico Extrusions Pvt Ltd- 2009 (248) ELT 497
- (4) Auni Aluminium Pvt Ltd- 2005(190) ELT 393
- (5) Sanket Food Products Pvt Ltd- 2005(188) ELT 107

(1) In cases involving clandestine removal of goods without payment of duty, under valuation and issuing phony invoices without delivery of goods, the investigation has to bring on record adequate corroborative evidence with such private records, however, DGCEI has not rendered statement of a single rolling mill or induction furnace unit in support of bald and imagined allegation against the Appellant about evasion of duty on mass scale. The impugned order, therefore, deserves to be set aside.

*(Signature)*

(iv) Allegation of under-valuation based on price lists circulated by private agencies in their respective jurisdictions, false and far from truth. The Appellant has not provided the price considered by investigating authority to be authentic. There is no oral evidence in the form of recipients involved in such illicit transactions. It is settled law that when Department is making allegations of deliberate undervaluation to evade payment of duty, it is for the investigation to prove such charges with sufficient degree of evidence, which has not been done.

(v) Allegation of clandestine removal of goods is based upon private documents maintained by the brokers, which are not reliable and admissible as independent evidences. The Appellant's official in his statement has disputed the authenticity of such documents and declared to believe it to be true. No investigation was carried out at the buyer's end by the DGCEI. The adjudicating authority confirmed demand based upon trip registers maintained by transporters and registers maintained at gate by Gujarat Maritime Board, without considering that transportation was not arranged by the Appellant and goods were sold by them on 'as is where is basis' and it cannot be established that the goods were actually loaded from the premises of the Appellant.

(vi) The impugned order has erroneously confirmed demand on the allegation that the Appellant had fraudulently passed Cenvat credit without physical supply of goods. The Department has not credible evidences except statements of brokers and diaries recovered from brokers which are not statutory records but unauthentic one. The DGCEI has not recorded statements of any single buyer who received only invoice without goods in support of their allegation. No proceedings were initiated against recipient of such phony invoices for recovery of alleged Cenvat credit fraudulently availed by them.

(vii) The adjudicating authority has erred in imposing penalty under Section 11A(1)(a) of the Act without considering that (a) the Appellant's official did not agree to the entries made in the private records of third parties (b) the investigation did not record statements of buyers who received goods without payment of duty or who received only invoices without the goods (c) No incriminating documents were recovered from the possession of the Appellant (d) Entire order is passed on the basis of

unauthentic and rough diaries recovered from third parties without cogent evidence either of physical removal of goods or about so called cash transactions (e) Whether the received of phoney invoices availed Central credit or not is not established.

Appellant No. 2 :-

(i) The adjudicating authority has erred in imposing penalty upon him under Rule 26(1) and Rule 26(7)(i) of the Rules: that for imposing penalty under Rule 26(1), the Department has to first establish that certain goods were held liable to confiscation under Rule 25 and that it must be proved that said person knew or had reason to believe that the excisable goods were liable for confiscation. However, there was no proposal in SCN for confiscation of goods, further, the Appellant in his statement had deposed that he was not dealing with day to day matters of manufacturing activities. Hence penalty under Rule 26(1) deserves to be set aside.

(ii) There is no evidence in the impugned order to sustain the allegation that the Appellant or his company had issued any invoices without physical supply of goods nor he had abetted his company in doing so. Further, the Department has not verified at recipient end to prove that only invoices were issued without delivery of goods and hence, penalty imposed under Rule 26(7)(i) of the Rules deserves to be set aside.

Appellant No. 3 :-

Appellant No. 3 has stated that penalty under Rule 26(1) of the Rules is not imposable upon him; that the order was issued in violation of principles of natural justice inasmuch as adjudicating authority did not grant opportunity of cross examination of Sri Mahendra Rana, Partner of M/s Manuli Metal Industries; that diary recovered during search carried out by the officers of DGCEI contained estimates written after making inquiry with concerned shipbreakers; that the Department has not produced any evidence of alleged illicit transactions; that onus to prove clandestine removal of goods is on the Department, however, this burden was not discharged by the Department. No corroborative evidences were produced by the Department: that they had not dealt with excisable goods in any manner as well as not acted with mens rea.

*(Signature)*

Appellant No. 4:-

(i) Appellant No. 4 has stated that the impugned order is non-speaking and non-reasoned one inasmuch as the lower adjudicating authority has not dealt with the pleas raised by them in their written submission, as well as judgments referred by them were completely ignored; that the diaries recovered from their residence were not relating to clandestine clearance but were either estimates of cargo after inquiry with concern ship breakers or relating to business of his elder brother Shri Vinoo Patel; that onus to prove clandestine removal of goods is on the Department, however the burden was not discharged. The Appellant was in no way concerned in illegally dealing with excisable goods with the knowledge or belief that the goods are liable for confiscation and that the Appellant had not acted with mens rea. Hence the Appellant is not liable to penalty under Rule 26(1) of the Rules.

(ii) The adjudicating authority has not discussed any evidence relevant for imposing penalty under Rule 26(2) of the Rules. There is no documentary evidences which suggest that they had fraudulently passed on Cenvat credit. There is no evidence or record regarding non-transport of goods cleared by the shipbreaker to the appellant's premises.

4. Personal Hearing in the matter was attended by Shri P.D. Rachdh, Advocate on behalf of Appellants No. 1 & 2, who reiterated grounds of appeals and submitted that they have not been supplied copies of rejection documents including statements of 3<sup>rd</sup> parties; that their request of cross examination of witnesses has also been rejected by the adjudicating authority without giving proper and legal reasons; that Shri Naveen Kumar Jain, Works in-charge of the Appellant No.1 has clearly stated in his statement dated 18.3.2013 (Page 214 to 216 of Appeal Memo) included in Para 3.10.1 of SCN that he did not agree to the noting of Shri Bharat Sheth and also Table/worksheets prepared by DGOEI officers; that he also denied cash transactions with Shri Vinoo Patel and Shri Kishor Patel (Page 256 of Appeal Memo- Para 4.13.1 of SCN); that Para 4.14.1 of SCN also states that statements of Shri Vinoo Patel were not correct, then how demand can be fastened on the appellant on the basis of statements of Shri Vinoo Patel; that the demand on account of undervaluation has no leg to stand on as it is without any evidence and statement of any one but only on rate supplied by M/s Major & Minor; that 3<sup>rd</sup> Party documents cannot be basis





of demand as held by CESTAT in 2 cases cited in the compilation submitted by them; that statement of co-accused is admissible only when jointly tried; that M/s Major & Minor have not been show caused; that their appeal may be allowed in view of above facts and case laws cited by them.

4.1 Shri Madhav Vadodariya, Advocate appeared on behalf of the Appellant No. 3 and reiterated grounds of appeal and submitted that there is no evidence against Shri Vinodbhai in this case but even then penalty has been imposed on him, which needs to be set aside.

4.2 Shri Madhav Vadodariya, Advocate appeared on behalf of the Appellant No. 4 and reiterated the grounds of his appeal.

#### **Discussion & Findings:**

5. I find that Appellants No. 1 to 4 have deposited amount 87.5% of duty or penalty in dispute and hence, have complied with the provisions of Section 35F of the Act. I find that Appellants No. 3 & 4 have filed the miscellaneous applications for condonation of delay of 28 days in filing appeals which state that they had received the impugned order on 29.1.2018 but could file appeal on 27.4.2018. They requested to condone delay of 28 days in filing appeals on the grounds that their consultant was busy with work related to adjudicating proceedings of various authorities and work related to GST. Considering that delay is within further period of 30 days as provided under proviso to Section 35(1) of the Act, I condone delay of 28 days in filing of these two appeals and take up these two appeals also for decision on merit.

5.1 I have carefully gone through the facts of the case, the impugned order, the appeal memoranda 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 on Appellant No. 1 and imposing penalty on Appellants No. 1 to 4 is correct, legal and proper or not.

6. I find that the Officers of the DGCEI carried out investigation and covered strip breakers, including Appellant No. 7, brokers including Appellants No. 3, 4 and Shri Bharat Sheth, Transporters etc. to unearth



Question-38. You have seen the Annexure-TR-1. Do you agree that 234 entries appear in the invoices pertaining to data for trucks made by you in some of the cases and in most of the cases brokers have indented the trucks?

Answer-38 : I have once again seen Annexure TR-1. However, I cannot confirm whether these trucks in fact were received at plot No. 2 and got loaded on that day.

Question-39. You may see Annexure-TR-1.1 which show that ship breaking material was cleared from your yard on the date and through truck number as mentioned in the manifestos registers. Do you agree that out of 254 entries appearing therein pertaining to indents for trucks to load scrap from your unit, 101 of these indents were issued by your unit?

Answer-39 : I have seen Annexure TR-1.1. However, I cannot confirm whether these trucks in fact were loaded at plot No. 1 and got loaded on that day."

(Emphasis supplied)

6.2 I find that during search carried out at the residence and business premises of Appellants No. 3,4 and Shri Bharat Sheth, incriminating documents were recovered showing purchase of Plates/scrap from Appellants No.1 on behalf of their clients for which no corresponding invoices were found issued by Appellant No. 1. On being confronted with the evidences gathered during investigation, Shri Naveen Kumar Jala, Works in-charge of Appellant No. 1 in his statement recorded under Section 14 of the Act on 18.3.2013, inter alia, deposed as under:

"Question 6: DSI at Office - you have deposed that Shri Bharat Sheth, Dealer of Ship Breaking Materials on 30.06.2010 wherein details of purchase and sale of ship breaking material is recorded. Subsequently statements dated 30.03.2010, 12.04.2010, 27.07.2010 & 04.08.2011 of Shri Bharat Sheth and statements dated 12.04.2010, 27.07.2010, 12.08.2010, 11.08.2010 (two statements), 23.08.2011 and 04.08.2011 of Shri Manish Patel, Accountant of Shri Bharat Sheth were recorded. You may please these statements. Statements of Shri Bharat Sheth and Shri Manish Patel were recorded wherein they have described mode of writing in their diaries. They stated that they write Plot Number instead of writing name of ship breaking company in the diaries. Accordingly, wherever '27' is written, the same is to be read as 'Mrs. Leela Ship Recycling, Plot No. 110 plot 2000'."

Answer 6: I cannot make any comment on the writing done in the private diaries of Shri Bharat Sheth.



Question: "On the basis of the information available in Entries No. A1 to A4 of A1 of Statutory Sheet No. 1, the goods were sold in local market in 1954-55. Will you state the details of the goods sold through him from his office in 01/2008 to 01/2009 to 01/2009? You will show this worksheet and offer your Comments."

Answer: "I state that it is true that we might have sold goods through materials through Shri Bharat Sheth during the period mentioned herein above. I have personal knowledge that he is a private trading concern by Shri Bharat Sheth in 1954-55."

(Emphasis supplied)

6.3 I find that there are substantial evidences available on record in the form of documentary evidences recovered from the premises of the Transporters, brokers and office of the GMB as well as Statements of brokers and transporters. However, when confronted with these evidences, Works in-charge of Appellant No.1 answered "I cannot confirm" or "I cannot comment" but did not deny the allegations. I find that some of the entries appearing in trip registers of Transporters and diaries/private records recovered from the premises of Appellants No. 3,4 and Shri Bharat Sheth were found tallying with the statutory records/transactions of Appellant No.1, which prove authenticity of transactions and details contained in the said trip registers of transporters as well as diaries/private records of Appellants No. 3,4 and Shri Bharat Sheth. I also find that these substantial evidences in the form of Statements of transporters and Appellants No. 3,4 and Shri Bharat Sheth have not been retracted till date and at any stage and therefore, as per settled legal position, sanctity/validity of the Statements cannot be undermined. I also note that diaries/private records recovered from the premises of Appellants No. 3,4 and Shri Bharat Sheth contained records of many other ship breakers and veracity of the said diaries/private records has been proved.

6.4 After analyzing the evidences available in form of (i) registers recovered from the Transporters showing transportation of goods from the premises of Appellant No.1 which corroborated with records maintained by Gujarat Maritime Board (ii) incriminating documents recovered from the residence/business premises of Appellants No. 3, 4 and Shri Bharat Sheth showing goods purchased from Appellant No. 1 on behalf of their

clients (iii) Statements of Transporters who transported the finished goods from the premises of Appellant No. 1, I am of the considered view that Appellant No. 1 was indulged in evasion of Central Excise duty.

6.5 Appellant No. 1 has contended that the lower adjudicating authority has not allowed cross-examination of the witnesses and therefore, principles of natural justice have been violated. In this regard, I find that the lower adjudicating authority at para 3.16 has held as under:-

"3.16. I further find that there is no provision in the Central Excise Law for such a cross-examination. Hon'ble Madras High Court in the case of K. Balan vs. Govt. of India reported at 1987 ELT (10) 386 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 rules of evidence as such who must offer such opportunity to the party concerned as would assure him a proper opportunity to defend himself. The case of K. Balan Vs Govt. of India reported at 1987 ELT (10) 386 was distinguished by Hon'ble Tribunal Ahmedabad in Arya Primes Pvt. Ltd. Versus Commissioner of C. Ex., Ahmedabad-II reported at 2014 (311) ELT 532 (Trib. Ahmed.) wherein it was held as under:-

"3.17. In K. Balan's case (supra), the Hon'ble Madras High Court states that the necessity of cross-examination depends upon the facts and circumstances of each case. The Adjudicating Authority has to give an opportunity to the party concerned as would assure him a proper opportunity to defend himself. Opportunity of cross-examination is given wherever it is relevant, justified and genuine and is not for protracting the proceedings. The decision in *CIT vs. Anand's 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. Hon'ble Tribunal's decisions cited in the later of 10/06/2006 are also to similar effect - that cross-examination is not always a mandatory procedure to be adopted in all cases. The request should not be considered arbitrarily or without exercising its discretion in the facts of each case. The Adjudicating Authority may refuse cross-examination for insubstantial reasons."

3.18 Similarly, in the case of *Shree P. G. & Wood Pvt Ltd Vs. Commr of Cus. & Cex. Ahmedabad* reported at 2004(27) ELT 1150 (Tri. Mumbai), Hon'ble Tribunal, in their order, in para 6, has held as under:-

"6. The Tribunal is of the view that principles of natural justice are violated inasmuch as cross-examination of persons whose statements are relied upon, are 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 clarify those

statements of fact, the price, duty, etc. - independent manner as defined in a matter of right in dispute in a proceeding.

5.11.2 Further, the Hon'ble Tribunal, in the case of *M/s. Kanchi Exports Vs. CCE, Chennai* reported in 2001(199) 417 235 - Tri.Chennai has observed that non-availability of witnesses for cross-examination not a fatal flaw when the findings are based on documentary evidence which is a credible explanation and nothing can be said to go against the voluntary or effectively retracted witness close proximity of the facts here were stated.

5.11.3 In view of above facts, I find the request for cross-examination by the Petitioner was not met and the order of duty cannot be quashed as:

6.6 I find that documents recovered from the premises of the transporters contained details of transportation of consignments from the premises of shipbreakers, including Appellant No. 1, like date, truck no., shipbreaker's plot no., destination, name of broker etc and these details were also corroborated with the records maintained by Gujarat Maritime Board in the form of parcel registers. Thus, evidences gathered from transporter's end were independently corroborated with the evidences gathered from GMB. I also find that none of the statements of transporters has been retracted. The transporters' role was limited to the transportation of the excisable goods and they had no reason to depose in their statements something which was contrary to the facts. Thus, non-granting of opportunity of cross-examination by the lower adjudicating authority would not vitiate the proceedings and would not prove to be detrimental to the interests of Appellant No. 1. I, therefore, discard this contention being devoid of merits and uphold confirmation of demand of Rs. 34,71,713/-.

7. Regarding confirmation of demand of duty of Rs. 27,63,231/- on the ground of under-valuation, Appellant No. 1 submitted that allegation of undervaluation based on price lists circulated by private agencies on their websites are unfounded, false and far from truth; that there is no oral evidence in the form of recipients involved in such illicit transactions; that when Department is making allegations of deliberate undervaluation to evade payment of duty, it is for the investigation to prove such charges with sufficient degree of evidence, which has not been done.



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7.1 I find that the lower adjudicating authority has confirmed the charge of under valuation, *inter alia*, giving findings as under :-

3.4 The Show Cause Notice alleged evasion of central Excise duty by way of under valuation of the goods obtained out of breaking up of ships. It is noted in reports that various Research Agencies simulate the area considering all the factors of demand and supply and there is no reason that prices circulated by such agencies are unrealistic one. It is in this backdrop that even Ship Breakers/Breakers-Buyers also subscribe to such market research agencies to have an idea of prevailing prices so as to enable them to sell their goods at maximum rate. It is also not in dispute that the re-rollable plates ranging from size 8 mm (4.5 ft) to 12 mm (14.5 ft) are emerged out of breaking up of ships and the majority of re-rollable plates emerged out of breaking of ships are of 12 mm size. In order to substantiate this allegation, the DDCIT conducted inquiry with various marketing research agencies including M/s. Major & Minor with reference to pricing data which revealed that day to day price of 12mm size of Plates is almost equivalent to the average price of all size within the range of 8mm to 25mm.

3.15 On comparison of the price mentioned in the invoice of M/s. Leela vis-à-vis of the price circulated by M/s. Major & Minor, it was also revealed that in many cases, the transaction value declared by the M/s. Leela were far less than the actual value prevailing in the market during the respective period. The ship breakers have, by not declaring the actual size & thickness of MS Plates cleared by them, undervalued MS Re-rollable Plates so as to avoid duty to declare any part of the value of such goods in the invoices and collect the differential value over and above the declared invoice value, by way of unaccounted cash transactions.

3.16 In view of the above, I agree with the contention of the DDCIT 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, the difference in price is considerable one. As stated above, Buyers & 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 14-20% in rates of Plates and Scrap 2% lesser than the rate of M/s. Major and Minor is considerable. It therefore fully square with the view accepted by DDCIT that duty short paid on account of variation of price more than 2% is on account of undervaluation of the goods and rightly recoverable from M/s. Leela. Further, I also find that a large number of ship

boasting an 85 star rating. They had 1000+ members of M/S Steel Rates and were receiving day to day updates on daily price rates of ship breaking materials through SMS alerts and emails. It is also observed that M/S Steel Rates were advising the most efficient 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 intelligently avoided the prices with a view to evade payment of Central Excise duty. Further enquiry was conducted with Joint Plant Committee, Government of India, State Industries Development Corporation, Government of India, State Industries Development Corporation as the only authority which is empowered by the Ministry of Steel for the purpose of formulating policies 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. IFC was established in 1964 by the Government of India under the powers vested by clause 13 of The Iron & Steel Control Order, 1966. IFC consist of members and representatives from the Ministry of Steel, steel Authority of India Ltd., Iron and Steel, Rostroya (Spt) Nigam Ltd. etc. With its authority and vast experience, IFC has maintained a comprehensive database which is considered to be the most authentic and reliable information on the iron & steel industry. This database includes capacity, production and stock of all the major steel producers of the country, domestic market prices of iron, BS steel, FOB and CIF prices and landed cost of steel products, value added cost on iron & steel products, production and reserves for select materials for steel making, steel loss and scrap loss, details of dispatches of iron & steel, etc. Apart from the regular use by researchers, academicians, market research firms, strategies of entrepreneurs, financial analysis by the F&S and banks, some of the key uses of the IFC database include the duty determination on customs, excise, export, importation of IFC, Industrial Production Index, understanding of price trends, defend price rises, formulation of Five Year Plans economic surveys and annual budgets, successive flow of materials and materials, etc. In short, the domestic price data on Iron & steel Products maintained by IFC is considered to be the most authentic data of the type for the steel industry. Thus analysis of the rates provided by IFC, Koushika and other evidence collected from various agencies and persons involved in the business of ship breaking materials as discussed above prove that M/S Lanka has undervalued their available goods with a view to evade payment of Central Excise duty and thus based on calculations done by IFCCE, in Annexure-IV, 1, 2 for the M/S Lanka have evaded Central Excise duty of Rs. 27,00,000/-.

7.2 I find that the prices of M/S Fiate/ Scrap circulated by market research agencies like M/S Steel Rates Info and M/S Major and Minor Exims Pvt. Ltd were considered to ascertain whether the transaction value



declared by the Appellant was reasonable or not. Find that said Market Research Agencies determined the price of MS Plate/ Scrap after taking into account various factors like demand and supply, prices prevailing in different parts of country etc and then circulate the price. The fact that large number of Ship breakers, brokers and dealers from Alang and Dhamnagar have subscribed to their services itself give sanctity to the services rendered by the said agencies and there is no reason to discard the price as unreasonable or unrealistic. I, therefore, hold that the lower adjudicating authority has rightly confirmed demand of Rs. 17,63,231/- on the goods cleared at value which was lower than the prevailing market price.

8. Appellant No. 1 has argued that allegation of clandestine removal of goods is based upon private documents maintained by the brokers, which are not reliable and admissible as independent evidences. In this regard, I find that the diaries maintained by Appellants No. 3,4 and Shri Bharat Sheth recorded licit as well as illicit transactions of ship breakers including Appellant No. 1 and only those entries for which corresponding sale invoices were not issued by Appellant No. 1 were taken into account for the purpose of demanding duty. I also find that transactions reflected in the said private records were further corroborated by Statements of the Transporters, who accepted to have transported the goods from the premises of Appellant No. 1. The registers maintained by the Transporters contained details of transportation of goods from the premises of Appellant No. 1 which were further corroborated with the records maintained at GMB check post. Therefore, demand cannot be said to be based only on private records of third party but duly corroborated by rest of evidences recovered during investigation. I find that the very fact of many persons involved negate the concept of third party. In the instant case, the evidences of clandestine removal have been gathered by the investigating officers successfully from many places and therefore, these documents cannot be called third party documents but corroborative and supporting evidences. I rely upon the Order of the Hon'ble CESTAT in the case of Om Prakash Agarwal reported as 2017 (346) ELT 125 (Tri Del), wherein it has been held that :-

*"5. Courts have in fact the proceedings against relatives who in fact were involved. The allegation was that based on evidences collected from the suppliers' who manufactured receipt and further manufacture of dutiable items by the appellant was*

search to be conducted separately. The evidence collected from the material evidence collected from the appellants is also as corroborated by the reasonable pattern of tax evasion and the receipt and use of the steel manufacturers and articles for further use. There has been no evidence by the appellants and that they have not been discharged during the course of investigation in of the appellants in respect of the liability of the further investigation in respect of receipt of transport, money receipt, etc. In the present case, the evidence collected from the suppliers is also categorical and cannot be disputed. The primary receipt of the suppliers have been corroborated and admitted for the correctness of the statement by the persons who were in charge of the supplier's work. When such evidence was brought before the court of the appellants and he categorically admitted the same and made a statement of the same. However, the court in this case is not to allow such evidence to be taken in such a manner. It is evident that the appellants have given a statement that the department has not established the details of the goods and the manager of the finished goods is such buyers. It is clear that the goods are manufactured by the suppliers, which were delivered to the persons in charge of the factory. It is not the case of the appellants that the suppliers maintaining such records and so forth. The appellants in fact, the supply of steel coils and materials has been corroborated by the persons of the appellants' firm. In such situation, it is not possible for the appellants to deny in the present stage, since the prima facie evidence of cross-examination, etc. Admittedly, none of the primary records or the statements given have been returned or have been returned for their authenticity. In the present before the Tribunal, the appellants are making a belated assertion that the statement by the persons of the appellants' firm is not genuine. It is not possible to believe in the appellants' statement of any support in the present case. In the case involving unaccounted manufacturing, the evidence of such case are to be appreciated for corroboration. As stated above, the third party's records of the appellants' side as collected by the persons in charge and further corroborated by the appellants cannot be discarded solely on the ground of former evidence like transportation and receipt of money has not been proved. In a manufacturing manufacturing and enterprise, such steps of operation cannot be established with precision. On overall 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]

8.3 Appellant No. 1 has contended that the investigation has failed to bring on record adequate corroborative evidences and that DGCEI has not recorded statement of a single rolling mill or induction furnace unit in support of allegation of clandestine removal of goods. In this regard, I have already discussed in Paras supra that the Department has adduced sufficient evidences in the form of incriminating documents recovered from the premises of Appellants No. 1,4 and Shri Bharat Sheth, all brokers, which contained details of goods purchased by them on behalf of their clients from Appellant No. 1 without cover of Central Excise Invoices and without payment of Central Excise duty. These evidences were further corroborated in the form of statements of transporters who deposed that they had transported the goods from the premises of Appellant No. 1. I also find that none of the Statements have been retracted so far. Considering

substantial evidences in the form of documentary and oral evidences on record. I am of the considered opinion that the Department has discharged its burden of proof for clandestine removal of goods by Appellant No.1. In cases of clandestine removal, Department is not required to prove the case with mathematical precision. My views are supported by the order passed by the Hon'ble Tribunal in the case of A.N. Guha & CO. reported in 1996 (86) E.L.T. 333(Tri.), wherein it has been held that:

*"In all such cases of clandestine removal, it is not possible for the Department to prove the same with mathematical precision. The Department is deemed to have discharged its burden if they place on record evidence which prima facie shows that there was a clandestine removal of such vehicles as conducted by the Department. Then the onus shifts on to the appellants to prove that there was no clandestine removal."*

8.2 The Hon'ble CESTAT in the case of Ramachandra Rexin Pvt. Ltd reported as 2013 (295) E.L.T. 116 (Tri. - Bang.) has held as under:-

*"5.2 In a case of clandestine activity involving exportation of production and clandestine removal, it is not expected that such evasion has to be established by the Department in a mathematical precision. After all a person indulging in clandestine activity takes rigorous precaution to hide/obscure the evidence. The evidence available stand in their light in spite of the best care taken by the persons involved in such clandestine activity. In such a situation, the entire facts and circumstances of the case have to be looked into and a decision has to be arrived at on the basis of 'preponderance of probability' and not on the basis of 'beyond reasonable doubt'."*

8.3 The Hon'ble Supreme Court as reported in 2014(307) EIT 461(SC) has upheld the above order of the CESTAT.

8.4 I also rely on the order passed by the Hon'ble CESTAT, Ahmedabad in the case of Apurva Aluminium Corporation reported at 1996 (261) E.L.T. 515(Tri. Ahmd.), wherein at Para 5.1 of the order, the Tribunal held that:

*"Once again the onus of proving that they have accounted for all the goods produced starts to the appellants and they have failed to discharge this burden. They want the department to show conclusive details of goods transported or not transported. There are several decisions of Hon'ble Supreme Court and High Courts wherein it has been held that in such clandestine activities, only the person who indulges in such activities knows all the details and it would not be possible for any investigating officer to unearth all the activities involved and prove with mathematical precision the evasion or the other illegal activities."*

8.5 The Hon'ble CESTAT in the case of M/s. N R Sponge P Ltd reported as 2015 (328) EIT 453 (Tri-Del) has also held that when preponderance of probability was against the Appellant, pleadings of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase issue unaccounted for and an input-output ratio prescribed by law etc. are of no use. The Hon'ble High Court in the case

of International Cylinders and also reported as 2010(255) 51766(I.P.) held that once the department proves that smuggling illegal had been done by the manufacturer which prima facie shows that illegal activities were being carried, the burden would shift to the manufacturer. It is a basic common sense that no person will manufacture authentic records of the illegal activities or manufacture being done by it. Therefore, the Appellant's reliance on various case laws are not available in light of the positive evidences available in this case as discussed above and in the impugned order.

8.6 In view of above, the various objections raised by the Appellants are of no help to them since the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that Appellant No.1 has evaded payment of Central Excise duty by resorting to clandestine removal of the finished goods and undervaluation of goods. I, therefore, hold that confirmation of demand of Central excise duty of Rs. 62,34,943/- by the lower adjudicating authority is correct, legal and proper.

8.7 Since demand is confirmed, it is natural consequence that the confirmed demand is required to be paid along with interest at applicable rate under Section 11AB read with Section 11AA of the Act. I, therefore, uphold order to pay interest on confirmed demand.

8.9 This is a case of clandestine removal of the finished goods and substantial undervaluation of the excisable goods for payment of Central Excise duty as held in above Paras and therefore, the impugned order has correctly imposed equal and mandatory penalty of Rs. 62,34,943/- on Appellant No. 1 under Section 11AC(i)(a) of the Act. The impugned order has correctly given option of reduced penalty of 25% to Appellant No.1 as per Section 11AC of the Act, hence, I concur with his decision on penalty on Appellant No.1 under Section 11AC of the Act.

9. Regarding penalty imposed upon Appellants No. 1 to 4 under Rule 26(2)(i) of the Rules for fraudulently passing of Central credit. I find that Appellant No. 1 was involved in sale of phony invoices without delivery of corresponding goods through Appellants No. 3,4 and Sri Bharat Shekh. The DGCEI unearthed the modus operandi adopted by Appellant No. 1 by

deciphering the entries recorded in files and pen drive recovered during search from the residence premises of Appellant No. 4 and Shri Bharat Sheth, as elaborated in detail at Para 3.9 and Para 4.12 of Show Cause Notice, respectively. Thus, it is beyond doubt that Appellant No. 1, in collusion with Appellants No. 3, 4 and Shri Bharat Sheth, issued invoices without physical delivery of the excisable goods and fraudulently passed on Cenvat credit. I find that Appellant No. 2, is involved and is responsible for this act of fraudulent passing of Cenvat credit. Appellants No. 3 and 4 facilitated Appellant No.1 by facing buyers who want to avail only fraudulent Cenvat credit without receipt of goods as well as buyers who want to purchase goods without invoice and also managed cash involved in such transactions. Hence, penalty imposed upon Appellants No. 1 to 4 under Rule 26(2)(1) of the Rules is correct and I uphold the same.

9.1 Regarding penalty imposed under Rule 26(1) of the Rules, Appellant No. 2 has contended that for imposing penalty under Rule 26(1), the Department has to first establish that certain goods were held liable to confiscation and that it must also be proved that said person knew or had reason to believe that the excisable goods were liable for confiscation however, there was no proposal in SCN for confiscation of the goods; that he was not dealing with day to day matters of manufacturing activities and hence penalty under Rule 26(1) deserves to be set aside. I find from records that Appellant No. 2 was Chairman and Managing Director of Appellant No. 1 and had concerned himself in manufacturing, removing and selling excisable goods on which excise duty was not paid and hence he had reason to believe that goods removed clandestinely or goods undervalued by them were liable for confiscation. I am also unable to agree that penalty under Rule 26(1) can be imposed only if goods are ordered for confiscation. I rely on the order passed by the CESTAT, New Delhi in the case of Ashwani Dewwan reported as 2011 (272) E.L.T. 99 (IT - Del.)

18. Evidently, therefore, whether it is under Rule 26 of the said Rules or under Section 113 of the said Act, a person for having dealt with any goods in any manner can be made liable to pay the penalty as provided in goods and other excisable goods or the contraband goods and such person knows or has reason to believe that such goods are liable to confiscation under the statutory provisions comprised under the Excise Act or the Customs Act.

respectively. The basic requirement is that an officer dealing with the goods who has either the knowledge or has reason to believe that such goods are liable to confiscation under section 65 of Act 1962 is not empowered to say that the goods should be originally not confiscated. The requirement merely deals with the knowledge of the reason to believe that the person dealing with such goods must entertain in relation to the bringing the goods are liable to confiscation. Being an officer of finding goods the goods being liable to be confiscated cannot be a justification of a person who cannot be penalized under either the said provisions of law.


9.2 I, therefore, hold that penalty of Rs. 6,50,000/- imposed under Rule 26(1) upon Appellant No. 2 in the impugned order is correct and proper and I uphold the same.

9.3 Regarding imposition of penalty under Rule 26(1) of the Rules, Appellants No. 3 & 4 have contended that diaries recovered during search carried out by the officers of DGCEI contained estimates written after making inquiry with the concerned ship breakers; that the Department has not produced any evidence of alleged illicit transactions; that onus to prove clandestine removal of goods is on the Department, which was not discharged by the Department. I find that appellants No. 3 & 4 have acted as brokers who purchased goods on behalf of their clients from Appellant No. 1. Search carried out by DGCEI at the residence/business premises of Appellants No. 3 & 4 resulted in recovery of incriminating documents in the form of pocket diaries and pen drive, which contained details of transactions entered with ship breakers, including Appellant No. 1 and recipient buyers. I find that the DGCEI deciphered the codes and abbreviated name used in the said documents which revealed that Appellants No. 3 & 4 had purchased goods from Appellant No.1 for which no corresponding invoices were issued by Appellant No. 1. I also find that the said documents contained details of cash transaction between Appellants No. 3 & 4 and Appellant No.1 for sale proceeds of goods removed by Appellant No. 1 without Central Excise invoices. I find that Appellants No. 3 & 4 played important roles in the whole episode of clandestine removal of goods by Appellant No. 1 and hence, imposition of penalty of Rs. 9,49,884/- each upon Appellants No. 3 & 4 under Rule 26(1) of the Rules by the lower adjudicating authority is correct and I uphold the same.

10. In view of above, I uphold the impugned order and reject all four appeals of Appellants No. 1 to 4.

11. अपीलकर्ताओं द्वारा दखल की गई अपीलें का निम्नलिखित प्रकार से निपटाया गया है।

11. The appeals filed by the Appellants are disposed off as above.

  
(कुलर संतोष)  
आयुक्त (अपीलें)

By R.P.A.D.

To,

1. M/s Leela Ship Recycling Pvt Ltd, Plot No. 2, Alang Ship yard, Alang, Dist Bhavnagar	श्री लीला शिप रिसाइकलिंग प्रा. लि. प्लॉट नं. 2, अलंग शिप यार्ड, अलंग, जिल्ला भावनगर।
2. Shri Kamalkant Sardaia, Chairman and Managing Director, M/s Leela Ship Recycling Pvt Ltd, Plot No. 2, Alang Ship yard, Alang, Dist Bhavnagar.	श्री कामलकान्त सार्देया, चेयरमैन एवं मैनेजिंग डायरेक्टर, श्री लीला शिप रिसाइकलिंग प्रा. लि. प्लॉट नं. 2 अलंग शिप यार्ड, अलंग, जिल्ला भावनगर।
3. Shri Vinod Patel, Plot No. 102, Iscon Mega City, Opp Victoria Park, Bhavnagar.	श्री विनोद पटेल, प्लॉट नं. 102, इस्कॉन मेगा सिटी, विक्टोरिया पार्क के सामने, भावनगर।
4. Shri Kishor Patel Proprietor of M/s Shree Yashna Enterprise, 304, Shoppers Point, Parimal Chowk, Waghiswadi Road, Bhavnagar.	श्री किशोर पटेल, मालिक, श्री कृष्ण स्टोरफाइज, 304, शॉपर्स पॉइंट, परिमल चौक, वाघिसवाडी रोड, भावनगर।

प्रतिनिधि :-

- 1) श्री. वि. मृदुल, आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात  
सेवा, अहमदाबाद को आवेदन है।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय,  
भावनगर को आवेदनक सम्बन्धी है।
- 3) समूक्त आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय,  
भावनगर को आवेदनक सम्बन्धी है।
- 4) नोट आइस।

