



સંસ્થાન સંસ્થાન (સર્વિસ) નો પલાયમ, વસ્તુ નો વેચાણ કરી પાત્રીન કરવા સુધ્ધ:
 THE HIRAPUR (PVT) & HIRAPUR (PVT) SUPPLIES & SERVICES PRIVATE LIMITED



સિદ્ધિકા હાઇ વોલ્ટેજ સ્ટોર (Pvt) Ltd. 101-102
 જા સર્વિસ સેક્ટર - 2, Near Ganga Kisa Road
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4) કુલકાર્યકરો નો સી કાર્ડ.

ક) સર્વિસ સેક્ટર નો સી કાર્ડ
 Serial File No. 210160
 1328 55, 8 & 13-DVR/2019
 HRV-EXCUS-000-APP-066-101469-2019
 સર્વિસ સેક્ટર નો સી કાર્ડ નો નંબર

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HRV-EXCUS-000-APP-066-101469-2019

સર્વિસ સેક્ટર નો નંબર: 06.03.2019
 Date of issue: 06.03.2019
 સર્વિસ સેક્ટર નો નંબર: 12.03.2019
 Date of issue: 12.03.2019

કુમાર સરોજી, સીઆઇ સીઆઇ (સર્વિસ), સર્વિસ સેક્ટર નો નંબર
 Requested by: Mr. Kumar Saroj, Financial Commissioner (Appeals) Rajkot

ક) સર્વિસ સેક્ટર નો સી કાર્ડ નો નંબર નો નંબર નો નંબર નો નંબર નો નંબર નો નંબર
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1. Mr. Bharat Industries (Ship Breaking Unit) Near Nadi-3492nd Near Madras Buzhar, Wagdar Road, Bhavnagar 36102 Gujarat.
2. Mr. K K Yashni (Manager and Author Signatory) M/s Bharat Industries (Ship Breaking Unit) Near Nadi-3492nd Near Madras Buzhar, Wagdar Road, Bhavnagar-36102 Gujarat.
3. Shri Bhalal L. Gada, Director M/s Jandamba Jspat, Plot no. 325a (C), Road no. 17, Vithwakarna Industrial Area, Bhavnagar.
4. Mr. Hitesh Kishor (Genl. Manager, M/s Rajkot Vidya Gupta & Co., House No. 31, Sector 37B, New Salim Market, Mori Ghatipura, Dist- Ferozpur, State- Punjab.

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11 The annual general meeting of the company shall be held on the 30th day of March in every year. The annual general meeting shall be held at the registered office of the company or at such other place as may be determined by the directors. The directors may also cause a copy of the annual report and accounts to be sent to the members of the company by post or by any other means of communication.

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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 the Table against Order-in-Original No. BHV-EXCUS-000-JC-55-2017-16 dated 20.2.2018 (hereinafter referred to as the impugned order) passed by Joint Commissioner, CGST and Central Excise, Bhavnagar (hereinafter referred to as the lower adjudicating authority) :-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/54/BV/R/2018-19	Appellant No. 1	M/s. Diamond Industries (Ship Breaking Division), Plot No.24, 637, Mang. P.O. Manar Bhavnagar.
2	V2/55/DV/R/2018-19	Appellant No. 2	Shri R.K. Inpathi (Manager and Autho. Signatory), M/s. Diamond Industries (SIV), Mang. P.O. Manar Bhavnagar.
3	V2/56/DV/R/2018-19	Appellant No. 3	Shri Bhavesh L Gupta, Director M/s. Jadhamba soap, Plot No. A/3/11 (c), Road No. 17, Vahwagamra Industrial Area, Vadu.
4	V2/13/BV/R/2018-19	Appellant No.4	Shri Balesh Krishna Gupta, Proprietor, M/s. Balesh Krishna Gupta & Co., House No 01, Section 21B Netaji Subhash Market, Mandi Gobindgarh Dist: Patna Sahib, Punjab

2 The brief facts of the case are that the DGCEI issued Show Cause Notice F.No. DICEE/AZU/36-31/15-14 dated 7.5.15 to Appellant No.1 to Appellant No.3 for clearance of Plates / Waata & Scrap of Iron and Steel (hereinafter referred to as the excisable goods) obtained from Ship Breaking clandestinely to various customers illegally as under :-

- (a) Central Excise duty of Rs.24,70,512/-r clandestinely manufactured and clandestinely cleared excisable goods and Central Excise duty of Rs 37,55,502/- on account of undervaluation of goods should not be demanded from Appellant No.1 under Section 11A(1) of the Central Excise Act 1944 (hereinafter referred to as 'the Act') without payment of Central Excise duty
- (b) Interest should not be recovered from Appellant No.1 under Section 11AA of the Act
- (c) Penalty should not be imposed upon Appellant No.1 under Section 11AC of the Act read with Rule 25 of the Central

(Signature)

- Excess Rs. 43,290/- (below 5% interest to the CDR),
- (d) Penalty of Rs. 3,95,750/- should not be imposed on Appellant No. 1 under Rule 26(1) of the CDR;
 - (e) Penalty should not be imposed upon Appellant No. 2 under Rule 26(1) and under Rule 26(2) of the CDR;
 - (f) Penalty under rule 26(1) of the CDR should not be imposed upon Appellant No. 3 as Appellant No. 3 who concerned themselves in buying of excess in goods seized fraudulently by the appellant No. 1.

2.1. The above SCN was adjudicated was the impugned order confirming demand of CF duty of Rs. 34,58,14/- under Section 14(4) of the Act, interest under Section 14A, penalty of Rs. 81,04,14/- upon Appellant No. 1 under Section 14C of the Act with order to pay 20% penalty as per Section 14C, imposed penalty of Rs. 2,29,724/- under Rule 26(1) of the CDR, imposed penalty of Rs. 3,95,750/- under Rule 26(1) of CDR and penalty of Rs. 3,79,702/- under Rule 26(1) of CDR on Appellant No. 2; imposed penalty of Rs. 41,562/- under Rule 26(1) of the CDR on Appellant No. 3 and Rs. 40,514/- on Appellant No. 4.

3. Being aggrieved with the impugned order, appellants No. 1 to Appellant No. 4 preferred appeals, inter-alia, on the various grounds as under:-

Appellant No. 1 :-

3.1. Appellant No. 1 was aggrieved that the impugned order has been passed in violation of adjudication proceedings as none of the grounds verbatim statements have been read and how best extracted or address by the lower adjudicating authority as required under Section 90 of the Act that they rely upon various judgments of the Hon'ble High Court including the case of M/s. Laxmi Drugs Pvt. Ltd reported as 2018 (360) ELT 67 (S & P);

3.2. The impugned order is violative in addition of principles of natural justice as equity and has not been provided documents in fact upon in the Show Cause Notice and cross-examination of the persons whose statements had been relied upon in the Show Cause Notice is not allowed by the lower adjudicating authority; that they rely upon the decision of the Hon'ble High Court in the case of M/s. Gujarat Cyminals Ltd reported as 2012 (346) ELT 623 (GU) and decision of the Hon'ble CESTAT in the case of M/s. Arys India Pvt. Ltd reported as 2014 (511) ELT 520 (re-Abud).

(Signature)

3.2 Appellant submitted that dislodging removal Supreme Court in the case of Asst. Commissioner of Commercial Tax reported as 2013 (254) ELT 0 (57) said that principles of natural justice have to be followed and therefore, the impugned order is liable to be set aside.

3.3 Appellant referred Para 3.3 of impugned order and stated that they were not provided copies of related upon for the purpose of issuance of SCN; that recording of facts by the lower adjudicating authority at Para 3.3 that appellant has not raised the fact of not receiving related upon document is incorrect; that the fact remained that since four documents were not provided to them.

3.4 Appellant referred Hon'ble CESTAT's decision in the case of M/s. Arya Fibers P Ltd (2014(311) ELT 520 (Tri-Ahmed)) and in the case of M/s. TGL Peshawar (2002(140) ELT 187 (Tri-Chennai)) to state that charges of clandestine manufacture and clearances cannot be considered only on the basis of statements of owner or directors or employees or any persons associated with manufacturer.

3.5 That duty demand of Rs.61.84 lacs represents value of Rs.6.80 crore and revenue has not brought any evidence on record about receipt of sale proceeds of Rs.6.80 crore by them.

3.6 That no investigation was conducted with any of the buyer of clandestinely cleared goods out of 100 transactions as alleged in Annexure TR-5 and Annexure RS-2 to SCN.

3.7 That it is not proved that appellant has actually produced the ethic breaking material of 1282.835 MTs allegedly cleared clandestinely that the allegation is made out on the basis of registers of transporters which are not substantiated by any other independent evidence; that details in such registers are in the names like KILU, Indrapal, P.A., J.P. etc. who are claimed to be brokers; that it is not established that quantity of 755 MTs worked out on the basis of Truck Number at Annexure TR-3 is manufactured by them; that transporter's registers are not corroborated by evidence like buyer's name, payment of price etc. and hence not reliable evidence.

3.8 That authenticity of trip booking registers is not established as there were no corroborating Central Excise Invoices issued by the appellant that records of transporters are maintained in haphazard and unorganized manner by some private persons, that there could not be higher evidential value to such registers as against statutory records maintained by them; that they rely upon various case laws

including in the names of Mrs. Jyoti (Spearhead Bridge) No. 23 - 2008(227) ELT 322, Mrs. Madhavi (No. 23 - 2004 (304) F & T (Tribunal), Mrs. Jyoti Anaya Lal 2014 (302) ELT 327 (3), Mrs. Deepa Sagar (No. 2013 (250) ELT 219 (F & T); that in many cases (type six cases); that in some cases vehicle are also diverted after making entry for the transference in Trip registers.

3.9 That details in the records of Gujarat Maritime Guard are not reliable because details showing movement of vehicles to ship breaking yard and back would not mean that this breaking scrap was actually loaded on the vehicle from the appellant's unit.

3.10 That details of a size of Shri Bharat Shree Broker is highlighted in the show cause notices however details of other brokers have not been disclosed; that demand of Rs.157,570/- have nothing to do with diaries including A/C recovered by DCCM from Shri. Senth's premises; that AS transactions dated at Appellant TR-3 at the GCM did not involve Shri Bharat Shree as a broker, that none of the brokers except Shri Bharat Shree is assigned and exposed for penal action though they are held to be main executors for committing fraud by Appellant No.1

3.11 That findings at Para 3.8.1 to 3.8.3 and Para 3.8 are assumptions and presumptions; that bringing truck to ship breaking yard and payment of entry fee to GMB would not mean that truck was actually loaded at a particular point and scrap was loaded without invoice; that there have been many cases where a truck initially brought to a particular ship breaking yard; but was actually loaded at some other yard; that even if a truck was brought in ship breaking yard by driver on surety of getting full truck load would not show as in which ship breaking unit had agreed for transporting such truck load and which unit is to pay freight; that may be GMB register can be accepted as an evidence for entry of a truck but it does not conclude that the truck was loaded at that plot; that plot number are also not written specifically.

3.12 That it is settled legal position that the statement of a person cannot corroborate statement of another person in absence of examination as witness in an adjudication proceedings. That there is no conclusive proof that the above stated quantity of ship breaking materials was actually removed by the Appellant No.1

3.13 That charges of under-invoicing is not supported by evidence in form of inquiries made with buyers of the goods; that appellant had not recovered any additional amount from the buyers; that not a single buyer has admitted additional



payment ever and above the invoice price ; that it is not established that the price rates circulated by M/s.Major & Minor or a similar agency like M/s. Steelates were the prices at which sale transactions were actually made by the ship breaking units of Alang; that price depends on various factors like payment terms, demand supply at a particular point in time, quality and quantity of goods etc ; that they rely upon case law including M/s. Ramchandra Ahi Silk Yam & Others: 2002 (139) ELT 540 (Guj), M/s. Varaha Plastics P. Ltd 2009 (235) ELT 153 (SC);that price aknts circulated by agencies like M/s. Major and Minors are not actual rates but price ranges of steel scrap.

3.14 That the Partner Sri R.K. Tripathi, Manager and Authorized signatory (Appellant No 2) has not admitted the allegation of unauthorised and clandestine removal of goods by the Appellant; that he has not agreed with all the documents seized by the DGD&I and hence statement is not an supporting evidence in their case.

3.15 That the demand is fine barred as it is not shown in the proceedings as to what was the suppression of facts or willful mis-statement or non-avention of the provisions of Contra Excise Law on their part that they rely upon the Hon'ble Supreme Court's judgment in the case of M/s. Continental Foundation reported as 2007(218) F.T. 177 (SC), M/s. Jaiarasa Industries Ltd reported as 2002 (143) ELT 451 (SC), M/s. Padmini Products reported as 1999 (43) ELT 495 (SC) and M/s. Camphor Drugs reported as 1989(40) ELT 273 (SC).

3.16 That no penalty under Rule 26 and under Section 11A2 is imposable upon them as it is a quasi-criminal matter and can only be resorted to where mistake intention or deliberate action by an assessee that there is no allegation of any sustained intention to evade payment of duty is made out against them.

3.17 That Section 11A2/11A3 is not attracted in their case as there is no short levy or short payment or non-levy or non-payment of excise duty in their case and hence no interest is payable by them.

Appellant No. 2 :-

1. Appellant No.2, Manager and Authorized signatory of Appellant No.1 submitted similar grounds as submitted by the Appellant No.1 in foregoing Paras.



4.7 Appellant No.2 has submitted that imposition of penalty under Rule 26 (1) of CER is not an impugned order as he did not have any personal interest in the matter and has made statement of the appellant and has been working as an employee doing his job in his official capacity, that he has not acted in excess of the terms of his employment and has not got some gain or benefit accrued due to disputed avowment of Central Goods and Sales Tax on his part, that he rely the case law reported as 2006 (33) P.T. 735 (T. De.) in the case of Vinod Kumar and 2007(21) ELT 743 (T. De.) in the case of M/s. R.K. Ispat Udyog, that Rule 26 (2) of CER in the application of the case law is not guilty of any illegal act he further rely the Honble Ct. STAT's decision in the case of Z.P. Alvi reported as 200(35) RLJ 411.

Appellant No.3

5 Appellant No.3 states that role of the appellant has not been established in the SCN and also not dealt specifically in the impugned order; that his firm M/s. Jagdamba Ispat has a policy to receive goods under proper invoice. However, it appears that inadvertently some employees of the company has accepted this consignment that unlike others his firm M/s. Jagdamba Ispat has once and occasion in small quantity involving duty demand of Rs.41,9324; that lenient view should be taken against him that he has no role in procurement of the particular consignment in question; that he is wrong to impose penalty on the appellant under Rule 26 (1) of the CER.

Appellant No. 4 :-

6 Appellant No.4 submitted that he is partner of M/s. Badesh Krisher Gupta & Co; that allegation of purchase of 24 MT scrap without invoice from Appellant No.1 and transported through Truck No. RJ47GA 1209 on 24/12/2009 is without any supporting evidence that Truck No. RJ37GA 1205 had loaded 20.750 MT of goods from M/s. Anand Export, Plot No. 84-B, Aarg cleared under invoice No. Ex 366/24/12/2009 and 4.910 MT from M/s. Jawardana Dhanwani Plot No.80, Aarg cleared under invoice No. Ex1253/25/12/2009 through Shri Jai Rampure Camara

7 That submissions made by him before the lower adjudicating authority were not discussed in the impugned order, which are as under

8 That his statement dated 10/8/2012 was prepared and the investigating officer



got it signed: that it was not possible to remember such detailed information like truck number, name of seller, name of broker, weight etc. after 6 years; that his sign was obtained by the investigating officer: that on receipt of the SON dated 7.5.2013, he filed affidavit on 28/7/2013 jointly with others to the effect that statements were printed and got signed within 2 hrs. that only on receipt of the SON he came to know that the investigating officers have recorded the details of Truck number and receipt of truck loaded with ship breaking material: that trucks can not carry goods without valid document like invoice, statutory form prescribed in various states law from where truck passes through; that statements from all the notaries were recorded in similar format: that the statement can not be believed as no person can record statement identifying exact date & of clearance of goods after 4/5 years!

(ii) That no document was supplied to him including statements of broker, statements of transporters, statement of marine board officer: records of Gujarat Marine Board, the scan copy of documents produced in the SON do not contain particulars of the goods disputed in the case; that statement got signed without any evidence or record: that department has not summoned the truck owners involved in the transactions: that investigation was not checked the state government records at entry and exit point of various states: that no investigation done in respect of sales and time of passing of trucks from the borders of Gujarat, Haryana, Rajasthan and Punjab; that the Department can not shift the burden to appellat without enlarging its own case: that he relied upon the case law of M/s. Rama News & Papers Ltd reported as 2005(221) FTTA 676: that the statement dated 6.4.2011 of Shri Vaishav Sharma, Promotor, Bikaner Punjab Haryana Roadways mentioned in the SON is not incorporated in the SON: that copy of the statement is not received by them: that there is no evidence in the SON showing goods received by the Appellant from Appellant No.1: they have filed affidavit dated: the said goods were purchased by M/s. R.G. Gupta & Sons, Mandi Gubindgarh and enclosed the copies of Invoice: that impugned order is based on jejeune and surmises without considering the submissions made by the Appellant No.5

(iii) That allegation that appellant has purchased goods through Shri Harsep Gupta broker is not supported by any evidence as Shri Gupta in his statement dated 25.8.2011 and dated 5.11.2011, has not stated that he has dealt with the Appellant: that copies of the statements were not yet supplied to them: that without receipt of copy of the statement he can not comment upon it and department can not rely upon by the department. Appellant No.4 relied upon the decision of Hon'ble CESTAT in the case of M/s. Nutech Polymers Ltd reported as 2004(173) ELT 385



(I+Da) and in the case of Anam Singh Dalia reported as 2014(230) EIT 819

(10) That no penalty under Para 25 (1) of CPE can be imposed on firm in absence of corroboration of goods that witnesses who admitted the supply of trucks are not made party in no case as witnesses in the SON, that he required to cross examine. Partner of M/s. Diamond Industries, Broker Sri Pardeep Gupta Transporter, and Smt. R. Karim, J.C., G. Krishnamoorthy SIO and Smt. Vikas Jashi through advocate of the appellants but was not allowed by the lower adjudicating authority.

(11) All the above points submitted in the written reply were not considered in the impugned order.

6.2 The lower adjudicating authority did not allow cross examination of the important persons that as per Para 15 of CBIC Circular No. 1153/2/2017 CX dated 10.3.2017 supply of RUD to the appellant is pending, that a specific request by letter dated 22.7.2016 was made to supply copies of statements and other relied upon documents; that vide his letter dated 22.11.2016 he was again requested to supply the relied upon documents, that vide their letter dated 17.2.2016 it was once again requested but the impugned order was passed without even supplying Relies upon documents.

6.3 Request for cross examination of persons was not considered which is mandatory requirement of law. But for this he refer to the following case laws;

- 2014(312) ELT 225 (11-Anna)- M/s. Gupta Synthetics
- 2014 (301) ELT 629 (11-Anna)- M/s. Arya Fibers P Ltd
- 2002 (243) ELT 833 (11-Del)- M/s. Swadeshi Polytext Ltd
- 2002 (243) ELT 806 - M/s. R. V. Shree P Ltd

6.4 Penalty upon firm was imposed relying on his statement at Para 3-25 of the impugned order. However copy of the statement was never provided to firm; that his statement stands retracted by his affidavit.

7. Perpara hearing on behalf of Appellant No.1 and Appellant No.2 was attended by Shri P.D. Rastogi, Advocate who reiterated the grounds of appeal and submitted that condonation of filing delay in Appeal may be allowed as per judgment of Hon'ble Apex Court cited in Appeal; that all RUDs have not been supplied herein as detailed in Appeal; that cross examination of witnesses request for



has been denied in violation of principle of natural justice; that third party documents have been relied upon without any evidences; that no inquiry has been conducted at Appellant's order; that in absence of above documents and due to facts of the case, the case needs to be remanded back for re-adjudication by the lower adjudicating authority.

7.1.1 In a combined written submission dated 5.1.2019, Appellant No. 1 Intervenor submitted that appeal was filed late by 7 days because of Advocate of the appellants it was abroad and hence filing got delayed; that delay in filing appeal may be condoned.

7.1.1.1 That appellant was not provided copies of relied upon documents based on which the impugned demand was raised in spite of appellant's request made on 14.09.2019; that therefore order passed by the lower adjudicating authority is in violation of principles of natural justice; that they relied upon judgment of the Honble High Court of Allahabad in the case of *M/s. Parmarth Iron Pvt Ltd* reported as 2010(255) F.T. 493 (All) and the Honble High Court of Madras in the case of *M/s. Rasm Industries (P) Ltd* reported as 2010(255) ELT 181 (Mad).

7.1.2 That no search was carried out at the factory premises or office premises of the appellant and entire demand raised is on the basis of third party documents recovered from third party premises and statements of third parties; that cross examination of witnesses is required under Section 90 of the Act which is not followed as held by the Honble High Court of P&H in the case of *M/s. Jindal Drugs Pvt Ltd* reported as 2018-FOL-1253-HC-P&H-CX and also by the Honble CESTAT in the case of *M/s. Flexel International* reported as 2010(332) ELT 416 (Del).

7.1.3 That persons whose statements are relied upon, have not been tried in these proceedings; that as per provisions of Section 30 of Indian Evidence Act, 1937, confession of co-accused is admissible as evidence only if they are jointly tried with the appellant; that they relied upon the decision of the Honble High Court of Madras in the case of *Lal Chand* reported as 2018 (335) ELT 416(Mad).

7.1.4 That the impugned order is not sustainable as the show cause notice is prejudged and has concluded the issues and therefore, the same was not sustainable in the eyes of law; that he relied upon the judgment of Honble Supreme Court in the case of *M/s. Oryx Healthcare Pvt Ltd* reported as 2011(236) ELT 3422 (SC).



7.15 That demand on account of undervaluation on the basis of price lists circulated by various officials regarding export tax is not correct as it is not the value of consideration that may refer to the value of goods, including judgment of the Hon'ble Supreme Court in the case of *M/s. Lintas - exvora & Fragrances Ltd* recorded as 2011 (233) P.T. 14660.

7.16 First Appellant No 2 being employer of Appellant No 1, is separate entity is responsible for the same.

7.17 That copies of all documents and notices provided may be provided to them; that cross examination of the departmental witnesses may be granted, that they should be given sufficient time for making further submissions or after providing relied upon documents, that copies of show cause notices issued to the buyers availing wrong Credit should be made available to them before deciding the matter against them.

8. Personal hearing was attended by Shri Rakesh K Shah Advocate on behalf of the Appellant No 4 who reiterated the grounds of appeal and made written PF submission to emphasize his arguments.

8.1 In his submission Appellant No 4 submitted that during the course of investigation and recording of statements by "MCOPI" total 8 consignments had been alleged to have been received by him without invoice which includes 3 from Pils. No 88, 1 from Pils. No. 84 and 2 from Pils. No. 87; that in the case of consignments received from Pils. No. 88, penalty was imposed against him vide the decision in the OIA no. BEIV EXCISE 051-APP 123 to 131 2018-19 dated 12.8.2018 that single statement for all consignments was recorded and no penalty is imposed upon him as decided vide the OIA dated 12.1.2019, that truck no. RJ61GA 1208 was used for transportation of Goods covered under invoices issued by M/s. Anand Export and M/s. Jawardana Pransanis and supplied to M/s. R.G. Gupta & Co under GR No. 544 dated 24.12.2009 and GR NO. 550 dated 25.12.2009 issued by M/s. Ratanra Rempura Distt.

9. Appellant No 2 was granted PFH on 15.12.2018, on 5.2.2019 and again on 15.2.2019. However, Appellant No 3 neither turned up to attend the hearing nor responded to any of the PF notices issued to him.



10. I find that Appellant No.1 & Appellant No.2 have filed appeal after 7 days beyond normal appeal period of 30 days but within further period of 30 days stating that his consultant was abroad. Since the appeal has been filed within further period of 30 days I condone delay in filing of both the appeals and proceed to decide both appeals on merits.

11. I find that Appellant No.3 has not availed opportunities of persons hearing granted to him and hence I proceed to decide his appeal on the basis of the grounds of appeal and on the basis of available records.

FINDINGS

12. 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 issues to be decided in these four appeals are as under:-

- (i) Whether Appellant No.1 has clandestinely manufactured and cleared the excisable goods attracting CF duty of Rs.24,26,512/- and whether duty should be recovered from them along with interest;
- (ii) Whether Appellant No. 1 has evaded payment of Central Excise duty of Rs.17,55,802/- by undervaluation of the excisable goods or not?
- (iii) Whether imposition of penalty of Rs.61,64114/- on Appellant No.1 under Section 11A(c) of the Act read with Rule 25 of the CER is correct?
- (iv) Whether penalty of Rs.3,39,792/- under Rule 26(2) (a) of the CER on Appellant No.1 is proper;
- (v) Whether Imposition of penalty of Rs.5 lakhs on Appellant No. 2 under Rule 25(1) of the CER and penalty of Rs.5,39,792/- under Rule 25(2) (b) of CER is correct and proper;
- (vi) Whether penalty of Rs.41,982/- imposed on Appellant No. 3 under Rule 26 of the CER is proper.
- (vii) Whether penalty of Rs.46,541/- imposed on Appellant No. 4 under Rule 26 of the CER is proper or not?

13. It is found that during coordinated search at offices' residences of various brokers, transmitters etc., CGCEI recovered incriminating documents like diaries, notebooks, files, loose papers etc. and recorded statements of Shri Bharat Sheth (hereinafter referred to as 'the broker') and Shri Manish Pale accountant of Shri Bharat Sheth (hereinafter referred to as 'the accountant of broker') and the entries recorded in the notebooks, diaries, etc. recovered during search indicated



classessime and rustique and also notes of the excisable goods against cash transactions. The "book" and the "accountant" violated the codes used in these private records and the registers thus received by the recovered notebooks, diaries, etc. Appellant No. 1 (Authorized Signatory of Appellant No. 1) in his statement dated 24.1.2015 explained that all the codes in their factory premises and the data is found to be noted in the private records of the class were in respect of sales of the excisable goods manufactured and cleared by Appellant No. 1. The Broker and the accountant of the Broker in their respective statements deciphered the codes and also explained in his details of sales pertaining to Appellant No. 1; that Diaries / notebooks recovered during search contained details including quantity, address, date, commission, etc. and the same have been decoded during the course of investigation and details in the proposed Show Cause Notice. Statements of transactors and records of Gujarat Machine Board which tracks movement of Lucke were also photocopied.

15.4 In the instant case, the manufacturing records seized during investigation have been duly corroborated by the brokers, the transactors, agents, accountants of the broker and by the records of Gujarat Machine Board. It is that the records seized during investigation are not related to only one manufacturer but many manufacturers involving specific persons associated in dealings of such illicit activities and hence, such evidences can not be brushed aside treating them as mere party evidences whereas, these are common records involving many manufacturers and preserved by the brokers, transactors etc. It is relevant to note that Gujarat Machine Board is a state government body and the records are maintained by them for all purposes and such records are inflexible. It is also relevant to note that the records were perused by the Authorized Signatory and Manager of Appellant No. 1 (the Appellant No. 2) and veracity of transactions recorded in those records were confirmed by him in as much as 219 entries of transactions were on record, out of total 294 entries recorded in Annexure IR-1 leaving 55 entries (clearances without payment) of duty. Appellant No. 2 has gone through all the entries in Top registers and confirmed the correctness of the details recorded therein including declaring plot no. 84 as his unit in reply to Question No. 10 of his statement dated 24.1.2015. Appellant No. 2 in reply to Question No. 13 in his statement dated 24.1.2015 has stated as under:-

Q.No. 13. Please peruse Annexure T-3 prepared on the basis of Annexure IR-1 prepared on the basis of said Top Registers and according to which your company had cleared 35 consignments where no duties have been levied. Please offer your comments.

A. 13. I have carefully perused the aforesaid Annexure T-3 and I am very glad



various losses in token of having seen and agreed with the details mentioned herein and method of collection of excise of Central Excise and compound interest. I understand that out of 254 consignments prepared on the basis of copy/print Banking Registers of various transporters, 219 consignments are the non-issued invoices and for remaining 35 consignments, I am unable to produce invoices for the reasons I cannot explain.

Q. 17. In reply to Question No. 16 above, explain mode of non-proceeds of these 35 consignments from your File No 84 and explain as to your firm has accounted the sale proceeds wherever in the books of accounts of the firm?

A. 17. Since sale proceeds of these 35 consignments's scrap distributed in various and many in deed and in such a case our firm does not keep an accounted Bank/notes in any statutory books of accounts maintained by us, and am therefore unable to produce any documentary evidence.

13. I find that Appellant No. 2 in reply to question No. 12 Q.20 and Q.21 in his statement dated 24.1.2013 had stated as under:-

Q.19 - Do you know Shri Bharat Shree, trader in Bhavnagar? Have you done any business or sale of steel-breaking scrap of your firm through him?
 Ans:- I know Shri Bharat Shree. He is one of the major traders in Bhavnagar. He has done many times sale scrap through him.

Q.20. The officers of CGOPI, Amravabad conducted search of mentioned-entities business records of Shri Bharat Shree on 26.3.2010. During the search, certain private records relating to sales were recovered from his premises and withdrawn to the officers. The details maintained by him or his employees are shown in captured and sealed manner. One Shri Manish Patel, Assistant of Shri Bharat Shree has written all the details in the diaries recovered from Shri Bharat Shree. In per the explanation about the details statements of Shri Manish Patel were prepared during the investigation, he explained and deciphered the details written by him in the above said diaries. You are shown paragraph (Annexure B3-1) enclosed on the basis of Entry Nos. A7 & A12 exhibited under Memorandum dated 04.02.10 from respondent no. office of Shri Bharat Shree, according to which during the period 27.1.2009 to 22.3.2010 your firm has sold the consignments of scrap weighing 1157,275 MTs through him to various parties.


Out of the 107 consignments:-

(i) in respect of 52 consignments, no central excise invoices have been issued by your firm and their corresponding proceeds have been cleared directly without payment of Central Excise and without issue of any central excise invoices. Details of such consignments are shown in Annexure B3-2 and accounts to which your firm had cleared 52 consignments of scrap totally weighing 527,605 MTs valued at Rs.26,97,754/- from File No. 24 directly without issuance of Central excise invoices and without payment of Central Excise duty to the tune of Rs.5,57,570/- payable thereon.

- (ii)
- (iii)
- (iv)

Witness please see annexure B3-3 and Annexure B3-4 and confirm the details mentioned therein.

Ans:- I have carefully reviewed the aforesaid Annexure B3-1, Annexure B3-2 & Annexure B3-3 and I put my dated signature thereon in token of having seen and agreed with the details mentioned herein in and collection of excise of Central Excise duty mentioned therein. I have also perused Annexure B3-3 and I put my dated signature thereon in token of having seen and agreed with the details



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15.3 I also find that Shri Manishbhai Himmatlal Patel, Accountant of the broker in his statement dated 27.1.2010, has stated as under:-

"Ques 4- Who has written the details mentioned in record A7, A8 and A13 of the Panchanama dated 20.05.2010?

Ans:- The majority of the details mentioned in record A7, A8, A13 of the Panchanama dated 20.05.2010 have been written by me in my own handwriting as per the instructions of Shri Ghanshi Sheth.

Ques 5- ...

Ans:- ...

Ques 6- Regarding the record of A10 & A11 of the Panchanama dated 20.05.2010 please explain details mentioned therein?

Ans:- ...

I further state that the diary mentioned at Sr. No. A12 contains the details of the Letterhead headed out by Shri Ghanshi Sheth in respect of supply of Ship Breaking Scrap to the various Floating MU units providing to Central Excise Invoices to the Indian Foreign units for the period from 15.01.2009 to 31.12.2009.

The said diary also contains the details of cash money received from various Floating MU units / persons of the (Shri Ghanshi Sheth) in respect of supply of Ship Breaking Scrap without cover of Central Excise Invoices delivered through Shri Ghanshi Sheth.

Further, both the aforesaid diaries also contain the details of cash money given to the various ship breaking unit of Alamy / Yosyo / persons of the aforesaid ship breaking units from whom the materials was delivered irregularly without Central Excise Invoices to the various Floating MU units of Gujarat and Maharashtra. Sometime, cash money was also given to the Indian Foreign units / persons of the Indian Foreign units for supply of Central Excise Invoices, say on behalf of the aforesaid ship breaking unit after deducting the amount of Tax (Central Excise + VAT) and our commission.

Moreover, both the said diaries also contains the details of various expenditures incurred by Shri Ghanshi Sheth and his family members viz. deposit of mobile bills, electricity bills, petrol expenses, household expenditures etc. Both the said diaries also contain the details of monthly salary given to me.

I also state that both the said diaries contain the details of commission received in cash from the Floating MU unit for supply of ship breaking scraps and from Indian Foreign units for supply of Invoices and etc. I further state that majority of the entries pertain to the debit removal of assets by the ship breakers Shri Ghanshi Sheth.

[Empress's reply]

15.4 I find that the details of diary are explained in Page No. 35 to 36 of the impugned show cause notice with the aid of scanned copy of copies of diary at "A12". I find that the details of Diary mentioned at Sr. No. A13 to the Panchanama dated 20.05.2010 have been explained in exhibitve manner in answer to question No. 4 by Shri Manishbhai Himmatlal Patel, Accountant of the broker (show cause notice page 40) in his statement dated 27.01.2010.

15.5 I also find that in his statement dated 14.8.2010, Shri Manishbhai Himmatlal Patel, Accountant of the broker, has explained as under:-



Ques. 15 Please peruse Annexure - B2-V/13 (Part-I to Part - VI) prepared on the basis of details available in seized diary marked as 'A/13'. Please go through the same along with the relevant details mentioned in the said seized diary and offer your comments. Also put your name/signature on the said annexure.

Ans. 15 I have perused Annexure - B2-V/13 (Part-I to Part - VI) prepared on the basis of details available in seized diary marked as 'A/13' and put my dated signature on the said annexure. I have compared the details mentioned in the said annexure with the details mentioned in the said seized diary 'A/13' and I found the same to be true and correct.

13.6 I find that Shri Bharatjai Manmarchai Seth Broker in his statement dated 4.8.2016 has confirmed that Shri Manish Patel was his paid employee and Accounts of who has maintained the diaries. Relevant portion of the statement reads as under:

Ques.6 Please state that under whose instructions Shri Manish Patel, Accountant has maintained the seized diaries showing the details of business transactions carried out by you?

Ans.6 I state that I am working as broker and dealing with export obtained from breaking of ships by the ship-breaking yard situated at Alinga Koliya and Shri Manish Patel has maintained the diaries under my instructions only as he is my own employee. He has maintained the said seized diaries as per my directions & instructions only.

13.7 I also find that creator and owner of the records has explained the set of diaries, i.e. clearances of the excisable goods including payment for those transactions and all other relevant details including transportation that Appellant No.2 in his appeal memorandum accepted the receipt of Consignment without invoice to state that it was once off incidence. Thus, authenticity of the seized records is proved and admission of buyers also establishes Appellant No.1 indulged in clandestine manufacture and clearances of the excisable goods. On going through explanation regarding the seized private records (diaries/notebook) offered by Appellant No.2, I find that the clandestine clearances of the excisable goods stand established and confession by creator and owner of the records remain unchallenged even now. Concession of Appellant No.1 that the investigation had not ascertained actual production, buyers not acquired, money flow back, not granting cross-examination etc. are nothing but to cooperate attempt find fault to cover up their activity of indulging in clandestine clearances of the excisable goods.

14 Appellant No.1 has argued that demand of duty cannot be confirmed on the basis of diaries and records recovered from the third parties and hence, demand confirmed on the basis of third party documents is not sustainable. In this regard, I find that the diaries maintained by the brokers recorded not as well as it is transactions of Appellant No. 1 and that many transactions recorded in the private records tallied with the invoices actually issued by Appellant No.1. The details are

(Signature)

worked out on the basis of their findings. Items seized during searches at the premises of brokers, transporters, agents, etc. and as per respective statements which have been prepared and explained in detail the modus operandi. The Broker and his accountant were not aware of these facts and entries were made accordingly in their private records which have also been corroborated by transporters, accountant, GDS records etc. including confessions, statements of buyers who are Appellant No.2 and Appellant No.4 in this proceedings.

14.1 I also find that the material proceedings cover transactions recorded in those diaries where Central credit has been raised on fraudulently issued invoices were issued by Appellant No.4 without issuing excisable goods to the buyer in whose name invoices were issued. Thus, transactions covered under invoices also existed and recorded in diaries maintained by the broker/his accountant.

14.2 Thus, multiplicity of entries/retrospective and other private records recovered from the premises of broker during search is clearly established. Further, broker and his accountant have admitted to have sold goods belonging to Appellant No. 1 without GE invoices. I also find that the demand has been computed on the basis of Annexures prepared during investigation based on private incriminating records recovered during searches carried out at the premises of the brokers and all vital links involved in the case. i.e. brokers, Appellant No.2 as Manager, transporters etc. have corroborated the evidence gathered during investigation and therefore demand cannot be said to be based on third party evidences only. I further find that multiplicity of entry and corroboration of evidences itself negate the concept of third party and the evidence of clandestine removal in this case have been gathered by the investigating officers from many places and therefore, it cannot be called third party evidence but sufficient corroborative and supporting evidences against Appellants. I, therefore, hold that allegation of clandestine manufacture and clearance of the excisable goods involving GE entry of Rs. 24,20,512/- sustain in this case.

14.3 I find that the statements recorded during course of investigation are substantial pieces of evidences duly corroborated, which have not been refuted at any stage by the statement makers and therefore, as per the settled legal position sanctity of the same cannot be undermined by legal arguments only. Appellant No.4 sought cross-examination and examination as witness by the lower adjudicating authority under Section 80, without specifying as to how such cross-examination will help them to arrive at different conclusion. I further find that the authenticity of



the records seized from the premises of Appellant No. 1 and both dockets have been duly corroborated and tallied with the records of Appellant No. 1. The Hon'ble CESTAT in the case of Lawn Toxic Mills Pvt. Ltd. reported as 2018- (10)-1924- HC MAD CX has held as under :-

30. The above facts will clearly show that the allegation is one of fraudulent removal. It may be true that the burden of proving such an allegation is on the Department. However, discharge required with an intention to evade payment of duty is always done in a secretive manner and not as an open transaction for the Department to immediately detect the same. Therefore, in cases of fraudulent removal where accurate records may not be made where direct documentary evidence will not be available. However, based on the overall records, if the Department is able to prima facie establish the case of fraudulent removal and the assessee is not able to give any logical explanation for the same, then the allegation of fraudulent removal has to be held to be proved, in other words, the allegation and discharge of duty, which is required to establish the case, are to be treated as if they were true and it is no defence of fraudulent removal.

31. As noticed above, the assessee had not denied any of the allegations, which were put forth except for simple and direct refutation. If the assessee had sufficient records to establish their innocence, similar to what the Managing Director has done to give an affidavit while seeking the restriction. There was no attempt made by the assessee to make any case by moving forward to get a statement and accounts records. The allegation of period averaging was not even disproved in the manner known to law. Thus, we find that the Appellate Authority, the Appellate Authority as well as the Tribunal proceeded on facts and each of them has given independent reasons for their conclusion.

32. Thus, in the absence of any poverty in the finding, the Court cannot interfere with the finding having recorded by the authority as well as the Tribunal, as the scope of the appeal before this Court under Section 35 C of the Central Excise Act is to decide if a substantial question of law arises there is no question of law, which has a substantial question of law arising for consideration in the instant case. Thus, the appeal filed by the assessee is dismissed.

[Emphasis supplied]

14.4. Shri R.K. Tripathi, Appellant No.2, Manager & Authorised Signatory of Appellant No.1 has in his statement dated 24/1/2016 on being confronted with documentary and other corroborating evidences along with duly calculating Annexures, submitted the diaries of brokers were showing transactions of Appellant No.1. This statement dated 24/1/2016 of Manager of Appellant No. 1 has not been retracted till date and hence, has sufficient evidentiary value. The combined application of all such oral and documentary corroborative evidences reflects that Central Excise duty evasion has indeed taken place. I, therefore, find that all these evidences are vital and bare evidences and are sufficient to prove the case against the appellants. In this regard I rely upon the decision of the Hon'ble CESTAT in the case of Om Prakash Agarwal, reported as 2017 (316) ELI 125 (Tri-Def) wherein it has been held as under :-

5. I note that in both the proceedings almost identical set of facts were involved. The allegation was that based on evidences collected from the suppliers' side, consolidated receipt and further manufacture of goods there

(Signature)

by the appellants was established on material. In effect, the case is largely based on the evidence which reflected on the supplier's and was also on documents of the appellant's records of the supplier's sale. The receipt and use of the goods manufactured and supplied by another manufacturer has apparently been admitted by the appellants and also they admit that the appellant is withholding the name of the supplier. The appellants have emphasized on the availability of the further evidence by way of details of transactions, namely, report etc. In the present case, the evidence collected from the supplier's records is not correct and cannot be disputed. The private records of the suppliers have been maintained and admitted for the consideration of their accounts by the appellant who were in charge of the suppliers' work. When such evidence was brought before the court, the appellants did not adequately provide appropriate explanation of reliable items. However, he did not bring the buyers to whom such goods were sold. In such situation, the charge that the appellant has taken a plea that the department has not investigated the details of nature and quantity of the finished goods is not correct. It is seen that the records maintained by the supplier, which were starting by the persons in-charge cannot be looked aside. It is not the case of the appellants that the suppliers maintained such records only in order to provide the appellant. In fact, the supply of unaccounted raw materials has been observed by the partner of the appellant's firm. In such situation, it is not tenable for the appellant to, now in the second stage, take the court by requirement of cross-examination, etc. Appellant's mode of the private records in the statements about each item, reference or later corrected for their correctness in the copies before the tribunal, the appellant is making a business assertion that the statement by the partner of the appellant's firm is not voluntary. Various case laws relied upon by the appellants are not of any support in the present case. In the case involving unaccounted manufacturing, the evidence of each case is to be considered for conclusion. As noted above, the third party's records of the supplier's and as stated by the primary evidence and further corroborated by the appellant's control or disapproved work on the ground of further evidence has been obtained and records of money has not been proved in a scientific manner and chronology. Such state of exception cannot be established and provision. On careful consideration of the grounds of appeal and the findings in the impugned order, I find no reason to interfere with the findings recorded by the lower authority. Accordingly, the appeal is dismissed.

[Franchise supplied]

14.5 I rely on the law laid in cases of unaccounted removal, the Department is not required to prove duty evasion with mathematical precision. My this view is duly supported by judgments of the Hon'ble Supreme Court in the cases of *Shri Shah Bunsanmal* reported as 1988 (19) EIT 1601 (SC) & *M/s. Anilal Textiles (I) P. Ltd.* reported as 2009 (235) EIT 587 (SC).

14.6 I rely on the decision in the case of *M/s. Haryana Steel & Alloys Ltd* reported as 2017 (319) EIT 49 (SC) wherein it has been held that private notebooks (journals) seized from the possession of appellant's employee at the time of search showing entries for accounted as well as unaccounted goods which have been explained in detail and disclosed by CMA of the factory tally with invoices / gate pass is trustworthy. Such statement of employee running into several pages and contains detailed knowledge to be considered reliable. I also rely on the decision in the case of *M/s. Ramchandra & Sons Pvt. Ltd.* reported as 2014 (302) EIT 781 (SC) wherein similar view has been taken by the Hon'ble Supreme Court.

[Signature]

14.7 The statements if not retracted are legal and valid evidences in the eyes of law and have to be considered as corroborative evidence as held by the Hon'ble Supreme Court in the case of *M/s. Narosh J. Bikhawani* reported as 1856 (82) ELT 258 (SC) and the Hon'ble Delhi High Court in the case of *Rakesh Kumar Gang* reported as 2016 (331) ELT 321 HC Delhi. I find that statements admitting clearances of goods without payment of Central Excise duty and without issuing invoices are incriminatory and specific and not retracted and hence, admissible as held in the case of *M/s. Hitech Agencies Ltd.* reported as 2017 (346) ELT 606 (Tri-Del). Relevant portion of the order reads as under:-

14. On careful consideration of the facts and circumstances as outlined above, I find that the statement of Director is the basis for the demand. The statement is mandatory and is specific. The Director clearly admitted that the documents/private records recovered by the officers contained details of procurement of raw materials as well as clearance of finished goods with and without payment of duty. This fact is further strengthened by the observation that many entries in the private documents are covered by the invoices issued by the assessee on which duty stands paid. The Director has clearly admitted the truth of the entries as well as clandestine clearance of goods covered by the entries in the private notebooks which are not covered by the invoices. Such statement is admissible as evidence as has been held by the Apex Court in the case of *Systems & Components Pvt. Ltd.* (supra). The activities of clandestine nature is required to be proved by sufficient positive evidence. However, the facts presented in each individual case are required to be scrutinized and examined independently. The department in the case has relied upon the confessional statement of the Director which is also supported by the mentioned entries in the private records. There is no averment that the statement has been taken under duress.

15. In view of the foregoing, I find that the Commissioner (Appeals) has erred in taking the view that there is not enough evidence of clandestine removal of goods. Even though the statement of Shri Sanjay Kataria who is said to be the author of the private records recovered has not been recorded, it stands admitted by Shri Jitendra, Director about the truth of the contents of the private notebooks. Consequently, I find no reason to disallow this piece of evidence.

(Emphasis Supplied)

14.8 In view of the aforesaid view that the admitted facts need not be proved as has been held by the Hon'ble CESTAT in the cases of *Alor Industries* reported as 2008 (239) ELT 1073 (Tri-Mumbai) and *M/s. Dyne Solutions* reported as 2008 (208) F.T.T. 1005 (1a) (Chennai). Hon'ble CESTAT in the case of *M/s. Karol Engg. Works* reported as 2004 (108) F.T.T. 273 (1a) Del. has also held that Admission/Confession is a substantial piece of evidence, which can be used against the taker. Therefore, the Appellant's reliance on various case laws are not applicable in light of the positive evidences available in this case as discussed above and in the aforesaid order. Hon'ble CESTAT in the case of *M/s. V. R. Sponco P. Ltd*

Sd/-

maintained as 2011 (223) EIT & CO. (P) Ltd. has not held that when the consideration of probability was against the Appellant, absence of no statements recorded from buyers and excess electronic opposition found, no new material purchases found unaccounted and no input cost of value presented by law is of no use.

14.9 In view of above facts that the contentions raised by Appellant No.1 are of no help to them and the Department has adduced sufficient oral and documentary corroborative evidences to corroborate that the Appellants were engaged in clandestine removal of the goods. Therefore, held that the confirmation of demand of Central Excise duty of Rs. 24,26,512/- on the ground of clandestine removal of the goods by the lower adjudicating authority is correct, legal and proper.

14.10 It is natural consequence that the confirmed demand of Rs.24,26,512/- is required to be paid along with interest at applicable rate under Section 11AA of the Act. Therefore, upheld the impugned order on this account.

14.11 It is held that this is a case of clandestine clearance of the goods which has been established. Imposition of invoking extended period of demand and imposing penalty under proviso to Section 11AC of the Act are same as held by the Honble DESTAT in the case of *M/s. Sun Microsystems India P. Ltd.* reported as 2016 (539) E.L.T. 470 (T.R. - Bang.) and hence, the impugned order has correctly imposed penalty equal to duty of Rs. 24,26,512/- levied on account of clandestine removal, under Section 11AC(1) of the Act on Appellant No. 1. The lower adjudicating authority has also granted option of reduced penalty @25 % of duty evaded, however, the same has not been availed by Appellant No.1 within 30 days of receipts by the impugned order.

15 Regarding confirmation of demand of duty of Rs.37,55,602/- on the ground of undervaluation, Appellant No.1 submitted that the said demand on account of undervaluation is on the basis of the rates obtained from the market research agencies is not identical to the ship breaking rates obtained by Appellant No.1 during the course of ship breaking and additional consideration over and above the invoice price received by them is not established.

15.1 The lower adjudicating authority has confirmed the charge of undervaluation inter alia, giving findings as under.

15.10 The Show Cause Notice alleged evasion of Central Excise duty by way of undervaluation of the goods obtained out of breaking up of ships. It is not in dispute that various Research Agencies obtain the price considering all the factors of demand and supply, and there is no reason that prices obtained by such agencies are unrealistic one. It is in this backdrop that even Ship Breakers/Exporters/Buyers also subscribe to such market research agencies to have an idea of prevailing rates so as to enable them to sell their

goods at minimum rate. It is also not in dispute that the in realistic prices supplied from the Bham (4 Aug) to 25th (14 Aug) are corrected out of breaking up of ships and the margin of reasonable margin emerged of breaking up of ships are of 15 and 20% in order to substantiate this situation, the DCEI conducted inquiry with various marketing research agencies including M/s Major & Minor with reference to pricing data of various which revealed that day to day price of 12mm size of plates is almost equivalent to the average price of 20 25% within the range of 20mm to 25mm.

3.17. In comparison of the price mentioned in the invoice of M/s HSLA with a list of the prices submitted by M/s. Major & Minor, it was also revealed that in many cases the transaction value observed by the M/s HSLA were far less than the actual value prevailing in the market during the respective period. The sub-breakers have by not accepted the actual size / thickness of M/s. Major & Minor as per their unavalued MS. Re reliable source as per it enable them to declare only part of the value of such goods in the invoices and adjust the differential value. They also showed the restored average value by way of unaccounted cash payments.

3.18. I therefore find the substance in the allegation of under-valuation in the present show cause notice particularly when plates issued from the Bharu Merchantal Steel already containing details of cash transactions with various Brokers / Shroffs / Amshias. Has the assessed amount of under-valuation been not correct. This would not have been maintenance of margin of 20% amount of cash which includes part of the unaccounted cash of ship breaking materials.

3.19. In view of the above I agree with the contention of the DCEI that under variation in price is obvious considering various factors like payment terms, quantity & quality of the goods, demand with buyers, demand and supply situation, therefore 2% difference in price is reasonable one. As shown above, Brokers / Ship Brokers / 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% i.e. rates of Plates and Scrap 2% lesser than the rate of M/s. Major and Minor, is considerable. I therefore fully agree with the view adopted by DCEI that duty shall owe on account of variation of price more than 2% is on account of under-valuation of the goods and duty recoverable from M/s. Dharma. Further I also find that a large number ship breaking units, dealers from Alang and brokers were members of M/s. Steel rates and were receiving day to day updated on the duty rates rates of ship breaking materials through SMS alerts and emails. It is also revealed that M/s. Steel rates were submitting the most specific and appropriate analysis of the data gathered by them. The SMS website were fair source of the rates of the scrap generated from ship breaking and intentionally under-estimated the goods and value to evade payment of Customs Excise duty. Further inquiry was conducted with Joint Fact Committee, Kolkata and I find that it is a fact that Fact Committee is the only institution which is empowered by the Ministry of Steel for the purpose of formulating guidelines for production, allocation, pricing and distribution of iron & steel materials in the country as well as to function as the central facilitator of the industry. JFC was constituted in 1961 by the Government of India under the powers conferred by clause 17 of The Iron & Steel Control Order, 1956. JFC consist of members and representatives from the Ministry of Steel, steel Authority of India Ltd., Tata Steel Ltd, Hindalco, Ispat Nigam Ltd. and IAFI to advisory and cost expenses, JFC has maintained a comprehensive database which is considered to be the most authentic and reliable information on Indian steel industry. The database includes capacity, production and stock of all the major steel products of the country, domestic market price of iron & steel, FOB and CIF prices and revised cost of steel products, export import data on iron & steel products, production and inventories for selected materials for steel making, state-wise and category wise details of dependence of iron & steel etc. Apart from the regular use by researchers, statisticians

(Signature)

marketing business, subjected to comprehensive financial analysis by the HD and banks, some of the key users of the JPO database, various study committees on systems, policy, export promotion, Central Industrial Production Index, implementation of price bands, defense trade cases, for analysis of the 'More - cost' scenario, surveys and audit budgets, etc. Also a lot of information and reports, etc. In fact, the database price data on Iron & Steel products maintained by JPO is considered as the most authentic data of the type for the steel industry. This analysis of the rates provided by JPO, Kolkata, states that Mr. Demandant has misargued that metallic goods were bought by the respondent at Central Excise duty and that based on the calculation done by DGCE, ITO, Patna, Demandant should pay Central Excise Duty of Rs.57,53,824/-

[Enclosure 3/11/13]

15.2 I find that demand of Rs.57,53,824/- has been confirmed on the ground that the Appellant has shown description of the taxable goods in relevant invoices as Waste and Scrap of Iron and Steel or Iron & Steel etc. and the impugned order has affirmed the valuation as per rates ascertained from the reputed agency for valuation of such goods during investigation. I also find that valuation of goods has been arrived at after scientific analysis of the data released by Joint Plan Committee, an institution approved by Ministry of Steel, Govt. of India and market research agencies i.e. M/s. Mayo & Wilks and M/s. Steerale. Appellant has not disputed the said analysis, however, contended that no excess payment over and above invoiced prices was received by them. I find that Manager and Authorised Signatory of the Appellant No.1 (i.e. Appellant No.2) in his statement dated 27.1.2013 has admitted that they did not mention the thickness of the plates in the invoices. Relevant Q.28 and its answer read as under.

Q.28 Do you mention the thickness of plates on the invoices? If yes, since when?

A.29 Earlier we did not mention the thickness of the plates in the invoices. Since mid of 2010, we have started declaring the thickness of the plates in the invoices.

15.3 The contention that transaction value declared in the invoices under Section 4 of the Act cannot be rejected does not have force, when Appellant No.1 is involved in clandestine transactions and they do not specify the grade/quality of the goods in the invoice and a series seized from Gini Bhanu Marhathar Sheth already containing details of cash transactions with various Brokers / Shroffs / Angadias. I, S.T. therefore of the view that appellant failed to establish the grade and quality of the goods concerned to justify the over price adopted by them and hence I find impugned order legal and proper and therefore, I uphold our intimation of CE duty of Rs.57,53,824/- along with interest and equal penalty under Section 11AC of the Act.

S. N. Singh

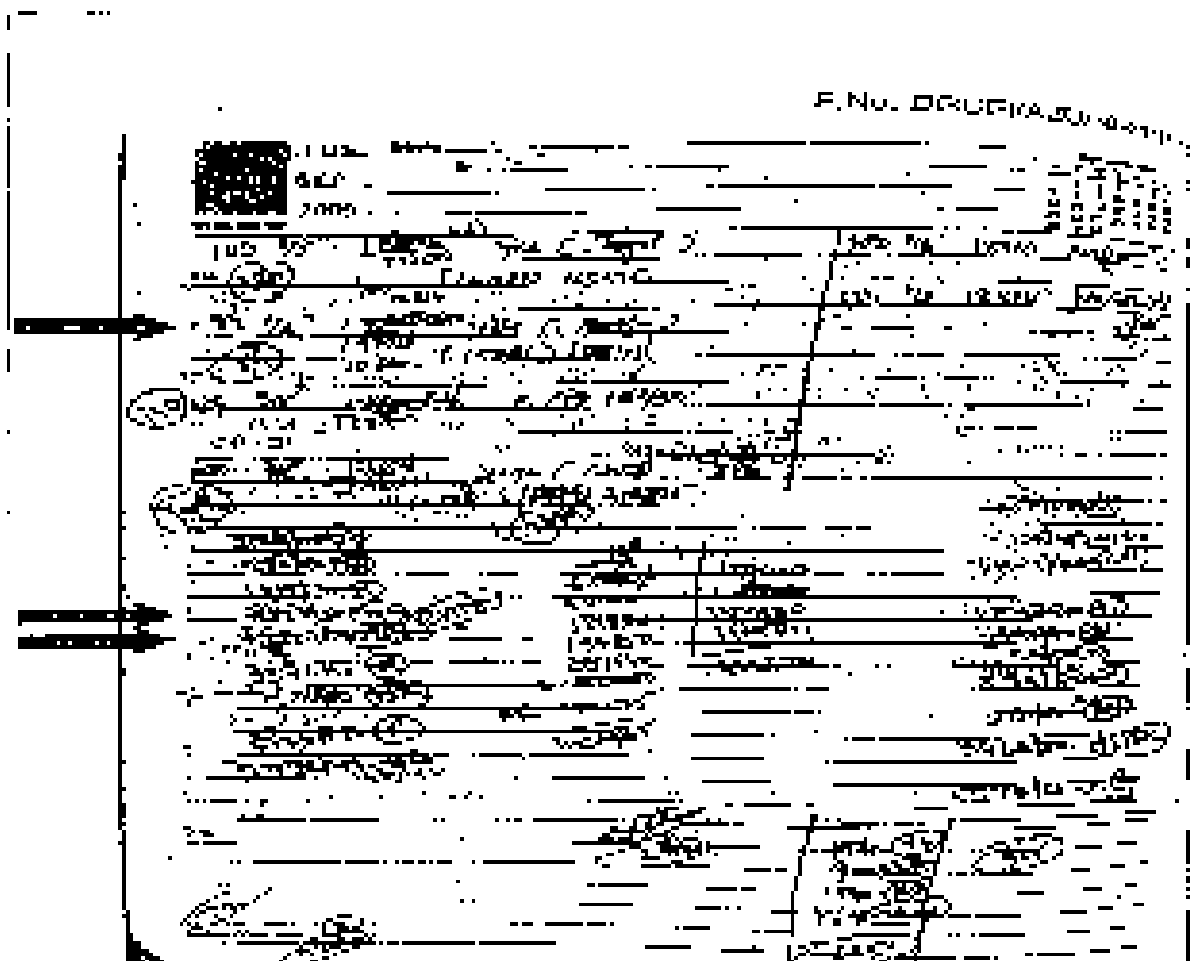
15.4 Regarding imposition of penalty equal to Cervat Credit of Rs.3,39,792/- under Rule 26(2)(c) of CEAT or Appellant No.1 for wrongly passing on Cervat credit. I find that the lower adjudicating authority has recorded his findings at Para 3.15 as under.

3.15

..... I also find that as per the details given in the Diary No AY2 and understanding given through the illustrations, M/s. Diamond cleared their excisable goods to Holyday Mills through Shri Bharat Sheth and issued sales invoices for the corresponding clearances in the name of furnace units and passed on fraudulent Cervat Credit without actually delivering the goods. I also find that as per the details given in the Annexure B.3.3, in 21 cases M/s. Diamond has cleared goods through Shri Bharat Sheth to rolling mills and issued Central Excise invoices in furnace units and merely passed on fraudulent Cervat credit amounting to Rs.3,39,792/- to said furnace units as detailed in the Annexure and find the same to be correct.

15.6 I find that at Para 10.2 & 11.2 of Page 13/74 of the Show Cause Notice, illustrative transaction has been explained with the help of Scanned image of page no. 33 of diary 'AY3' (Image-I) showing transaction dated 15.8.2009. The said transaction as recorded during the investigation (Image-I & Image-II) reveals that Invoice (Image-IV) has been raised in the name of a buyer to whom physical delivery of the goods has not been made. Relevant portion of the Show Cause Notice is reproduced as under -

(IMAGE-I)



Signature

IMAGH:

10.2.11.3 - Review of the scrap issue of page 83 above revealed the following. It appears recorded on the said page in respect of transactions entered therein on 15.09.2009, in first column 2nd entry "100" has been recorded which has the number of ship-breaking unit i.e. M/s. Diamond Industries, in second column "100" has been recorded which denotes issue of iron scrap/ores. In third column "10000" has been mentioned which denotes rate per metric ton of the scrap and the respective receipt and required to issue payment to ship breaker which denotes rate per metric ton of which broker has to collect cash from respondent the next column from which it is recorded amount "10000" is short name of unit i.e. via M/s. Patel Steel Rolling Mills, Dehriwason, Mahara to which bills are cleared as explained by Shri Manish Patel, Accountant for Shri Bharal Exports whereas Invoice has been issued to M/s. Kashi Export Limited, Gadhra, Faridkot, Punjab without supply of the corresponding goods. Below is the list of

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IMAGH:

No. DGCEM2008-3110-14

"10000" has been recorded which denotes the quantity in metric ton of scrap cleared at said unit. In addition to these information the words & figures such as "10000 (10000) 102411" has been mentioned, which means that M/s. Diamond Industries has issued invoice on 15.09.2009 for 10,000 MT @ 102411/- per MT having total invoice value amounting to Rs.1,02,41,111/- for the sale consignment in other words, it can be explained that ship-breaking unit situated at Plot No.84 i.e. M/s. Diamond Industries had cleared 10,000 MT of scrap of size 100 @ Rs.102411/- per MT to M/s. Patel Steel Rolling Mills, Dehriwason, Mahara on 15.09.2009 through Shri Bharal Exports.

(Signature)

made to the Cops. At the time of seizure and hence this contention raised by appellant is devoid of merit.

13.7 In view of above, I find that the Department has sufficiently discharged onus of proving that Central credit of Rs. 3,32,722/- has been passed on without accounting entry books. Therefore, without imposition of penalty of Rs. 3,32,722/- under Rule 26(2) of the CEF on Appellant No. 1.

13.8 In the Inter Appellant No.2, Shri R.G. Tripathi Manager & Authorized Signatory of Appellant No.1, in his statement dated 24.1.2013 in answer to question No.21 (i) (a) and 20 (b)(i) explained to examine BS 5 and Mr. As Oberoi of Appellant No.1 with regard to raising invoices to various parties without actually sending the goods and has admitted as under.

I have carefully perused the original Annexure-4.1-1 Annexure 4.1-2 & Annexure 4.1-3 and I put my valid signature thereon in token of being seen and agreed with the details mentioned there in and issuance of invoice of Central House also mentioned therein. I have also signed Annexure 4.1-3 and I put my valid signature thereon in token of being seen and agreed with the details mentioned therein.

13.9 Thus, I find that Appellant No.2 has admitted entries written in diaries and transporting details establishing that Appellant No.1 has with the help of Appellant No.2 issued Central credit Invoices without physically sending the goods to pass on the Central Credit fraudulently.

13.10 Further, Rule 26(2) 5.2b (2) of the CEF reads as under

Rule 26: Penalty for certain offences -

(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, leaving, receiving, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or five thousand rupees, whichever is greater.

(2) Any person who issues -

(i) an invoice with untrue details; or (ii) the goods specified therein or deals in making such invoice; or

(iii) any other document or obtains or makes such document, on the basis of which the user of said invoice or document is likely to claim or has taken any advantage permitted under the Act or the rules made there under the stamping of such invoice or document under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."

(For details accepted)



13.1 The details of various private records and statements of transporters, brokers, accountant, etc. records corroborating records resumed have been duly affirmed by him in his statement dated 24.1.2019 and Para 3.36, 3.36 and 3.44 of the impugned order specifically detail them. He is the person concerned, who dealt with such excisable goods and had reason to believe that the goods were liable to confiscation. I find that Appellant No.2 was actively involved in clandestine removal of the goods and also in passing of ineligible Central Credit and hence, liable to penalty under Rule 26 of CEF. Therefore, penalty of Rs.8 lakhs on Appellant No. 2 under Rule 26(1) of CEF and penalty of Rs.3,39,752/- under Rule 26(2) (ii) of CEF is correct and proper.

17 I find that appellant No.3 in his statement dated 8.8.2012 has, in answer to Question No. 12, admitted purchase of excisable goods from Appellant No.1 without CE Invoices and also confirmed payment in Cash through broker, Shri Pawan Agarwal. Appellant No.3 has not contested this admitted fact, therefore, hold that penalty of Rs.41,952/- imposed upon Appellant No.3 under Rule 29(1) of CEF by the impugned order is correct, legal and proper. Accordingly, I reject the appeal filed by Appellant No.3.

16 I find that Appellant No.4 has been alleged to have purchased goods clandestinely cleared by Appellant No.1 without payment of Central Excise duty and without issuance of Central Excise Invoices. Appellant No.4 contended that he filed sworn affidavit on 26.7.2016 retracting statement made by him under a stress that an investigator was extended at their premises and he can not be penalized on the basis of third party evidence. The fact Appellant No.4 has retracted his statement is also upon in the impugned SCN and Appellant No.4 has produced copy of GRN No.514 dated 24.12.2009 issued in the name of M/s Grand Exports for transportation of excisable goods from Alang to Mandi Gobindgarh through Truck No. RJ21CA 1209 covered under Central Excise Invoice no. Ex 765/ 24.12.2009 issued to M/s. EG Gupta & Co., Mandi Gobindgarh. I find that no direct credible evidence discussed in the impugned order establishing involvement of Appellant No.4. Therefore, I am compelled to hold that the allegations made against Appellant No.4 in the SCN is not supported by sufficient evidences and hence, Appellant No.4 can not be penalized under Rule 26 of the CEF. I, therefore, set aside penalty of Rs.42,571/- imposed upon Appellant No.4 under Rule 26 of CEF.

15 In view of above, I uphold the impugned order except penalty imposed upon Appellant No.4 and accordingly reject appeals filed by Appellant No.1 to Appellant No.3 but allow appeal filed by Appellant No.4.

