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O/O THE PRINCIPAL COMMISSIONER (APPEALS) GST & CENTRAL EXCISE

[illegible]
[illegible] Raja Bazar Road
[illegible]
Tel: [illegible]

[illegible]

[illegible]	[illegible]	[illegible]
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[illegible]	BHV-EXCUS-000-APP-130-18-19	13.2.2018

[illegible]

BHV-EXCUS-000-APP-130-TO-132-2019

[illegible] Date of Hearing	24.05.2019	[illegible] Date of Order	29.05.2019

[illegible] Parveen Kumar Santosh, Principal Commissioner (Appeals) [illegible]

[illegible]

[illegible]

[illegible]

1. M/s G K Steel (Unit of M/s Bansal Industries Pvt. Ltd.) Plot No. 123, Alang Shipbreaking Yard, Alang, Dist: Bhavnagar.
2. Shri [illegible] Bansal, Director of M/s G K Steel (Unit of M/s Bansal Industries Pvt. Ltd.) Plot No. 123, Alang, Shipbreaking Yard, Alang, Dist: Bhavnagar.
3. Shri Vipul Patel, Plot no. 103, Ekta Nagar City, Opp. Vikrosh Park, Bhavnagar.

[illegible]

(2) [illegible]

(3) [illegible]

(4) [illegible]

(5) [illegible]

(6) [illegible]

(7) [illegible]

[illegible]

Revision application to Government of India

[illegible]

:: ORDER-IN-APPEAL ::

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1 to Appellant No.3"), as detailed in table below, against Order-in-Original No. BHV EXCUS 000 JC-51-2017-18 dated 15.2.2018 (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.	V2/92/BVR/2018-19	Appellant No.1	M/s G.K. Steel (Unit of M/s Purest Industries Pvt Ltd), Plot No. 120, Alang Shipbreaking Yard, Alang, Dist Bhavnagar.
2.	V2/93/BVR/2018-19	Appellant No.2	Shri Kishorchand Barsa, Director, M/s G.K. Steel (Unit of M/s Puneet Industries Pvt Ltd), Plot No. 120, Alang Shipbreaking Yard, Alang, Dist Bhavnagar.
3.	V2/93/BVR/2018-19	Appellant No.3	Shri Vinod Patel, Plot No. 102, Iscon Mega City, Opp. Victoria Park, Bhavnagar.

2. The brief facts of the case are that Appellant No. 1 (holding Central Excise Registration No. AACCP9025DXM001) was engaged in breaking of ships imported 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/Sosiya of Bhavnagar District were evading payment of Central Excise duty by resorting to clandestine removal and under valuation of their finished goods viz. MS plates and scrap. Investigation carried out by the officers of DGCEI revealed that Appellant No. 1 evaded payment of Central Excise duty by resorting to clandestine removal of their finished goods, with active support of Appellant No. 3 and Shri Bharat Sarth, both brokers. The investigation also alleged that Appellant No. 1 indulged in under valuation of their goods and thereby evaded payment of Central Excise duty. The Appellant No. 1 availed fraudulent Cenvat credit without delivery of goods in collusion with Shri Bharat Sheth, broker.

2.1 Show Cause Notice No. DGCEI/AZU/36-319/2012-13 dated 3.1.2013 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty of Rs. 67,92,425/- should not be demanded and recovered from them under proviso to Section 11A(1) of the Central Excise Act,1944 (hereinafter referred to as "Act") along with interest under Section 11AA of the Act and also proposing imposition of penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'Rules'). It also proposed imposition of penalty equal to Rs. 5,24,085/- under Rule 26(2)(i) of the Rules upon Appellant No. 1 for allegedly passing fraudulent Cenvat credit by issuing only invoices without actually delivering the goods. The Show Cause Notice also proposed imposition of penalty, inter alia, upon Appellants No. 2 & 3 under Rule 26 of the Rules.

2.2 The above said Show Cause Notice was adjudicated vide the impugned order which confirmed Central Excise duty of Rs. 67,92,425/- under proviso to Section 11A(1) along with interest under Section 11AA of the Act and imposed penalty of Rs. 67,92,425/- under Section 11AC(1)(a) of the Act and Penalty of Rs. 5,24,085/- under Rule 26(2)(i) of the Rules upon Appellant No. 1. It also imposes penalty of Rs. 5,24,085/- under Rule 26(2)(i) of the Rules and Rs. 6,60,000/- under Rule 26(1) of the Rules upon Appellant No. 2 and Rs. 20,99,514/- under Rule 26(1) of the Rules upon Appellant No. 3.

3. Being aggrieved with the impugned order, Appellants No. 1 to 3 have preferred appeals on various grounds, inter alia, as below :

Appellant No. 1 :-

(i) The impugned order has not at all dealt with the pleas made in written reply of the appellant; that judgments referred to and relied upon have been ignored by the lower adjudicating authority, which makes the impugned order non-speaking and non-reasoned, that the lower adjudicating authority had not recorded any finding on the arguments relied before him and has cursorily and mechanically dealt with the pleas of the appellant. The appellant reiterate the pleas made by them in their reply to SCN and written submission filed before the lower adjudicating authority as if the same are specifically canvassed herein also.

(ii) The adjudicating authority contravened the principles of natural justice by not allowing cross examination of transporters and Shri Jhamit Shah, broker. It is elementary principles of natural justice that person who is sought to be proceeded against and in adjudication on the basis of third party statements

should be afforded effective opportunity to challenge the correctness of the same as per law by cross examination.

(iii) The fact of clandestine removal has to be proved as it is well settled principle of law that charges of clandestine removal are serious charges and cannot be established based upon some diaries of unverified nature and relied upon case law of Tejwal Dyestuff Industries reported in 2007(216) ELT 310 in this regard.

(iv) Apart from the registers of the transporters, which are not having much evidentiary value, there is no evidence on record to establish clandestine activities of the appellants that investigating officers have not recorded any statements of buyer/consignee of goods and no corroborative evidence available on record about receipt of cash amount.

(v) The fact of clandestine removal has to be proved and it's not a matter of reference; it cannot be based upon mere surmises and assumptions; that charge of clandestine removal is required to be proven by production of affirmative, positive and tangible evidence; that onus to prove the clandestine removal of goods is on the Department, which alleged that the Appellant had sold the goods clandestinely. The Department should have disclosed evidence, documents. However, in the instant case, burden was not discharged by the Department and Appellant Ld. 1 relied upon case law of Ambe Ltd reported in 1983 (13) ELT (32) (SC).

(vi) The Appellant did not receive the amount, which has been indicated in private diaries and no evidence of payment in cash to the Appellant. No investigation was exercised to any purchaser that they had made any payment or receipt of the clandestinely removed goods to the appellant. The Department has not produced any evidence regarding inquiry from buyers about such purchase, flowback of funds from buyers, in absence of which findings recorded in impugned order are not sustainable.

(vii) The appellant had not indulged in undervaluation of goods and had not evaded Central Excise duty and had not received differential payment in cash from their buyers towards the goods sold by them. If the rates quoted by M/s Major and Minor and other agencies are actual rates prevailing during that period as recorded by the adjudicating authority, then said prices should be taken for each and every invoices issued by them, which has not been done. They have sold goods either equal or higher than the prices circulated by the

market research agencies. Hence, the prices of the market research agencies are not acceptable as transaction value of the goods sold by them.

(viii) That they had sold goods ex-factory at their factory gate through brokers and delivery was given at factory to the brokers representing buyers; that they received payment from buyers through cheque or RTGS; that there is no evidence on record to show that the Appellant had not received payment regarding alleged sale through proper banking channel.

(ix) The penalty imposed under Section 11AC of the Act is illegal as it is established principle that intentions about commission of any offence are to be proved. In absence of any evidence that excisable goods manufactured by the appellant had in fact been cleared without invoices by them, the allegation of clandestine removal excisable goods did not arise at all. No evidence was adduced in the SCN to establish that the alleged acts or omissions had been committed by the appellant deliberately or contumaciously or in flagrant violation of provision of law or with intention to evade duty. No penalty was imposable when there was no mala fide intention to evade payment of duty.

Appellant No. 2 :-

(i) Appellant No. 2 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 made by them in their written submission, as well judgments referred by them were completely ignored; that the Appellant was Director of the Company and had not acted with any personal motive or benefit and hence, imposition of personal penalty is not proper; that the Department has not adduced evidence that the Appellant had belief or knowledge that the goods were liable to confiscation and hence, penalty under Rule 26 was not imposable.

(ii) That the Appellant had not made any transactions through Bharat Shah without supply of goods for facilitating their buyers to avail Cenvat credit fraudulently and hence, he is not liable for penalty under Rule 26(2) of the Rules.

Appellant No. 3 :-

(i) Appellant No. 3 has stated that penalty under Rule 26(1) of the Rules is not imposable upon them; that diary recovered during search carried out by the officers of DGCEI contained estimates written after making inquiry with concerned stockbrokers; 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 the 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.

(ii) The penalty imposed on the Director of the shipbreaker is Rs. 6,30,000/- for the alleged duty evasion of Rs. 67,32,125/- i.e. 10% of duty evasion whereas penalty imposed upon him is Rs. 20,91,574/- for alleged duty evasion of Rs. 20,91,574/- by the shipbreaker. Thus, the adjudicating authority has acted in pre-determined and prejudiced manner.

4. Personal hearing in the matter was attended by Shri Madhav Vaidaryar, Chartered Accountant on behalf of Appellants No. 1, 2 & 3, who reiterated grounds of appeals and submitted that they had requested for cross-examination of Shri Bharat Sheth and transporters but not allowed; that these appeals may be remanded for cross examination.

<u>Discussion & Findings:</u>

5. I find that Appellants No. 1 to 3 have deposited amount @7.5% of duty or penalty in dispute and hence, have complied with the provisions of Section 35F of the Act. I find that Appellants No. 1 to 3 have filed the miscellaneous applications for condonation of delay of 30 days in filing appeals which state that they had received the impugned order on 27.2.2018 but could file appeal on 28.5.2018. They requested to condone delay of 30 days in filing appeals on the grounds that their consultant was busy with work relating to adjudicating proceedings of various authorities and work of notices issued by Income Tax Department. Considering that delay is within further period of 30 days as provided under proviso to Section 35(1) of the Act, I condone delay in filing of these appeals and take up all three appeals for decision on merit.

6. I have carefully gone through the facts of the case, the impugned order, the grounds of appeals detailed in 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 3 is correct, legal and proper or not.

7. I find that the Officers of the DGCEI carried out investigation and covered shipbreakers, including Appellant No.1, brokers including Appellant No. 3 and Shri Bharat Sheth, market research agencies, transporters etc. to unearth alleged evasion of Central Excise duty by way of clandestine removal of goods.

Searches carried out at the premises of various Transporters resulted in recovery of registers/ documents showing details of transportation of goods from the premises of Appellant No. 1, viz. date, Truck No., Plot No., broker names etc. The transporters deposed in their statements that as and when ship breaker or broker contact them for trucks, they used to send trucks at the ship breaker's plot after making entry regarding plot no. where the truck was sent to and name of ship breaker/broker etc. The entries appearing in trip registers of the transporters tallied with the invoices issued by Appellant No.1 during the years 2009-10 to 2010-11 and it was found that out of 545 entries appearing in trip registers, invoices were issued in 473 cases and no invoices were issued by Appellant No. 1 in respect of remaining 72 entries. I find that investigation was extended at the check post maintained by Gujarat Maritime Board(GMB) which revealed that GMB maintained records of movement of vehicles at the Ship breaking yard and has details like, date, vehicle details, purpose, in & out time. The details recovered from Transporters with the records maintained by GMB revealed that most of the entries were found tallying, which suggest that trucks entered ship breaking yard and went to the premises of Appellant No. 1 for loading Plates/scrap. I also find that during search carried out at the residence/business premises of Appellant No. 3 and Shri Bharat Sheth, both brokers, incriminating documents were recovered showing purchase of Plates/scrap from Appellant No.1 on behalf of their clients for which no corresponding invoices were issued by Appellant No. 1.

6.2 I find that substantial evidences are 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. I find that many entries appearing in trip registers of Transporters and diaries/private records recovered from the premises of Appellant No. 3 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 Appellant No. 3 and Shri Bharat Sheth. I also find that the substantial evidences in the form of Statements of transporters and Appellant No. 3 and Shri Bharat Sheth have not been retracted till date, 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 Appellant No. 3 and Shri Bharat Sheth contained records of many other ship breakers and veracity of the said diaries/private records has been amply proved.

6.3 After analyzing the evidences available in the 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 Appellant No. 5 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 has indulged in evasion of Central Excise duty.

6.4 Appellant No. 1 has contended that the lower adjudicating authority has not allowed cross-examination of transporters and Shri Bharat Sheth, broker and therefore, principles of natural justice have been violated. In this regard, I find that the impugned order at para 3.11 has held as under :-

> "3.11.1 I further find that there is no provision in the Central Excise Law for seeking cross examination. The Hon'ble Madras High Court in the case of K. Bains Vs. Govt. of India reported in 1982 ELT (010) 361 opined 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 cross opportunity to defend himself. The case of K. Batar Vs Govt of India reported in 1987 (31) (0 0) 346 was distinguished by Hon'ble Tribunal Ahmedabad in Arya Fibres Pvt. Ltd. Versus Commissioner of C. Ex., Ahmedabad II reported at 2014 (311) E.L.T. 329 (Tri.-Ahmd.) wherein it was held as under :-
>
> "[illegible] In K. Bains 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 so as to assure him proper opportunity to defend himself. Opportunity of cross examination is given wherever it is relevant, justified and [illegible] and is not for protracting the proceedings. The decision in Gulf Refineries case (supra) is again to the effect that cross examination cannot be granted as a matter of routine and it is to depend upon the facts of each case. This Tribunal's decisions cited in our letter of 10.10.2005 are also to similar effect – that cross examination is not always a mandatory procedure to be followed in all cases. The request should not be granted routinely or without exercising its discretion in the facts of each case. The Adjudicating Authority may refuse cross examination for [illegible] reasons. ..."
>
> 3.11.2 Similarly, in the case of Shivam Dry-N-Wood Pvt Ltd Vs. Commr of Cus (Imp) Ex, Aurangabad reported in 2004 (179) ELT 1181 (Tri. Mumbai, Hon'ble Tribunal), in their order, in para 6, has held as under:
>
> "6. [illegible] Thus contention that principles of natural justice are violated inasmuch as cross-examination of persons, whose statements are relied upon, ought to be allowed in the light of the facts that all the statements relied upon were passed before them. They had all the opportunity to consider their statements during the proceedings. Cross-examination cannot be claimed as a matter of right in deportment of proceedings."
>
> 3.11.3 Further the Hon'ble Tribunal, in the case of M/s Beauty Dyes Vs CCE, Chennai reported in 2003 (156) ELT 329 (Tri.-Chennai) has observed that

non-availability of witnesses for cross-examination not a fatal flaw when the findings are based on documents about which there is no credible explanation and nothing on record to show statements not voluntary or not duly recorded within close proximity of the time there were detained

9.11.4 In view of above facts, I find the request for cross-examination by the Noticees does not merit consideration and hence cannot be accepted."

6.5 I find that the 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 permit 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 goods and they had no reason to depose in their statements, something which was contrary to the facts. I also find that diaries/private records recovered from the premises of Shri Bharat Sheth, broker recorded licit as well as illicit transactions of ship breaking units/ rolling mills. Shri Manish Patel, Accountant of Shri Bharat Sheth, who wrote/maintained diaries, explained the modus operandi adopted for removal of goods clandestinely from ship breaking units of Alang as well as coding/short forms used to record transactions in the diaries. I also find that being a broker, Shri Bharat Sheth was required to record details of all transactions, licit as well as illicit, in order to get commission from respective parties. I also find that said diaries/private records contained records of many other ship breakers and veracity of the said diaries/private records has been proved. After examining the facts and evidences available on record, I am of the considered opinion that non granting of opportunity of cross examination of transporters and Shri Bharat Sheth by the lower adjudicating authority has not vitiated the adjudication proceedings. I, therefore, agree with the impugned order that this contention is devoid of merits.

7. Regarding confirmation of demand of duty of Rs. 21,21,060/- on the grounds of under valuation, Appellant No. 1 submitted that they had not indulged in undervaluation of goods and had not received differential payment in cash from their buyers towards the goods sold by them; that they had sold goods either equal or higher than the prices circulated by the market research agencies; that prices of the market research agencies are not acceptable as transaction value of the goods sold by them.

7.1 It is to be noted that the lower adjudicating authority has confirmed the charge of under valuation, *inter alia*, giving findings as under :-

> "3.11 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 not in dispute that various Research Agencies circulate the price ruling, all the vagaries of demand and supply and there is no doubt that prices circulated by such agencies are realistic [illegible]. It is in this backdrop that every Ship Breaker/Dealer will give a [illegible] in 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 some reliable plates ranging from size 8 mm to 25 mm (Ans. 3561 to 34 Ans) are emerged out of breaking up of ships and the majority of re-rolling units emerged of breaking of scraps size of 12 mm size. In order to substantiate this allegation, the Department conducted inquiry with various leading 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.
>
> 3.5 On comparison of the price mentioned in the invoices of M/s G.K. vis-a-vis of the prices circulated by M/s. Major & Minor, it was also revealed that in many cases the transaction value declared by the M/s G.K. 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 M/s Plates sold by them, undervalued M/s Re-rolling Plates so as to enable them to declare only 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 accounts.
>
> 3.16 I therefore, find no substance in the allegation of under-valuation in the present show cause notice particularly when duties raised from Shri Bhanu Sheth & Shri Vinod Patel or any such Ship [illegible] is of such transactions with various Dealers/Shroffs/Aragadiya. Had the aforesaid allegation of under valuation been not correct, there would not have been involvement of transfer of huge amount of cash which constitute part of the undervalued cost of ship breaking materials.
>
> 3.17 In view of the above, I agree with the contention of the DGCEI that price variation in price is obvious considering various factors like payment terms, Quantity & Quality of the goods, relation with buyers, demand and supply situation, therefore, 2% difference in price is considerable one. As stated above, Brokers / Ship Dealers / 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 the price quoted by M/s. Major and Minor is false. The variation of [illegible] 25% i.e. rates of Plates and is 2% lesser than the rate of M/s Major and Minor is considerable. Therefore fully agree with the view accepted by DGCEI that duty short paid on account of valuation of price more than 2% is on account of undervaluation of the goods and rightly recoverable from M/s G.K. Further, I also find that a large number of ship breaking units, dealers from Alang and brokers were outside of M/s Steelrates and were receiving pay to pay collects on the daily price rates of ship breaking materials through SMS Gems and emails. It is also revealed that M/s Steelrates were adopting the most scientific and appropriate analysis of the data provided by them. The Ship breakers were fully aware of the rates of the scrap [illegible] and from ship breaking units intentionally undervalue the goods with intent to evade payment of Central Excise duty. ... ... From analysis of the rates provided by IPC, KoTrade and other evidence on hand from various agencies and persons

involved in the business of ship breaking materials as discussed above proves that M/s G.K. was introducing their clandestine goods with intent to evade payment of Central Excise duty. CGCEC has calculated the differential duty on the basis of invoice data furnished by M/s G.K., rates of scrap shown in the invoices and steel rate declared by M/s Major & Minor as shown in Annexure-I, V.I. Thus the M/s G.K. have evaded Central Excise duty of Rs. 21,24,[illegible]/-

7.2 I find that the prices of MS Plate/Scrap circulated by market research agencies like M/s Steel Rates Info and M/s Major and Minor Ex Ms Pvt Ltd were considered to ascertain whether the transaction value declared by the Appellant was reasonable or not. I 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 Bhavnagar 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 impugned order has rightly confirmed demand on the ground of gross undervaluation of value, which was lower than the prevailing market price.

8. Appellant No. [illegible] has argued that clandestine removal has to be proved by the Department and cannot be established based upon some diaries of unverified nature. In this regard, I find that the diaries/ private records recovered from the premises of Appellant No. 2 and Shri Birjan Shah regarding their as well as illicit transactions of 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 third party documents but duly corroborated by host of evidences recovered during investigation. 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 2007 (345) ELT 129 (Tri Del), wherein it has been held that :-

> 75. I note that in both the proceedings almost identical set of facts were involved. The allegations were based on evidence collected from the suppliers' side. Unauthenticated receipts and further manufacture of excisable goods by the appellant was sought to be evidenced. In this case, it is not only based on the material evidence collected from the supplier's end and also as corroborated by the responsible persons of the supplier's end. The receipt and use of the such unauthenticated raw materials for further manufacture has opportunity been admitted by the appellant and the only short point has also been discussed during the course of investigation itself. The appellant given emphasis on non-availability of the primary documentation by way of details of transport, manual receipt etc. In the present case, the evidences collected from the supplier's side is unassailable and cannot be disputed. The primary records of the supplier have been corroborated and admitted for the correctness of their contents by the persons who were in-charge of the supplier's firm. When such evidence was brought before the partner of the appellant's firm, he categorically admitted unaccounted clearance of dutiable items. However, in the per-case the details to whom such products were sold to such clearance, it is strange that the appellant has taken a plea that the department has not established the details of buyers and receipt of the finished goods in such manner. It is seen that the records maintained by the suppliers, which were affirmed by the persons in-charge cannot be brushed aside. It is not the case of the appellant that the suppliers maintained such records only to subsist with the appellant in law. The details of unaccounted raw materials has been corroborated by the persons of the appellant's firm. In such situation, it is not tenable for the appellant, now at the appeal stage, raise the point of requirement of cross-examination, etc. Admittedly, some of the raw materials or the excisable goods have been manufactured and clearance for their consumption. In the appeal before the Tribunal, the appellant is making a bouncer assertion that the evidence in the matter of the appellant's case is not cohesive. Various and long relied upon by the appellant are not of any support to the present case. In the case involving unaccounted manufacture, the evidence of each case are to be appreciated for consideration. As noted above, the third party's reliance on the supplier's side as affirmed by the corporate in-charge and further corroborated by the appellant cannot be discounted only on the ground of further evidence like transportation and receipt of money has not been proved. In a clandestine manufacture and clearance, each stage of operation cannot be established and proved. 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 authorities. Accordingly, the appeals are dismissed."

[Emphasis supplied]

8.4 Appellant No. 1 has contended that the Department has not discharged burden of proof for alleged illicit transactions and that evidences regarding buyer of goods, flow back of funds from the buyers were non-existent. 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 Appellant No. 3 and Shri Bharat Sheth, 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 by the statements of transporters, who deposed that they had transported the goods from the premises of

Appellant No.1 and these Statements have not been retracted. Considering substantial evidences in the form of these documentary 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. Regarding money flow back, I find that incriminating documents recovered from the premises of Shri Bharat Sheth, broker establishing, inter alia, cash payment made by customers to Shipbreakers, including Appellant No.1 as per Para 9.27 of Show Cause Notice. 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 [illegible] reported in 1996 (86) E.L.T. 332(Tri.), wherein it has been held that,

> "In a case of clandestine removal, it is not possible for the Department to prove the same with mathematical precision. The Department is deemed to have discharged their burden if they place any kind of evidence which, prima facie, shows that there was a clandestine removal. If such evidence is produced 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 Resin Pvt Ltd reported as 2013 (295) E.L.T. 116 (Tri. - Bang.) has held as under:-

> "7.2 In a case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be substantiated by the Department in a mathematical precision. After all, a person indulging in clandestine activity takes extreme precaution to avoid detection by the revenue. The evidence available should be those left 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 conclusion has to be arrived at on the yardstick of 'preponderance of probability' and not on the yardstick of 'beyond reasonable doubt'."

8.3 The Hon'ble Supreme Court as reported in 2014(302) ELT A61(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, shifts to the appellants and they have failed to discharge this burden. They want the department to show the bounce data of goods transported or no transport. 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 evidences required and prove with mathematical precision, the evasion of the duty legal remedies".

8.5 The Hon'ble CESTAT in the case of M/s. N R Sponge P Ltd reported as 2015 (328) ELT 453 (Tri-Del) has also held that when preponderance of probability was against the Appellant, pleading of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted for and no input-output ratio prescribed by law etc. are of no use. The Hon'ble High Court in the case of International Cylinders Pvt Ltd-reported at 2016(233) ELT69(H.P.) held that once the department proves that something 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 maintain authentic records of the illegal activities or manufacture being done by it. 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 impugned order.

8.7 In view of above, the various contentions 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. 67,92,425/- by the lower adjudicating authority is correct, legal and proper.

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

9. This is a case of clandestine removal of the finished goods as held in above Paras and therefore, the impugned order has correctly imposed equal and mandatory penalty of Rs. 67,92,425/- on Appellant No. 1 under Section 11AC(1)(a) of the ACE. The impugned order has correctly given option of reduced penalty of 25% to Appellant No.1 as prescribed under proviso to Section 11AC of the ACE, hence, I concur with his decision on penalty on Appellant No.1.

9.1 Regarding imposition of penalty under Rule 26(1) of the Rules, Appellant No. 2 has pleaded that the Department has not adduced evidence that he has belief or knowledge that the goods were liable to confiscation and hence, penalty under Rule 26(1) was not imposable; that he did not made any

transactions through Bharat Shetti without supply of goods for facilitating their buyers to avail Cenvat credit fraudulently and hence, he is not liable for penalty under Rule 26(2) of the Rules. I find from records that Appellant No. 2 was Director of Appellant No. 1 and had concerned himself in manufacturing, removing and selling excisable goods without paying Central Excise duty and hence, he has reason to believe that goods removed clandestinely/ undervalued by them were liable for confiscation. 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. Regarding penalty imposed under Rule 26(2), I find that Appellant No. 2 in connivance with Shri Bharat Shetti, broker issued invoices without physical delivery of goods as reflected in diaries/private records removed from the premises of Shri Bharat Shetti. I, therefore, hold that penalty of Rs. 5,24,850/- imposed under Rule 26(2)(ii) of the Rules upon Appellant No. 2 in the impugned order is also correct and proper and I uphold the same.

10. Regarding imposition of penalty under Rule 26(1) of the Rules, Appellant No. 3 has contended that diaries 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 claus to prove clandestine removal of goods is on the Department, which was not discharged by the Department. I find that Appellant No. 3 acted as broker who purchased goods on behalf of their clients from Appellant No. 1. Search carried out by DGCEI at the premises of Appellant No. 3 resulted in recovery of incriminating documents in the form of loose papers and pocket diaries. The said documents contained details of transactions entered with shipbrokers, 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 Appellant No. 3 had purchased goods from Appellant No. 1 for which no corresponding invoices were issued by the Appellant No. 1 in same case. I also find that said documents contained details of cash transaction between Appellant No. 3 and Appellant No.1 presumably towards sale proceeds of goods removed by Appellant No. 1 without invoices. I find that Appellant No. 3 played crucial roles in the whole episode of clandestine removal of goods by Appellant No. 1 and hence, imposition of penalty of Rs. 25,91,514/- upon Appellant No.3 under Rule 26(1) of the Rules by the lower adjudicating authority is correct and proper and I uphold the same.

11. In view of above, I uphold the impugned order and reject the appeals of Appellants No. 1 to 3.

12. अपीलकर्ताओं द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

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

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By R.P.A.D.

To,

1. M/s G.K. Steel. (Unit of M/s Puncet Industries Pvt Ltd). Plot No. 120, Alang Shipbreaking Yard, Alang. Dist Bhavnagar.	मे. जी. के. स्टील, (यूनिट ऑफ पुनीत इंडस्ट्रीज प्राइवेट लिमिटेड) प्लॉट नं. 120 अलंग शिप यार्ड, अलंग, जिल्ला भावनगर
2. Shri Kishorchand Bansal Director, M/s G.K. Steel (Unit of M/s Puncet Industries Pvt. Ltd), Plot No. 120, Alang Shipbreaking Yard, Alang. Dist Bhavnagar.	श्री किशोरचंद बंसल, डायरेक्टर, मे. जी. के. स्टील, (यूनिट ऑफ पुनीत इंडस्ट्रीज प्राइवेट लिमिटेड) प्लॉट नं. 120, अलंग शिप यार्ड, अलंग, जिल्ला भावनगर।
3. Shri Viraj Patel, Plot No. 102, Ibcon Mega City, Opp Victoria Park, Bhavnagar,	श्री विराज पटेल, प्लॉट नं. 102, इब्कॉन मेगा सिटी, विक्टोरिया पार्क के सामने, भावनगर।

प्रति :-

1) प्रधान मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु

2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।

3) संयुक्त आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।

4) गार्ड फाइल।