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NEW-EX-CISE-ORD-APP-154-TC-141-2019

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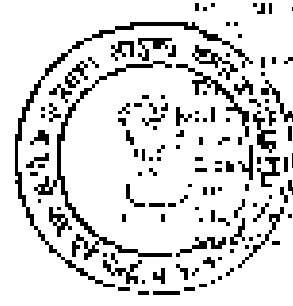
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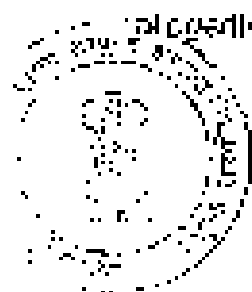
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ORDER IN APPEAL

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as 'Appellant No. 1' to Appellant No. 8') as detailed in the table below against Order in Orig. No. SHV-FK/2018-20030-06-2017-18 dated 31.01.2018 (hereinafter referred to as 'the impugned order') passed by the Joint Commissioner, Central GST Bhavnagar (hereinafter referred to as 'the lower adjudicating authority').

Sl. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/2018/VR/2018-19	Appellant No. 1	M/s. R.K. Industries (Unit-2), Plot No. V-7, Sesiya, Bhavnagar
2	V2/2018/VR/2018-19	Appellant No. 2	Shri. Mukesh E. Friel, Partner of M/s. R.K. Industries (Unit-2), Plot No. V-7, Sesiya, Bhavnagar
3	V2/2018/VR/2018-19	Appellant No. 3	Shri. Ashok Amarsinhra. Patel, Proprietor of M/s. Shree Krishna Enterprises, 204, Shopers Mart, Patna, Chok, Wagnwadi Road, Bhavnagar
4	V2/2018/VR/2018-19	Appellant No. 4	Shri. Vinod Amarsinhrai Patel, Plot No. 102, Eson Mega City, Opp. Victoria Park, Bhavnagar - 382002
5	V2/2018/VR/2018-19	Appellant No. 5	Shri. Mahendra Anubhai Bana, Partner of M/s. Manvi Metal Industries, A-202, Leels - floor, Wagnwadi Road, Bhavnagar - 382002.
6	V2/2018/VR/2018-19	Appellant No. 6	Sarveer Gupta, Proprietor of M/s. R.C. Gupta & Co. Mandi Gobindgarh, Punjab
7	V2/2018/VR/2018-19	Appellant No. 7	Baldev Kishan Gupta, Proprietor of M/s. Baldev Kishan Gupta & Co., Motaji Subhash, Market, Mandi Gobindgarh, Punjab
8	V2/2018/VR/2018-19	Appellant No. 8	Jasveer Kumar, Proprietor of M/s. J.K. Jinda & Co. Moti Khar, Mandi Gobindgarh, Punjab

2. The brief facts of these appeals are that Appellant No.1 was engaged in the process of obtaining goods and materials by seeking ships, posts and other floating statements which amounted to manufacture in terms of Note-9 of Section-XV of the first Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as 'CETA') and was registered with the Central Excise Department and had been availing Central credit 100%. The provisions of Central Credit Rules, 2004 (hereinafter referred to as 'the CRs'); Appellant No. 2 (Partner of Appellant No. 1) was alleged to have clandestinely cleared the excisable goods and evaded payment of Central Excise duty. Appellants No. 3 & 4 were brokers through whom clandestinely goods were allegedly cleared by Appellant No. 1 and Appellant No. 2. Appellants No. 5 to 8 were buyers who had clandestinely purchased the clandestinely cleared goods from Appellant No. 1.



2.1 The officers of the Directorate General of Central Excise Intelligence (hereinafter referred to as "DGCEI") gathered intelligence indicating that smuggler breaking units of Aung/Sasiya were engaged in large scale evasion of Central Excise duty by way of concealing removal of plates to the Rolling Mills; diversion of goods, undervaluation of goods etc. and that most of such illicit activities were being carried out by the Strip Breakers with the support of some brokers. These brokers were obtaining orders from different Rolling Mills and Furnace units and many times were getting the material dispatched through some intermediaries without Central Excise invoices and without payment of Central Excise duty. These brokers were also procuring orders from Furnace Units and Registered Dealers for supply of Concess invoices without any physical supply of goods. DGCEI conducted coordinated search at the premises of brokers at Shymager and recovered several incriminating documents substantiating the intelligence. Thereafter, another round of search operation was conducted at Haripurdera, whose documents were available on the records of recipient furnace units, premises of various Strip Breaking Units and Rolling Mills. A search operation was also conducted at the residence cum office premises of Appellant No. 3 & Appellant No. 4 and incriminating documents were recovered.

2.2 The above investigation led to issuance of Show Cause Notice No. DGCE/RAZDUGS-88/013-14 dated 29.8.2013 demanding recovery of Central Excise duty of Rs. 1,52,05,882/- from Appellant No. 1 under proviso to Section 11A (1) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") along with interest under Section 11A3/Section 11AA of the Act and for imposition of penalty under Section 11AG/Section 11AQ (1) of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules") and imposition of corporal penalty on Appellant No.2 to Appellant No. 8 under Rule 20(1) of the Rules. The said SCN was adjudicated by the lower adjudicating authority vide impugned order confirming Central Excise duty of Rs. 1,52,00,882/- along with interest and imposed penalties on Appellant No.1 to Appellant No. 8 as provided in the SCN.

3 Being aggrieved with the impugned order, Appellant No.1 to Appellant No. 8 preferred appeals, inter-alia, on the following grounds:

Appellant No. 1:-

(i) The impugned order has not dealt with the pleas made in written reply of the appellant and the judgments rendered by and taxes levied have been ignored in the impugned order hence, the impugned order is non-speaking and can reasonably be said that the findings of the lower adjudicating authority are baseless and self-serving in nature; the impugned order has failed to apply ratio and principle laid down in the judicial pronouncements relied upon by the appellant; the appellant accept and reiterate the pleas made by them in their reply to SCN and written submissions filed before the

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lower adjudicating authority.

(ii) The refusal of cross-examination of transporters and Shri. Kundra Patel was not entertained and thereby the lower adjudicating authority has contravened the principles of natural justice.

(i) No penalty was proposed on transporters which implies that the statements of transporters were recorded under threat, duress and with negotiation in unfair manner. Therefore, cross-examination of transporters is required and their statements cannot be relied upon and cannot be used for corroborating evidence not being genuine and true. The appellate precedents or decisions in the case of Shalimar Agencies reported as 2000 (120) ELT 106 (Tri), ... Chandra Sekar reported as 1990 (12) ELT 299 (Tri), ... each a transporters reported as 2001 (137) ELT 589 (Tri - Del.), Sharma Chemicals reported as 2001 (126) ELT 271 (Tri - Kan.)

(iv) The charges of clandestine removal are serious charges and cannot be established on the basis of some registers of unverified nature. Apart from registers of the transporters, which did not carry evidentiary value, there is no evidence on record to establish clandestine activities of the appellants. The appellate relied on decision in the case of Tejas Dyesstuff Industries reported as 2007 (218) ELT 310 (Tri - Ahmed) affirmed by the Hon'ble Gujarat High Court reported as 2009 (234) F.T 242 (Guj.). No statements of vehicle owners or their drivers and buyers of the goods were recorded by the investigation and no corroborative evidence available on record for receipt of cash amount by the appellants. Therefore, central excise duty of Rs. 17,05,737/- levied on the basis of typewriting registers is wrong.

(v) With regards to the findings recorded at Para 5.1.1 & 3.15.2 of the impugned order the appellate submitted that the entries made in diary recovered from Shri Vinod Patel and Shri Kundra Patel are third party evidences. How can the appellate explain or clarify or some write up of Shri Vinod Patel and Shri Kundra Patel. Thus there is no such clandestine removal as held under the impugned order. The department neither provides any information in SCR in which they have listed deciphered large number of concealed entries and names appearing in the pocket diaries/notebooks seized from the brokers. There is no evidence submitted by the department of alleged illicit transaction. The burden of proof is on the department. The allegation of clandestine removal cannot be sustained only on the basis of statements but some corroboration is also required. The appellants did not receive the amount which has been indicated in the diaries/diary as paid in cash to the appellants. No investigation was conducted to ascertain that they had made payment to the appellants or receipt of clandestinely removed goods and whether they received such goods or not. The confirmation of demand and imposition of penalty on the basis of diaries maintained for evidences and not for actual fact and not

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corroborated with any evidence is unjust, improper and unreasonable. Neither Shri Vinod Patel (broker) has stated that he has brokered the clandestine supply of goods from the appellant nor Shri Kishor Patel has stated that he has purchased the dutiable goods clandestinely from the appellant. The authorized signatory of the appellant has never stated that they have sold the goods clandestinely. Regarding date received from the appellant, Shri Vinod Patel stated that he made a practice of accounting. Hence, no corroborative evidences have been produced by the department therefore, conclusion of the lower adjudicating authority is not correct. The deposition made by a third person in their statements are not relevant. None of the transporters have confessed that the goods clandestinely cleared by the appellant had been transported by them or none of the purchasers have confessed that the said goods were purchased by them or none of the angadias confessed that amount has been sent to the appellant. The appellant relied on decision in the case of Anshu Lal reported as 1983 (13) ELT 1321 (SC) to state that onus of proof is on investigating authority and Section 106 of the Evidence Act does not shift the burden of proof to the appellant.

(vi) The appellant has not indulged in undervaluation of the excisable goods and has not evaded central excise duty and not received a financial payment in cash from their buyers as mentioned in Annexure IV to the SCN. The rates quoted by M/s. Major and Minor as well as other agencies are actual rates prevailing during that period as held at Para 3.16 of the impugned order. If the department should take these prices for each and every invoice issued by the appellant during that period. The department has taken only those invoices in which the transaction value is lower than the price circulated by the market research agencies. It has not been considered that the appellant has sold their goods at either equal or higher price than the price circulated by the market research agencies.

(vii) Penalty imposed under Section 114C of the Act is illegal in absence of any evidence that excisable goods manufactured by the appellant had in fact been cleared without proper invoices by the appellant and allegation of clandestine removal and undervaluation of the excisable goods did not justify. No evidence was adduced in the SCN to establish that the alleged act of omission had been committed by the appellant deliberately or contumaciously or in flagrant violation of provisions of law or with intent to evade duty. Therefore, the appellant is not liable for penalty under Section 114C of the Act.

Appellant No.2:

(i) The impugned order has not dealt with their plea made in original reply and the judgments referred to and relied upon by them have been ignored by the lower adjudicating authority and therefore, the impugned order is a non-speaking and non- reasoned order; that no findings have been recorded on the arguments raised before



(Signature)

the lower adjudicating authority and he has casually and mechanically dealt with the pleas of the appellants and the findings are baseless and self-serving. Inasmuch that the lower adjudicating authority has shown judicial indiscipline in not acting by the veridical judicial pronouncements rendered by the appellants in support of their submissions, the appellants adopt and reiterate the various pleas made by them in reply to RCN and write a submission filed before the adjudicating authority.

(ii) The appellant is partner of the firm and has not acted with any personal motive or benefit and thereby question of personal liability upon him is not proper. Hence no duty can be imposed on a person who acquires possession of or otherwise physically deals with any excisable goods which, according to his belief or knowledge, was liable to confiscation. The department has to show that the appellant had belief or knowledge that the goods were liable to confiscation. The department has neither produced any evidence nor discussed by the lower adjudicating authority in his findings to establish that the appellant played a role in evasion of excise duty in respect of alleged clandestine clearance of the excisable goods. The department has not produced any evidence to establish that the appellant had handled the realization of unaccounted sale amount.

(iii) It is settled law that when the partnership firm is penalized, separate liability cannot be imposed on partners of the firm. It is not a legal entity even though it has some attributes of personality. The appellant relies on decision in the case of *Swam Industries* reported as 2003 (151) ELT 417 (T).

Appellant Nos. 2 & 4:

(i) The appellants made requests for cross-examination of Sri. Valensubini Anbalal Kana, Partner of M/s. M/s. M/s. Industries Bhavnagar which were not entertained and order has been issued imposing penalty on the appellant and thereby contravened the principle of natural justice and it is an elementary principle of natural justice that person who is sought to be proceeded against and penalized 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; that denial of cross-examination of the person concerned that charge of clandestine removal of the excisable goods based on the statement of that person did not stand proved and relies upon the following case laws -

- (i) *Shalimar Agencies* reported as 2000 (120) ELT 153 (Trib);
- (ii) *L. Chandrashekar* reported as 1990 (48) ELT 266 (T);
- (iii) *Bhama Chandra* reported as 2001 (120) ELT 271 (Trib);

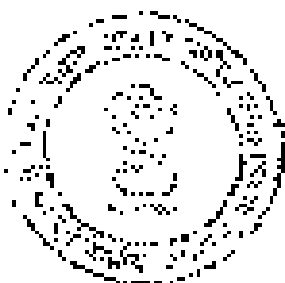
(ii) The impugned order has not dealt with their pleas made in written reply and the judgments rendered to and relied upon by them have been ignored by the lower adjudicating authority and therefore, the impugned order is a non-speaking and non-reasoned order, i.e., no findings have been recorded on the arguments raised before

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the lower adjudicating authority and he has courage and mechanically dealt with the mess of the appellants. That the findings are basically a self-serving in nature that the lower adjudicating authority has shown judicial discipline in not abiding by the various judicial pronouncements relied upon by the appellants in support of their submissions; the appellants adopt and reiterate the various pleas made by them in reply to SCN and various submissions filed before the adjudicating authority.

(j) Regarding findings recorded at Para 3.11.1 & Para 3.11.2 of the impugned order, the appellants submitted that the entries made in the diary recovered from the residence of the appellants are estimates written by Appraiser No. 4 after inquiry with the concerned ship breaker. That regarding findings recorded at Para 3.11.2 of the impugned order, the appellants submitted that the department neither provided any list nor relied in SCN in which they have listed equipment along number of accused entities and names appearing in the pocket diaries/records seized from the drawers, that there is no evidence produced by the department of alleged illicit transaction that the burden of proof is laying on the department. That regarding findings recorded at Para 3.11.5 & 2.11.5 of the impugned order, the appellants submitted that the allegation that the ship breaker has cleared the excisable goods clandestinely through the appellants is not correct as the appellants have not admitted to this fact nor any documentary evidence even remotely suggesting that the appellants were involved in clearance of removal of any such goods involving duty of Rs. 18,00,187/- as mentioned in Annexure-VKP to the SCN; that there had to be an evidence regarding sale of excisable illicitly cleared goods through the appellants to some persons, that the appellants have neither purchased nor procured the excisable goods clandestinely cleared from the premises of the ship breaker and also the authorized signatory of the ship breaker has never stated that they have sold the goods clandestinely that the depiction made by different person in their statements are not relevant; the notes of the transactions have confessed that the goods clandestinely cleared by the appellant had been transported by them or some of the purchasers have confessed that the said goods were purchased by them or some of the purchasers confessed that amount has been paid to the appellant.

(k) The appellants are not covered under Rule 26(1) of the Rules as the appellants have not dealt with the excisable goods in any manner; that the rule can be applied only under this rule is that the person has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to excise duty under the Act or Rules or he has been in any way concerned in selling or purchasing or any other manner dealt with the excisable goods, that the appellants relied on decisions in the case of *Sixth, Dwyer & Mig. Co.* reported as 2002 (148) E.L.T. 157 (1) and *Ram Nath Singh* reported as 2000 (161) E.L.T. 451 (Tri. Del.)



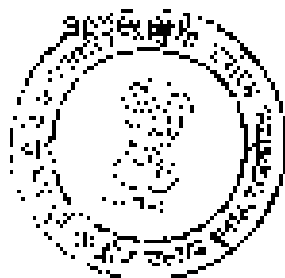
(b) Moreover, besides to the above, these appellants submitted that the penalty imposed on the banner of the firm is Rs. 15,00,000/- for the alleged duty evasion of Rs. 1,02,02,382/- means around 15% of the duty evaded and penalty imposed on each of them (two) is Rs. 75,70,127/- means 100% of the alleged duty evaded; that this is travesty of justice and clear case of pre-determined and prejudiced attitude of quasi-judicial authority.

Appellant No. 2:

(i) The impugned order has not dealt with their pleas made in written copy and the judgments rendered to and relied upon by them have been ignored by the lower adjudicating authority and therefore the impugned order is a non-speaking and non-reasoned order. That no findings have been recorded on the arguments raised before the lower adjudicating authority and he has at best and mechanically dealt with the pleas of the appellants. That the findings are careless and self-serving in nature; that the lower adjudicating authority has shown judicial indiscipline in ruling by the various judicial pronouncements relied upon by the appellants in support of their submissions. The appellants adopt and reiterate the various pleas made by them in reply to SCN and impugned order submitted before the adjudicating authority.

(ii) During adjudication, the appellant made request for supply of copy of Annexures and copy of relied upon documents mentioned in Annexure-F to the SCN, which was not entertained. Therefore, the impugned order had contravened the principles of natural justice thereby rendering the impugned order as untenable.

(iii) The findings recorded in Para 328 of the impugned order are vague as neither Sri Vinod Patel nor the seller viz. the partner of the ship breaker nor their authorized signatory has confirmed that the tin steel exposable goods are alleged to have been sold clandestinely to the appellant. The appellant has never admitted the facts that they have received the exposable goods belonging to the ship breaker through brokers in clandestine manner. The fact of their purchase has to be proved and is not a matter of inference. The findings cannot be based on mere surmises and conjectures and on assumptions and charge of clandestine removal and illicit purchase is required to be proved by production of affirmative, positive and tangible evidence. For imposition of penalty under Rule 25 of the Rules, the person must have dealt with the exposable goods with knowledge that the exposable goods are liable to confiscation. In the present case, there being no material in the SCN nor in the impugned order that the appellant had any intention to evade contra-excise duty and indulge himself by adopting the way as alleged in the SCN and as such no penal action under law can be taken against the



(Signature)

Appellant No. 8 to 9:

(i) During the disputed period, Shri Ram Gopal Gupta was proprietor of M/s. R.C. Gupta & Co. who expired on 13.11.2011 and the Appellant No. 8, son of deceased Shri Ram Gopal Gupta became proprietor of the firm as legal heir. That penalty cannot be imposed on deceased person and if imposed cannot be recovered from the legal heir as held by the Hon'ble Bombay High Court in the case of Tarak Nath Gayer and others reported as 1957 (21) FLT 631, that the Appellant No. 8 also relied on decisions in the case of Abhay Intelligence & Security Services reported as 2010 (20) STR 104 (Tri - Ahmed), Tarak Nath Gayer reported as 2010 (20) FLT 705 (Tri - Mumbai), Manojit Singh reported as 1996 (55) F. T 131 (Tri), Jazel A/ Experts and Imports reported as 2001 (37) ELT 220 (Tri - Chennai).

(ii) The impugned order has been passed in a mechanical way without applying mind and without considering wider submissions, without supplying related user documents even without supplying the copy of statement. Appellants were registered with Central Excise Range, Wandi Gandhinagar Division - Wandi Gandhinagar under Central Excise - Gandhinagar-1 Commissionerate, Central Excise Bhavnagar has no territorial jurisdiction to adjudicate this impugned order. The impugned order is liable to be quashed on this ground alone as held in judgment in the case of P. U. Equatorial Satcom Ltd. reported as 2001 (130) ELT 146 (Tri - Chennai), Calicuture Area Based Customs Sys (P) Ltd reported as 2007 (115) ELT 153 (Tribunal).

(iii) Same format of statement got signed from all these appellants through copy and paste in the computer file; that allegations of issue of cheques by these appellants were made out on bank record is produced by the investigation showing issue of cheques, cheque numbers, date of issue, date of realization, amount of cheque etc. and no bank record was found from the appellants from where the said cheques were found to have been issued. That the facts stated in the statements cannot be believed as no person after 15 years can record statement and can identify the Intra number, name of seller, name of broker, weight, exact date of purchase, name of transporter without verifying the records. Thus, all the facts mentioned in the statements are categorically shown to have been accepted and agreed by the appellants. That summons were issued to record oral statement and in the statement it has been got signed as if the appellants were carrying whole of the record. That it cannot be believed that a person can get each statement recorded without record.

(iv) The appellants had in some affidavits claimed the position as some the compelling circumstances to which the statements were got signed without being allowed to read. All the facts and circumstances narrated in the statements are not matching with the factual position.

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(v) There is no single document supplied to the appellants in the manner directed by broker, statement/record of shipbroker/ship broker, statement/record of transporter, statement/record of Marine Board showing that the disputed goods were received by the appellant without cover of invoices except of getting statements signed in hurry which had been prepared by the appellants as has been got signed fraudulently/legally and in unfair manner.

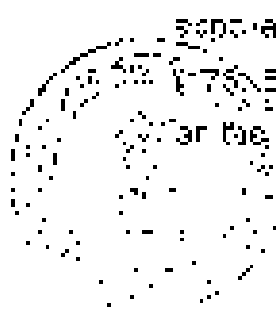
(vi) The scanned copy of record of the transporter has been incorporated in SOA so too contain the particulars of the goods in dispute to have been received by the appellants. The department tries to supply evidence available with them from the record of Maritime Board. It has been mentioned in SOA that some records of Maritime Board is not available, entries of truck having registration of Bhavnagar District are not made as entry permit is issued on monthly basis. The appellant failed to produce any the investigation on the end of Maritime Board as no any documents, entry has been supplied to the appellant showing alleged clandestine purchase. Without any evidence or record, statements got signed that the appellants purchased scrap metal without payment of Central Excise duty and against such purchases paid payments in cheques and against payment of cheques the appellants received back the cash from broker/ship brokers through agents from broker and ship broker jointly. The statements without any such evidences got signed through pressure tactics in the same manner and same style by copying and pasting the data verbatim which shows that whole of the investigation is fake and malicious and cannot be relied upon.

(vii) Not a single truck/vehicle can carry goods without valid documents as truck/vehicles from Ahmed Bhavnagar has to cross Sales Tax Check post of States of Gujarat, Rajasthan, Madhya and Punjab so as to reach appellants' premises. The investigator failed to exchange of such as it has not checked the records of State Government Barrera situated at the entry and exit point of territory of Gujarat, Rajasthan, Madhya and Punjab. The department has not summoned the In-charge driver/truck driver involved in these transactions.

(viii) Onus to prove allegation lies on department and the department cannot shift the same to appellants without discharging its onus as held in following cases:-

- Ramo News & Papers Ltd - 2006 (227) ELT 403-9
- Chander Tobacco Co - 2014 (311) ELT 698 (Trib - Ahmed.)
- Sebasco International Ltd. - 2014 (310) ELT 607 (Trib. - Del.)

(ix) The department relied on the basis of presumptions and assumptions. Thus, the department relied on decision in the case of *Nutch Polymers Ltd* reported as 2004 (75) ELT 335 (Trib. - Del.) to contend that department cannot frame a allegation merely on the basis of assumptions and presumptions that it is well settled law that statement



of appellants without any corroborative evidence cannot be made the sole basis for imposing penalty on other appellants as held in the case of Vikram Singh Dalia reported as 2008 (223) E.L.T. 215.

(x) Rule 28 applies where there is possession of goods and hence, penalty on appellants cannot be imposed since no goods confiscated as held in the case of Sanyam Traders reported as 2012 (275) E.L.T. 408 (Tri. - Del.). The same transporters who have agreed in the statements to have stopped the trucks for clandestine removal of goods and some brokers who have agreed in the statements to have supplied trucks for clandestine removal of goods, but the SCNs were not issued to such transporters and brokers, therefore imposition of penalty under Rule 28 of the Rules is not sustainable. It is an investigation has been done at the premises of the appellants. The Hon'ble High Court of Gujarat in the case of Vetalsteel Iron and Steel Industries reported as 2015 (316) E.L.T. 374 (Gu.) has quashed the demand and penalty based only on the statement of transporters/ third party and the premises of the assessee was not visited by the investigating agency.

(xi) Appellants had requested for cross examination of Fanner of Appellant No. 1 (Appellant No. 2) broker Shri Pradeep Gupta, Transporter M/s. Gauri Narat Transport Co. and concerned officers of CCOB, Ahmedabad; that the submissions made in written reply were not discussed/ contradicted in the impugned order. Neither cross examination was provided nor any reason was given in the impugned order denying cross examination and therefore the impugned order is liable to be quashed. The appellants relied upon following judgments in this regard:

- Southern Plywoods - 2008 (243) E.L.T. 692
- Gupta Synthetic Ltd. - 2014 (312) E.L.T. 255 (Tri. - Ahmed.)
- Aya - Drex Pvt. Ltd. - 2014 (311) E.L.T. 528 (Tri. - Ahmed.)
- Swadesh Polymex Ltd. - 2008 (243) E.L.T. 835 (Tri. - Del.)
- H.V. Steels Pvt. Ltd. - 2008 (243) E.L.T. 305
- Hindustan Polyster Lines - 2008 (235) E.L.T. 41 (T&F)

(xii) The impugned order has been passed without supplying RUD though requested by the appellants which is gross violation of principles of natural justice and in violation of CBEC Circular No. 105/27017-CX dated 10.3.2017.

(xiii) The only evidence available with the department relied upon in the impugned order is the statements of the appellants. But such lengthy statements of six persons cannot be recorded within hours as proved from the affidavit duly sworn in by all the deponents; that the statements saved in the computer and records of date and time of creation of file, date and time of saving the file would have proved that the files in the computer were created and saved within minutes only by changing the name of the

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persons making the statement even without change of para number and other facts. When under the Act this information was requested to supply, the Public Information of the Office of DGCIIT informed that information/files are not available meaning thereby that the files are deleted to wash out the important fact. The appellants had filed written complaint to Revenue Secretary to make enquiry of this incident.

3. Six persons visited DDCB, office on some day to record the statements. It has been got recorded from one of the persons Smt. U.S. Gupta that he had got the material clandestinely while his firm R.G. Gupta had duly received material with invoice as mentioned in Para 13 of Affidavit.

4. Personal hearing in the matter was attended by Smt. Madhav K. Madharia, Chartered Accountant on behalf of Appellant No. 1 to Appellant No. 5 who reiterated the grounds of all 5 appeals and made written submissions in all 5 appeals; that partner and managing firms both can't be penalized in same case/order; that there are not sufficient evidences against appellants and hence, penalty not required to be imposed on them.

4.1. Smt. Madhav K. Madharia, Chartered Accountant on behalf of Appellant No. 1 in their written submissions stated that they had requested for cross-examination of all the transporters and Smt. Vinodkumar Patel, broker; however, the same has not been allowed by the lower adjudicating authority; that the impugned order suffers the infirmity being passed violating the principles of natural justice and therefore, liable to be set aside; that without prejudice, he submitted that the lower adjudicating authority has not discussed any evidence on which he relies and mentions his findings; that the investigation failed to show any amount received by the Appellant No. 1 in respect of alleged clandestinely diverted goods; that there is neither enquiry as to how the goods changed the hands nor any corroborative/circumstantial evidence from the consignee or the transporters; that they relied on the decisions in the case of Eluce Industries Ltd reported as 2010 (201) EIT 803 (Tri. - Ahmed); K. Rajagopal reported as 2002 (112) EIT 128 (Tri. - Chennai), Martin Dyes & Chemicals Pvt. Ltd. reported as 2007 (218) EIT 420 (Tri. - Ahmed); D.T. Ind. Reported as 2007 (218) EIT 242 (Tri. - Del.), Poo Sani Industries Ltd. reported as 2007 (218) EIT 267 (Tri. - Ahmed); T.G.L. Posters Corpn. reported as 2002 (140) EIT 187 (Tri. - Chennai); Ram's Sanyam Papers Ltd. reported as 2004 (160) EIT 494 (Tri. - Del.); and Motabhai Ishi & Siceal Inds. reported as 2015 (318) EIT 374 (Guj.); that the Appellant No. 1 is not liable to penalty under Section 140 of the Act read with Rule 29 of the Rules as no evidence was adduced in the SOA to establish that the alleged sale or commissions had been committed by the Appellant No. 1 deliberately or consciously or in flagrant violation of provisions of law with intent to evade duty and there was no reasonable intention to evade payment of duty; that statements of the analysis and brokers are not relevant as the same have not



been corroborated with independent evidence that he explained as to why the judgments relied upon by the lower adjudicating authority are not relevant with the facts of this case.

4.2 Shri Madhav N. Madhdarya, Chartered Accountant on behalf of Appellant No. 2 in their PH submissions reiterated the grounds of appeal and submissions made during persons hearing.

4.3 Shri Madhav N. Madhdarya, Chartered Accountant on behalf of Appellant No. 3 & 4 in their PH submissions stated that they had requested for cross-examination of Shri Manendra Rana Partner of M/s. Metal Metal Industries, however, the same was not allowed by the lower adjudicating authority. That the impugned order suffers the infirmity of being passed violating the principles of natural justice and therefore, liable to be set aside that without prejudice. It is submitted that Para 12.2 of the SOA states that M/s. R.K. Industries (Unit-2) has indulged in clearance of dutiable goods clandestinely with connivance of appellants and evaded payment of duty, whereas, Para 10.3 of the SOA states that appellants have acted as broker and facilitated the ship broker for final clearance of finished goods without issuing central excise invoices and without payment of central excise duty. Para 11 indicates that the department is not sure whether Appellant No. 3 or Appellant No. 4 was involved in so called fraudulent transactions or both were involved in so called fraudulent transactions; that ideally such aberrations or flaws should have been sorted out or at least for the sake of justice the adjudicating authority should have commented on or discussed these matters which has not been done in the impugned order; that both these appellants have clearly mentioned and revealed their business activity and they do not undertake business jointly; that neither the SOA nor the impugned order controvert the fact and the fact is to be set aside for imposition of penalty under Rule 28 of the Rules; that in absence of such findings these two appellants cannot be penalized; that the investigation has not corroborated the departmental explanation given by the appellants with regard to entries in the diaries that many entries were estimated/survey of the goods lying at various plots of ship breaker yard; that the lower adjudicating authority has considered merely tallying of some sale indications with those of storage device as corroborative; that how can matching some entries in records seized from the same person can be considered as corroborative? That the lower adjudicating authority has failed to appreciate the submissions of the appellants without any reason recorded in the impugned order with regard to matching of entries in ship breaker's records; that no investigation was carried out for physical movement involving vendor not with any entries in whom unvalued clandestinely removed goods were sold; that the judgments relied upon by the lower adjudicating authority are not relevant with the facts of this case.



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4.4. Sri Madhav K. Madhaviya, Chartered Accountant on behalf of Appellant No. 5 in their PII submissions stated that CD seized is only evidence for alleged clandestine removal; that the Investigator has not substantiated the deposition/explanation given by Sri Vinod Patel (baker) with regard to entries in the CD; that the lower adjudicating authority has ignored the submission of Sri Vinod Patel that many entries were estimated/survey of the goods lying at various places of a p/breaking yard; that the lower adjudicating authority has considered merely tallying some data in diaries with those in storage device as corroborative; that how can matching some entries in records seized from the same person can be considered as corroborative?; that the lower adjudicating authority has failed to appreciate the submissions of the appellants without any reason recorded in the findings; that no investigation was carried out with regard to physical movement of CD; that entries made in data removed from CD was mostly made by Sri Vinod Patel on Saturdays for practice of account and that CD be verified from the report of Forensic Science Laboratory, hence, it cannot be concluded that entries removed from CD are of its nature removed; that there is no evidence except these entries, that the appellant is not liable for penalty under Rule 25(1) of the Rules as he has not received in possession of the excisable goods removed clandestinely; that the judgments relied upon by the lower adjudicating authority are not relevant with the facts of this case.

5. Persons hearing in the matter was attended by Shri Rakesh K. Shahi Advocate on behalf of Appellant No. 6 to Appellant No. 8 and made written PII submissions as follows: that goods have actually been received by Shri Sai Martin (Proprietor of V/S Sairajal Madan Gurga) as per Bill copies attached with PII submissions for Appeal No. MVA/RV/2018-19; that Shri Jalinder Kumar also received goods (same destination) from Shri. Jain Vessels Service Pvt. Ltd. as per documents attached with Appeal No. MVA/RV/2018-19; that submissions are filed in the Appeal No. MVA/RV/2018-19 in respect of Shri Rajesh Kishan Gupta that penalty imposed on all 3 appellants need to be set aside as they have purchased all goods properly and no goods have been purchased without relevant documents and hence, no penalty is required to be imposed on them.

6.1. Sri Rakesh K. Shahi, Advocate on behalf of Appellant No. 8 in PII submissions stated that at the time of recording of statement of the appellant, total 4 consignments (One each from Bill No. M7, F of No. 75, P of No. 68 and Bill No. 132) alleged to have been received by the appellant without invoice against which the SGNs were issued in Court record (Appellate, Rajkot vide Order-1/Appeal No. EHV-EXCUS-001 APP-125-TO-131 2018-18 dated 12.6.2018 has questioned imposition of penalty in respect of alleged clandestine receipt of goods from Pet. No. 06; that single statement was recorded by the department against all these 4 consignments. This appeal is liable to be

allowed and imposition of penalty to be waived, that the goods under dispute in the present SCN was actually were removed by M/s. Jetti Lal Mazan Copal in Truck No. B-137-GA-2523 on 27.12.2008 through Shree Gaur Narsik Road Carriers from Plot No. 78 (Shree Ram Vessel Group Pvt. Ltd.) under Invoice No. 22/308 dated 27.12.2008 and submitted copy of invoice and GR No. 758 dated 27.12.2008 of the transporter along with Punjab State corporation entry order.

5.2 Shri. Rakesh K. Sharma Advocate on behalf of Appellant No. 8 in PH submits one stated that at the time of recording of statement of the appellants, total 14 consignments detailed at copy to Annexure No. 11 in his statement dated 15.8.2012 of the appellants alleged to have been accepted by the appellant without invoice against which the SCNs were issued. That Commissioner (Appeals), Rajkot vide Order in Appeal No. BHT/EXCUS-000-APP-123/TO-104-2012-A-11 dated 19.8.2012 has quashed imposition of penalty in respect of alleged blank cheque receipts of goods from Plot No. 84; that a single statement was recorded by the department against all these 14 consignments, this appeal is liable to be allowed and imposition of penalty to be quashed; that the appellant received the excisable goods in Truck No. B-137-GA-1424 under Invoice No. 223 dated 22.8.2009 and did not receive goods in Truck No. B-3-20-D-2117 and B-137-GA-0133; that the Investigator prepared fake record to make fabricated case and the adjudicating authority has passed the impugned order without discussing material facts and submissions made before him.

FINDINGS:-

6. I find that Appellant No. 1 to Appellant No. 3 have filed appeals beyond 90 days but within further period of 90 days by stating reason that their consultant was busy with other adjudicating proceedings; that their consultant/Chartered Accountant was busy with work related to reply to notices of Income tax department and statutory audit of nationalized banks. Since these appeals have been filed within further period of 90 days as prescribed under the Act, no adverse delay in filing these appeals and proposed to decide these appeals also on merits.

7. I find that this Appellant No. 1 has deposited 7.5% of demand concerned vide Challer dated 3.5.2010 as stated by them and Appellant No. 2 to Appellant No. 3 have deposited 7.5% of penalty imposed on each of them respectively as submitted by them, in their Appeal Memoranda in compliance to Section 55F(4) of the Act has been made by them.

7.1 I have carefully gone through the facts of the case, the impugned order and written as well as oral submissions made by the Appellants. The issue to be decided in the present appeal is whether the impugned order, in the facts and circumstances of this case, confirming demand and imposing penalty on the appellants is correct or



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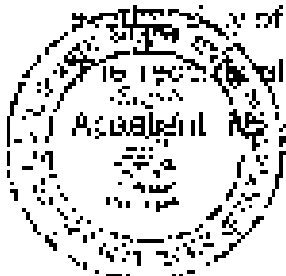
otherwise.

6. I find that the officers of DCCBI, Annapasadi conducted search/raided see ones at various places of brokers and transporters from where various incriminating documents like books, files, loose papers, computer, pen drive, etc. and lorry receipts, booking slip registers etc., were recovered. Further searches were also conducted at the premises of any remaining units and milling mills.

8.1 It has been submitted that the adjudicating authority while passing the impugned order has completely ignored the submissions made by the appellants. However, I find that the adjudicating authority has stated detailed defense submissions of the appellants at various sub-para(s) of the impugned order and also given his findings.

8.2 It is on record that before recording the statement of Appellant No.2 (Partner of Appellant No.1), all evidences in form of documents recovered from the premises of Appellant No.1, 3 & 4 and transporters during investigation were placed before him. That he had seen photographs drawn at the premises of Appellants No.1, 3 & 4 and at the premises of various transporters and the statements given by Appellant No. 3 & 4 and various transporters, that he had been given full opportunity to peruse the same before giving testimony about the truthfulness and correctness thereof. Thus, Appellant No.2 was given sufficient opportunity to examine documentary evidences duly corroborated by oral evidences collected from the premises of Appellant No. 3 & 4 and transporters. He was also shown schedule prepared on the basis of investigation conducted in respect of records seized from Appellant No.1, 3 & 4 and transporters showing the details of the transactions carried out through Appellant No. 3 & 4 by Appellant No.1. I find that from the documentary evidences viz. seized diary of Appellant No. 3 & 4 and statements of the transporters, it is proved that Appellant No.1 had removed the goods with the help of Appellant No. 3 & 4 clandestinely and also fraudulently caused on Central credit by issuing Central excise invoices without actual supply of taxable goods. These transactions also tallied with the records of Appellant No. 3 & Appellant No. 4 which are corroborated with the records of invoices issued by Appellant No. 1, and witnesses who have also admitted transfers of cash amount as well as taxable goods. These are substantial evidences in the form of documentary and oral evidences on record gathered from the firm and persons indulged in transaction with Appellant No.1 and that the investigation has corroborated various evidences and established evasion of Central Excise duty and fraudulent passing of Central Credit by Appellant No.1. Therefore, it is proved beyond doubt that Appellant No.1 has evasion duty of Rs. 17,08,727/- as detailed in Annexure TR 3 and has also evaded duty of Rs. 16,70,187/- as detailed in Annexure VKP of the Show Cause Notice.

8.3 It is also shown that Appellant No. 3 & 1, whose statements were recorded by Appellant No. 2 before giving his own statements never filed any objection of



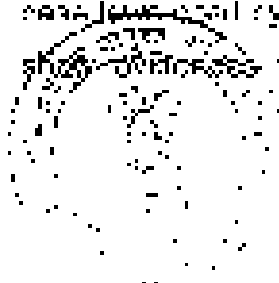
statements at any point of time. Therefore, all these evidence substantiate the charges against the appellants and are valid, admissible and legal evidences in the eyes of law.

6.3 I find that the investigation undertaken by DGCE, proved the authenticity of records seized from various transporters, Appellant No. 3 & Appellant No. 4 duly corroborated the same with records seized from other premises. Regarding removal of duty based on booking register of the transporters, it has been contended by the appellants that department has not adduced evidence with regard to quantity of goods and value of the goods. Despite the fact that out of 345 entries found in the booking register of the transporters, except for 92 entries Appellant No. 1 had issued invoices, thus, authenticity of the booking register is beyond doubt. During investigation, statements of Appellant No. 2, who is partner of Appellant No. 1 were recorded in which he failed to produce copy of central excise process in respect of clearances mentioned therein and admitted to have cleared goods without issue of invoices. I find that the registers maintained by the GMD, at the gate of ship breaking yard, provided corroborative evidence to establish that the truck number mentioned in the booking register of the transporter actually entered the premises of ship breaking yard on the given date and time. The appellants have not challenged the fact that only after finalization of deal, the trucks are engaged in order to save money pertaining to association of booking of truck. Therefore, there is no doubt that both the registers viz. booking registers of the transporters as well as the registers maintained by GMD are authentic and genuine. Regarding purchase of such goods, it is seen that the booking register does not show names of the buyers. It shows only destination for which the trucks were hired. It is settled law that in cases of clandestine removal, department is not required to prove the case with mathematical precision as held by the Apex Court in the case of *D. Bharami*, 1963 (13) EL 1548 (SC), wherein it was held that -

*31. The other cardinal principle bearing an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered to use the words of Lord Mansfield in *Barton v. Archer* (1774) 1 Coop. 63 at p. 64 "According to the Proof which it was in the power of one side to prove and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden."*

(Emphasis supplied)

6.4 I find that the department has adduced sufficient evidence to establish that Appellant No. 1 was engaged in clearance to removal of the goods and therefore, the case law cited by them are of no help to them as the facts of the present case clearly show otherwise that Appellant No. 1 was engaged in evasion of duty by way of



declaring removal of the excisable goods without payment of Central Excise duty and without issuing invoices.

7. Regarding demand of duty on the basis of entries recovered from brokers i.e. Appellant No. 2 & 3, it has been contended that the demand made on the basis of third party documents is not sustainable. However, I find that in the entries maintained by the assessee as well as their transactions were recorded that in case of many entries in the diary invoices have actually been issued by the appellants. Thus the authenticity of the diaries and other records recovered from the brokers is established. Further the brokers have admitted to have received the goods from appellant without Central Excise invoices and sold the goods without Central Excise invoices. Thus the case is based not only on third party documents but duly corroborated by other evidences. Appellant No. 2 (Partner of the Appellant No. 1) has not furnished any satisfactory explanation in respect of entries as well as the seized diaries showing premises of the appellants from where goods were raised and could not produce corresponding central excise invoices in this regard. The statements have never been refuted by Appellant No. 2 and hence have sufficient evidentiary value. The cumulative effect of all such evidences is that the evasion has indeed taken place and Appellant No. 3 to Appellant No. 4 have indulged themselves in such Central Excise duty evasion. Hence, in this case third party evidences backed by professional statements are admissible. It is on record that all transactions were recorded in diaries and issued manner, and the case was made out after deciphering and decoding the same, even though Sanjiv Anandhichar Patel and Shri Kesor Anandhichar Patel did not cooperate during investigation. The transactions recorded in diaries and storage records seized from Sanjiv Anandhichar Patel and Shri Kesor Anandhichar Patel were further corroborated with relevant records. These are vital and crucial evidences as per the Indian Evidence Act, 1972 and are sufficient to prove evasion of duty by Appellant No. 1 to Appellant No. 4.

7.1 Regarding allegation of misrepresentation it has been contended that the rates quoted by M/s. Major and Minor as well as other agencies/persons were not actual rates prevailing during that period. I find that ship brokers and brokers submitted to publications issued by them and other research agencies in order to ascertain prevailing market prices so as to enable them to transact the goods. Inquiry conducted by TIGCE with various marketing research agencies revealed that day to day price of 12mm size of plate is almost equivalent to average price of all size of rolling plate within the range of 9 mm to 26 mm. The price adopted by TIGCEI was the rates upon by most of the ship breaking units of Alang and the prices emerging out of breaking up of ship were also at these prices. I find that in order to be just and fair, the investigation has alleged a margin of 2% in the price published by M/s. Major and Minor. In cases where appellants have indulged in its destined dealers as well as undersubmission of the goods produced by them, one-to-one correlation of goods sold and payments received

process through, angaria can be established. In my view, it is sufficiently proved from the entries in the books recovered from brokers that cash transactions took place between various milling & flourmills units and 2008 and No. 1 through brokers (Appellant No. 3 & 4). Therefore, I find that the rejection of transaction value and addition of the price prevailing in the market as per M/s. Major & Sons is correct in view of Valuation Rules read with Section 4 of the Central Excise Act, 1944.

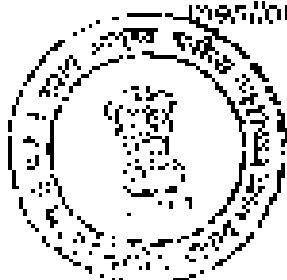
B. The following case-laws are relevant to decide the correctness of the impugned order, which are discussed as under:-

(a) The statements of the accused, if not retracted, the same is legal and valid in the eyes of law. And the same can be considered as corroborative evidence and no further evidence is required. The above has been held in the cases of (i) Nandish J. Sukhwani (1996 (82) ELT 258 (SC)) (ii) Rakesh Kumar Garg (2018 (357) ELT 521 HC Delhi)

(b) Thus, the admission or confession is a substantial piece of evidence, which can be used against the maker of it as has been held in the cases of (i) Aksh Industries (2008 (220) 273 ELT (14) Mumbai); (ii) M/s. Divine Solutions (2009 (200) ELT (Tri. Chennai)) (iii) M/s. Karori Figg Wadia (2004 (189) ELT 573 (Tri. Delhi))

(c) Statement of director and authorized persons of assessee admitting clearance of goods without payment of Central Excise duty and without issuing Central Excise invoices, indicative and specific and never issued later on a certificate as genuine as held in the case of Hi-Tech Abrasives Ltd. reported as 2017 (343) ELT 805 (Tri. Del.)

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 involuntary and is specific. The Director clearly notified 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 notebooks are covered by the invoices issued by the assessee on which duty stands paid. The Director has clearly admitted the truth of the charges 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 nature of clandestine nature is required to be proved by sufficient corroborative evidence. However, the facts presented in each individual case are required to be analyzed and examined independently. The department in this case has relied upon the confessional statement of the Director which is also supported by the mentioned entries in the private accounts. There is no contention that the



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statements are used taken under duress. The appellants also state that they have never been asked for cross-examination during the process of adjudication.

19. In view of the foregoing, I find that the Commissioner (Appellate) has erred in taxing the tax that there is not enough evidence of possession removal of goods. Even though the statement of Shri Rajiv Kajirani, who is said to be the author of the private records recovered has not been recorded in stands admission by Shri Technical Director about the nature of the contents of the private notebooks. Consequently, I find no reason to disallow the cost of excise duty.

20. The evidence of simulated clearance has been brought on record only as a result of investigation undertaken by the department. The evidences unearthed by the department are not statutory documents and would have gone undetected but for the investigation. Therefore tax is a clear case of suppression of facts from the department and certainly the extended period of limitation is applicable in this case and hence the demand cannot be held to be time-barred.

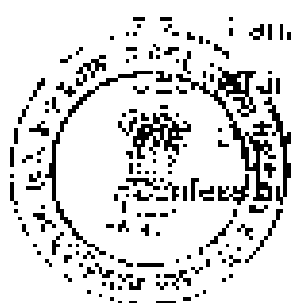
(Emphasis supplied)

(10) The penalty on director of company is impossible when he was directly involved in the evasion of Central Excise duty has been held in the case of U.S. Singhal reported as [2011 (271) EIT 143 (Gau.)].

(11) It is settled legal position that once a case of concealment or removal of excisable goods is established as has been done in the instant current case, it is not necessary to prove the same with mathematical precision as held by the Hon'ble Supreme Court in the cases of (i) *Shah Gurnam Ma.* reported as [1988 (13) EIT 1548 (SC)] and (ii) *Haribhai Textiles (India) Pvt. Ltd.* reported as [2008 (285) EIT 1497 (SC)].

12. I also rely on the decision in the case of *Udayana Steel & Alloys Ltd.* reported as [2011 (350) EIT 457 (Tri. Del.)] wherein it has been held that notebooks (copies) seized from the possession of appellants' employee at the time of search showing entries for accounted as well as unaccounted goods which have been explained in detail and discussed by GM of the factory fully with invoices/gate passes is trustworthy; that statement of an employee containing detailed knowledge to be considered as reliable. I also rely on the decision in the case of *Kamotandra Textiles Pvt. Ltd.* reported as [2014 (302) EIT 681 (SC)] wherein similar view has been accepted by the Hon'ble Apex Court.

In all of the view that admitted facts need not be proved as has been held by the Hon'ble Supreme Court in the cases of *Alax Industries* reported as [2008 (230) EIT 0573 (Tri. Mumbai)] and *State Solitaires* reported as [2006 (208) EIT 1305 (Tri. Chennai)] that the statements of witnesses would not be held true there is no need to search for



evidence. Honble CESTAT in the case of M/s. Karri Engg. Works recorded as 2004 (198) E.L.T. 372 (ri. De.) has also held that Admission/Confession is a substantial piece of evidence, which can be used against the maker. Therefore Appellant's reliance on various case laws relating to corroborative evidences and establishing clandestine removal cannot be made acceptable in light of the positive evidences available in the case as discussed in the findings of the impugned order.

8.5 Honble CESTAT in the case of M/s. V. S. Sponge P. Ltd recorded as 2015 (325) E.L.T. 402 (Tn-De) has held that when preponderance of probability was against the Appellant, lodging of 10 statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted and no input-output ratio prescribed by section 17(1) use. The relevant portion of the decision is reproduced below:-

10.1 Recovery of the loose sheets and pencil marked ledger from the premises of the Appellant in the course of search proved the names therein as representatives of the clandestinely removed goods which were well within the knowledge of the Appellant. Active involvement of Appellant in first regard came to record since these materials were in the custody of the Appellant. It is common sense that the materials having utility in the possession thereof are only possessed by him. He derives substantial interest and is answerable to the contents therein. Entries on such incriminating materials demonstrated clandestine clearance of 562.130 MT of Sponge Iron and 587,090 MT of such goods respectively well explained by Appellant. That also proved clandestine removal of 84.910 MT of Dolomite by the Appellant. Such removals were further proved from the records seized from the transporters M/s. Purvanchal Road Carriers and M/s. Chiraj Rosettes. The materials removed from transporters brought out the evidence of clandestine removal of 59.180 MT of Sponge Iron and 55,855 MT of such goods respectively. Those clearances were not substantiated by Excise invoices. When certain entries in the pencil handwritten ledger matched with the Central Excise notices and other copies did not match the unattached copies, however insufficiency of clandestine removals not supported by invoices. Accordingly, such clearances became subject-matter of allegation in respect of removal of 88,505 MT of Sponge Iron without payment of Excise duty. Similarly, the loose sheets when evaluated, that proved removal of excisable goods without payment of duty to the extent of aforesaid quantity of goods.

10.2 The statement recorded from said supervisors being self-serving cannot be treated as reliable because they were the persons within whose knowledge goods were manufactured and cleared. Their evidence was inherently doubtful and creditable for the reason that they vividly described manufacturing of production.

10.3 Added to the above, the director admitted clandestine removal of the goods not supported by Excise invoices. That resulted in loss of revenue. The incentive, admitted to make approval of the duty evaded, illegal, contravening the Revenue implication of the entries in pencil handwritten ledger and this remuneration from possession of Appellant being proved. Entire passing of the Appellant therefore, failed to sustain when view filed of the Appellant came to record. Clandestine removal was well within the knowledge of the said supervisors, accountant, Director, transporters and excise-duty agent. Each offered evidence corroborated all of them and established unaccounted goods cleared without payment of duty. The most heavy burden of English Appellant brought the Appellant-company to the end of allegation. All of their assistance

knowledge day of evasion. Sri Agarwal by his evidence admitted all the persons involved in the chain of distribution chain and their involvement.

10.4 Preponderance of probability was against the Appellant. Reading of all statements extracted from para. no. 62 to 64 electricity consumption band, an 11KV pole and wire found unaccounted and no input output ratio consequent by law is of no use to it. Revenue discharged its duty of averring for the allegation in the short course since summary. But the Appellant miserably failed to discharge its burden of proof, it did not come out with clean hands.

10.5 It is not only one evidence but multiple related evidence demonstrated oblique motive of the Appellant and proved its mala fide. Therefore, Appellant fails on all counts. Revenue's investigation was successful and its suffering was manifested.

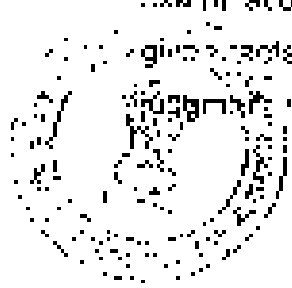
(Emphasis supplied)

2.4 I further find that the Hon'ble CESTAT in the case of M/s. Praveer Kumar & Co reported as 2014 (226) E.T. 222 (1-De) has held as under:-

"23. Country confidential statement which is retracted after two years without any basis has no legs to stand. No one has ever come on record to justify retraction about levy was paid consciously upon confession not once but many. Further confidential statement recorded by Sri Praveer Kumar was also verified by Sri Praveer Kumar authorized signatory. Contentions that returned records were only referring to purchase and time dates and not to filed purchase of invoices is clearly overblown as pointing out to the fact that seized records are having reference to the purchase. No. has no force as these facts were on record and were not challenged and sensibly admitted. Also duties on evaded goods were paid in two instalment (2nd instalment being after a gap of four months). Once evasion is accepted and documents are furnished mandatorily, liability of interest is disband. There is no force of assumed inference. Appellant's contention that there were no investigations relating to procurement of the materials and manufacture of huge quantity of fuel goods and transportation of goods. I feel once an evasion is clearly admitted and illegal activities are undertaken in the darkness of night, no wonder shall leave behind of their activities. Once transaction intent to evade is manifested and later confessed, proving such evasion by other evidence which are not recorded, will be giving a bonus to the evader. As per Supreme Court's judgment in D. Hindustani - 1993 (13) F.T.R. 1545 (S.C.) case, Consistent is not required to prove its case with mathematical precision, but what is required is the establishment of some a degree of probability that a prudent man may on its basis believe in the existence of facts in the issue."

(Emphasis supplied)

3.5 I find that no statements have been narrated by any person and facts recorded in the returns and contents of seized items have been accepted by Appellant No. 2 to Appellant No. 4 in their submissions. It is not a case that a single statement has been recorded and relied upon but various statements of Appellant No. 2, 3, & 4 establishing clandestine removal of final products by Appellant No. 1. In the circumstances, I am of the considered view that the statements recorded at different time and of different persons are not recorded under duress or threat. Truth of the statements have been independently corroborated by the facts and contents of the documents recorded at the time of seizure. The afore said of the well-considered view that detail of cross examination by adjudicating authority does not vitiate principles of natural justice in the given facts of this case. My views are supported by the Hon'ble Hon'ble High Court's judgment in the case of M/s. Shree Kamesh Gangli reported as 2017 (147) E.T. 213



(Fact) wherein it has been held that where witnesses have themselves admitted the guilt and statements have not been retracted, there is no question of cross-examination and denial of same does not give rise to any substantial question of law. Relevant portion of the judgment is reproduced below:-

13. The Tribunal recorded following reasons:-

15.1. As regards the denial of cross-examination of Sri Chhaya and Sri Ashok Kumar Yadav and whether the said denial has caused any prejudice to the Appellants, it is seen from the records that the entries made in the private records were corroborated by Sri Ramose Saurabh Sanghi, Director of the Appellant No. 1 and Sri Shashi Ramose Sanghi, Proprietor of Mrs. Ambica Sany Merchant through whom the clandestinely removed goods were sold wherein they had admitted that the entries recorded are true and correct and pertain to the unaccounted production/purchase of raw materials without accounting and sale of the finished goods in cash without payment of duty. Further from the records it is seen that about sixteen buyers (referred to in para 11.13 of the impugned order), who purchased the finished goods from the Appellants without payment of duty have also confirmed that they had received these goods without the cover of proper invoice documentation and without payment of duty. Similarly, two scrap suppliers Mr. Yonus Arvind Chakri and Mr. Sushil Muntesh Gaid have also admitted that they have supplied the MS scrap which is the raw material for the manufacture of these goods without the cover of documents and they have received consideration for sale of such scrap in cash. Considering these admissions available in record, we hold that the denial of cross-examination of the entries of the private records has not caused any prejudice to the Appellants. In fact none of the statements recorded have been retracted or disputed. In such a scenario, even the fact is not disputed, cross-examination of the party is not necessary. The Hon'ble Apex Court in the case of *Kanyaga Company - 1983 (13) E.L.T. 1436 (S.C.)* and the notable *Hipe Court of Andhra Pradesh in the case of Shanti Steels Pvt. Ltd. (supra)* have held that there is no absolute right for cross-examination and "if sufficient corroborative evidences exist cross-examination of the deponent after statements is not necessary. In view of the above we hold that the denial of cross-examination of Sri Chhaya and Sri Ashok Kumar Yadav who maintained the private records has not caused any prejudice to the Appellants."

From the above conclusions, we are also of the view that this was not a case which required cross-examination. The Directors themselves admitted the guilt. So, almost all objections stood answered. As said above, the statements recorded were not retracted or disputed. Learned counsel for the Appellants submitted that he can succeed in showing that these appellants should be admitted for deciding following question, which according to him is substantial question of law:-

"Whether denial of cross-examination of witnesses caused any prejudice to the Appellants?"

"We are not inclined to accept the submission at all. In these appeals, there was no question of cross-examination and therefore, denial of the same would not give rise to any substantial question of law. We perused the judgment of the Tribunal and find the same is quite pertinent, it is not necessary to interfere in it."

(Emphasis supplied)

5. In view of above, we find that Appellant No. 1 has evaded payment of Central Excise duty by way of concealment of removal of goods as well as by undervaluation of the goods hence, we hold that the use of an unauthorised authority is serious, legal and proper.

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8. I find that Appellant No. 1 has, intentionally adopted unlawful means to evade payment of central excise duty. The evasion in mind and mens-rea of Appellant No. 1 is clearly established. Therefore, I find that the removal of excisable goods in this case was of clandestine nature. If, of removal with intent to evade payment of excise duty and hence Appellant No. 1 is liable for penalty equal to the duty under rule 25 of the Rules read with Section 11A of the Act. In view of above, I hold that Appellant No. 1 is liable to pay Central excise duty of Rs. 1,52,05,892/- under Section 11A of the Act. It is natural consequence that the confirmed duty is required to be paid along with interest at applicable rate under Section 11A of the Act.

10. Appellant No. 2 has contended that Appellant No. 1 is a partner in concern and when penalty on Appellant No. 1 is imposed, no penalty on Appellant No. 2 is necessary under Rule 26(i) of the Rules. I do not find force in the argument of Appellant No. 2 since in the present case, there are cogent evidences that Appellant No. 2 was played important role in evasion of central excise duty. It is seen that penalty under this rule is imposed on the person who has dealt with such excisable goods, which he knew that the same are liable to confiscation. My view is also supported by the order of CESTAT in the case of Raxihaha Prints Pvt. Ltd. reported as [2012 (294) E.L.T. 159 (Tri - Ahmed.), wherein it has been held that -

"The show cause notice makes it clear that the goods were offending in nature and therefore liable to confiscation and adjudicating authority has concluded a finding that goods are offending in nature. There is only a technical objection in the writ that no has not specifically mentioned that these goods are liable to confiscation. In view of the specific allegation in the show cause notice which indicates the nature of offence for as goods are confiscated and the consequence of such offence, the findings recorded by the original adjudicating authority is sufficient to show that the goods were liable to confiscation and therefore, imposition of penalty is justified."
(Emphasis supplied)

11. I find that Honble CESTAT, Ahmedabad in the case of Yunkaha Samsuddin Dasa wala reported as 2018 (334) E.L.T. 120 (Tri - Ahmed.) has already held that personal penalty upon partners is in essence in addition to penalty imposed on the partnership firm.

12. I also find that the Hon'ble Madras High Court in the case of G. Jayaraman reported as 2014 (305) E.L.T. 234 (Mad.) has held as under:-

"It is clear that the statutory authority imposed penalty on the firm as well as on the partners. The finding recorded by the original authority was confirmed in appeal. The legality and correctness of the order was also seen vis-a-vis by the CESTAT. The CESTAT being the final fact finding authority arrived at a conclusion that there was sufficient evidence to show that the appellant evaded his excise duty by falsifying the records regarding his year of manufacture."

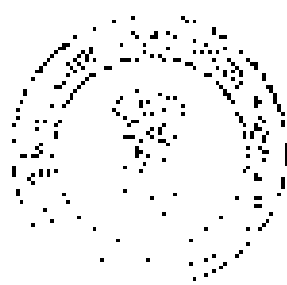
9. The only question raised in the present appeals is as to whether the statutory authority was justified in imposing fine on the firm as well as on the partner.

10. Section 17(1) of the Customs Act, 1962 provides that not only the person who is instrumental in doing a particular act by violating the provisions of the Act but also the person who accepts or surrenders such act is also liable for payment of penalty. The words in question were accepted by the name of the firm by same individuals from Tax. The appellant in C.A. No. 877 of 2012 in his capacity as the partner admitted the firm to commit the offence. Therefore, the statutory authority was fully justified in imposing fine on the firm as well as on the partner.

(Emphasis supplied)

11. Sri Vinod Amarnishka Patel and Shri Kishor Amarnishka Patel brothers (Appellant No. 3 & 4) have contended that they have not dealt with the goods in the manner prescribed under Rule 28 of the Central Excise Rules, 2002 and therefore they are not liable to penalty. I find that the entry maintained by Shri Vinod Amarnishka Patel in coded language contained details of bills as well as their discrepancies by Appellant No. 1. When asked about the entries in the diaries, he gave evasive replies like the accounts were imaginary, he was practicing accounts on Sundays etc. He never cooperated with the investigation, however, DDO's officers got the coded data decoded and the whole character of clandestine removal got revealed. The decoded data matched with the data maintained in the electronic form and in case of some transactions, Appellant No. 1 had issued Central Excise invoices whereas for many transactions, no Central Excise invoices were issued and no Central Excise duty was paid. This authenticates the data maintained by Shri Vinod Amarnishka Patel. His brother, Shri Kishor Amarnishka Patel was running business of registered brokers and was involved in facilitating clandestine removal through his deposed firm. The records also showed cash transactions for various buyers and sellers through angadias.

12. Appellant No. 3 & 4 in their submissions argued that they have not indulged in clandestine activities but accounts found in Pen Drive/Computer were written for learning accounting/software etc. I also find that they were not only indulging in clandestine removal of goods but were also indulged in selling Appellant No. 1 in clandestine removal of the excisable goods. As far as data recovered from Pen Drive/Computer is concerned, it is argument of learning accounting/software is nothing but an attempt to get out of duty liability. It is a common practice that any software is to be installed either in computer desktop or laptop and not in Pen Drive. It is something special with intent to defy law in such a way that no one can be detected or later stage about the case. It is a practice to create records in Pen Drive to avoid detection from the computer. The correlation of data recovered by DDO's with the data available in Pen Drive is neither a mere coincidence nor a coincidence.



14.2 Appellants No. 3 & 4 also argued that they had given explanations for the documents to the investigating officers (during search) but, however, it is on record that Appellants No. 3 & 4 had not cooperated with the investigation and had given evasive replies during the same. Therefore, their role is very much covered under Rule 28 of the Rules and provisions of Sec. 76, 77 & 78 for granting Appellant No. 1 the clandestine clearance of the excisable goods on basis of Appellants by the adjudicating authority under Rule 28(i) of the Rules is proper and there is no need to interfere with the same.

14.3 I find that the facts of this case are distinguishable from the judgments relied upon by these two appellants inasmuch as the documents received, analysis thereof and data storage divisions have been corroborated by the statements of Appellant No. 2, statements of Appellants No. 3 & 4, statements of transporters and records obtained from G.O.2 authorities and the statements have never been retracted. The persons involved in this case have closely monitored, arranged and managed all affairs of clandestine clearances made by Appellant No. 1 and hence, penalty imposed on Appellant No. 3 & 4 is justified in view of provisions aforesaid in Part 8 to Part 9.3.

14.4 I find that the ledger named as 'MP' and recovered from the premises of Appellant No. 4 has contained details of transactions and Appellant No. 5 in his statement dated 17.2.2011 has admitted details contained therein and also admitted that Appellant No. 4 has facilitated him in purchase the excisable goods i.e. papers weighing 20 removed clandestinely, involving Central Excise duty of Rs. 2,69,680/- and the admissions made in the statement were never retracted by him. The print outs obtained by Forensic Science Laboratory from the Computer Laptop and Pen drives seized from the premises of Appellant No. 4 fully corroborate the said statements and indicate that the excisable goods were cleared by Appellant No. 1. Hence, imposition of penalty of Rs. 2,69,680/- under Rule 28(i) of the Rules on Smt. Manendra Ambalal Ram is justified.

14.5 I find that Appellant No. 5 to Appellant No. 2 have been alleged to have purchased goods clandestinely cleared by Appellant No. 1 without payment of Central Excise duty and without issuance of central excise licences. The local adjudicating authority has imposed penalty on them under Rule 28(i) of the Rules whereas Appellants No. 3 to 5 have contended that they cannot be penalized when no investigation has been carried out at their premises; that they had filed sworn affidavits regarding depositions made by them in their statements recorded on 15.5.2012 that the excisable goods alleged to have been purchased by Appellant No. 5 were in fact received in same truck number by another firm of same destination, that Appellant No. 5 had purchased goods in Truck No. GU-07-GE-1424 out from Smt. Ram Vessel Soap Pvt. Ltd. Plot No. 19A near their invoice No. BX-297 dated 15.6.2005. I find that the circles concerned have been made in 2004-05 and 2006-07 whereas the statements of these

appeals were recorded on 16.05.2012. These appellants have filed sworn affidavits on 25.07.2012 denying conspiracy of their numerous vehicles relied upon in the impugned SCM. I also find that names of Appellant No. 6 to 8 have not been reflected in the booking registers of the respondents and no corroborative evidences are available in the SCM impugned order establishing involvement of these appellants in purchase of clandestinely cleared goods. Therefore, in my considered view there are not sufficient evidences available in this case to hold that Appellant No. 6 to Appellant No. 8 have participated in clandestine clearances of the goods and/or they were concerned in purchase of clandestinely cleared goods by Appellant No. 1. I also find that Appellant No. 6 was not proprietor of the firm at the material time hence, I find that it is not a fit case to impose penalty on these three Appellants and therefore, set aside penalty imposed upon them under Rule 26 of the Rules.

14. In view of above I uphold the impugned order except penalty imposed upon Appellant No. 6 to Appellant 8 and accordingly reject appeals filed by Appellant No. 6 to Appellant No. 8 but allow appeals filed by Appellant No. 6 & Appellant No. 8.

14. अपीलकर्ता 6 से चार दूध की गाड़ी गाड़ी के माध्यम से निर्यात करके रोक किया जाता है।

15. The appeals filed by the Appellants stand disposed of as above stated.

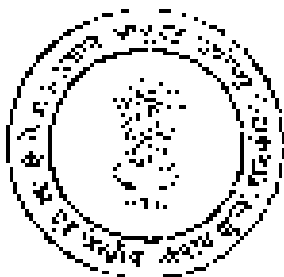
(सुनील चतुर्वेदी)
प्रधान अधिकारी (अपील),

By R.F.A.D.



To:

1. M/s R.K. Industries (Unit-2)
Plot No. V-7, Suseva
Bhavnagar
2. Shri Muxesh R. Patel,
Partner of M/s. R.K. Industries (Unit-2),
Plot No. V-7, Suseva
Bhavnagar
3. Shri Kshur Anandshah Patel,
Proprietor of M/s. Shree Krishna Enterprises
504, Shoppers Plaza,
Karnis Chowk,
Mughawadi Road,
Bhavnagar
4. Shri Vinod Anandshah Patel
Plot No. 102,
Jawahar Mega City,
Opp. Victoria Park,
Bhavnagar - 581002.



5. Shri Madendra Ambal Nana,
Partner of M/s. Ms. U. Metal Industries
A-219, Loha Ring,
Waghvadi Road,
Bhavnagar - 364002
6. Shri Sanjeev Gupta,
Proprietor of M/s. H. C. Gupta & Co.,
House No. 309, Sector-4A
Mandi Gauriyagan, District - Fatehgarh Sahib,
Punjab
7. Shri B. S. Dev Kishan Gupta,
Proprietor of M/s. B. S. Dev Kishan Gupta & Co.,
House No. 70, Sector - 21E
Kareji Subhas Market, Mandi Gauriyagan
District - Fatehgarh Sahib, Punjab
8. Shri Anand Kumar,
Proprietor of M/s. J. K. Gupta & Co.,
House No. 127, Sector - 24C
Mandi Gauriyagan, District - Fatehgarh Sahib,
Punjab

प्रति:

- (1) प्रधान मुद्रा-आयुक्त, केन्द्रीय प्रदूषण नियंत्रण बोर्ड, भारत सरकार, ई. 2, अहमदाबाद को भेजना है।
- (2) आयुक्त, केन्द्रीय प्रदूषण नियंत्रण बोर्ड, अहमदाबाद को आवश्यक कार्यवाही हेतु
- (3) सहायक आयुक्त, केन्द्रीय प्रदूषण नियंत्रण बोर्ड, अहमदाबाद को आवश्यक कार्यवाही हेतु
- (4) सहायक प्रमुख (सूचना), अहमदाबाद, प्रदूषण नियंत्रण बोर्ड, अहमदाबाद को आवश्यक कार्यवाही हेतु,

दिनांक 14/05/2019

- (1) कक्षा सं. 92/13/ENV/2018-19
- (2) कक्षा सं. 92/12/ENV/2018-19
- (3) कक्षा सं. 92/11/ENV/2018-19
- (4) कक्षा सं. 92/10/ENV/2018-19
- (5) कक्षा सं. 92/09/ENV/2018-19
- (6) कक्षा सं. 92/08/ENV/2018-19
- (7) कक्षा सं. 92/07/ENV/2018-19
- (8) कक्षा सं. 92/06/ENV/2018-19
- (9) कक्षा सं. 92/05/ENV/2018-19
- (10) कक्षा सं. 92/04/ENV/2018-19
- (11) कक्षा सं. 92/03/ENV/2018-19
- (12) कक्षा सं. 92/02/ENV/2018-19

