:: ORDER-IN-APPEAL ::

The present two appeals have been filed by the Appellants (*hereinafter referred to as* "Appellant No. 1 to Appellant No. 2") as detailed in the Table below against Order-in-Original No. 4/EXCISE/DEMAND/18-19 dated 17.07.2018 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central GST Division, Bhavnagar – I, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority'):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/183/BVR/2018-19	Appellant No.1	M/s. Raj Steel Rerolling Mill, GIDC, Plot No. 16-17, Vartej, District Bhavnagar.
2	V2/184/BVR/2018-19	Appellant No.2	Shri Mukesh Rameshwardayal Gupta, Partner of M/s. Raj Steel Re-rolling Mill, GIDC, Plot No. 16-17, Vartej, District Bhavnagar

2. The brief facts of the case are that Appellant No. 1 was indulging in clandestine removal of excisable goods and hence, search was carried out by the department on 23.09.2017 wherein the physical stock of finished goods viz. MS Angle/TMT/Round/Square of 971.310 MTs. and Waste & scrap of 1.720 MTs. (total 973.03 MTs.) was found short as compared to quantity shown in Daily Stock Register. Show Cause Notice No. V/15-4/Demand-Raj Steel/16-17 dated 20.12.2017 was issued alleging clandestine clearance of goods and proposing demand of recovery of Central Excise duty of Rs. 36,63,959/- from Appellant No. 1 under the proviso to Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") along with interest under Section 11AA of the Act; imposition of penalty on Appellant No. 1 under Rule 25(1) of the Central Excise Rules, 2002 read with Section 11AC(1)(a) of the Act. The SCN also proposed to impose penalty under Rule 26(1) of the Rules upon Appellant No. 2.

2.1 The SCN was adjudicated by the lower adjudicating authority vide the impugned order under which demand of central excise duty of Rs. 39,85,958/- was confirmed under Section 11A(4) of the Act along with interest under Section 11AA of the Act; penalty of Rs. 39,85,958/- was imposed under Rule 25(1) of the Rules read with Section 11AC(1)(a) of the Act with benefit of reduced penalty as envisaged under proviso to Section 11AC(1)(e) of the Act and penalty of Rs. 5,00,000/- was imposed on Appellant No. 2 under Rule 26(1) of the Rules.

3. Being aggrieved with the impugned order, the appellants have preferred the present appeals, *inter alia*, on the grounds as under:

(i) The impugned order is not proper, legal and correct as the same has been passed on the basis of the assumptions/presumptions; that it is general practice prevailing in India that the stock of the manufactured goods is being computed

for in the Daily Production Register on approximate basis; that the quantity of final products manufactured by the Appellant was depending upon the nature of the melting waste and scraps of Iron and Steel Products procured from various ship Breakers of SBY Alang/Sosiya; that if the said imported ships were heavily rusted or deteriorated due to sea-voyage/age wear [illegible] that the quality of the raw materials varied from ship to ship having no fixed parameter of yielding of the final products; that the Government has not prescribed any statutory manner how to maintain the Daily Production Register; that it is not feasible to weigh the raw materials while feeding into the Furnaces having 1400°C temperature and hence, waste and Scraps of Iron and Steel product is estimated/approximated to get the finished products; that the disputed short stock was negligible and arose only due to the reasons that the stock of finished goods during the period was being maintained by considering the weight loss 8% to 12% approx. and hence, physically stock was not lying in the factory; that they were not maintaining books of accounts; that the quantity of finished products was properly being entered into Daily Production Register and quantity of the raw material was also being ascertained on approximate basis; that balance occurred only due to the arithmetical calculation which was ascertained by approximation; that they relied upon case law of the Hon'ble Tribunal in case of Kailash Industries Ltd. reported as 2017 (353) ELT 113 (Tri. Del.); that therefore, the allegation made in the show cause notice is not legal and proper.

(ii) The appellant had closed their manufacturing activities from December 2014 due to abnormal circumstances of the company and Recession of the Market.

(iii) The Bank Officers and their Chartered Accountant issued inspection report after physical verification of stock of raw material as well as finished goods for releasing fund to the Appellant; that therefore, the shortage was not because Appellant was involved in evasion of Central Excise duty.

(iv) It was alleged that shortage of negative stock of finished goods found in the factory was 371.540 MTs. However, the department has not produced any evidence of clandestine receipt of the raw materials from which the finished goods under dispute were manufactured; that the department has not alleged that the Appellant procured raw material clandestinely during the period under dispute.

(v) The appellant maintained books of raw material register as well as Daily Production Register were being maintained on approximate basis; that the authorized CA of the Bank has never reported regarding the shortage/excess

that the physical weighment of the stock was ascertained with reference to the stock of the finished goods shown in the records; that how the stock of the finished goods had been shown in the records had not been verified by the said CA at the time of carrying out the physical verification; that even, the Central Excise Department had never inquired about the burning loss; that in the steel industry the burning loss is important factor; that if the burning loss of raw material is very high, then the cost of the final products will increase as per market conditions; that this factor has been ignored by the lower adjudicating authority and the charges confirmed without any corroborative important [illegible].

(xvi) That investigation made on basis of stock verification report of CA, the Bank [illegible] ('circumstantial evidences'); that the burden to prove clandestine removal is on the department which has not been proved.

(xvii) That the department has not furnished calculation as to how it has worked out the evasion of Central Excise duty to the tune of Rs. 38,63,836/-; that the department has wrongly worked out disputed duty evasion by considering total quantity of finished goods; that each and every transaction is required to be considered to work out the duty liability with reference to the transaction value as provided under Section 4 of the Central Excise Act, 1944; that the department has not produced any evidence to justify the rate taken to determine the duty liability of Rs. 38,63,836/-; that the average value is not justifiable without any market rate evidence; that the value of Iron & Steel Products always fluctuates on day to day basis; therefore, the value as ascertained by the department for evasion of Central Excise duty of Rs. 36,87,879/- is not justifiable.

(xviii) That the statement dated 07.02.2017 of Shri Anuj Jagdishchandra Joshi, Relation Manager (ME), R. M. M. T. Department, Administrative Building, 2nd Floor, Nilam Baug Circle, Bhavnagar is not corroborative evidence; that it was practically not feasible to weigh all the finished goods on the date of visit to get exact quantity of finished goods and hence average weight was taken; that statement dated 07.02.2017 of Shri Manoj R. Oza, CA is also not relevant as he clearly stated that they have not carried out weighment of entire stock of finished goods lying in the factory premises; therefore, the show cause demand issued on the basis of the figures shown in the Daily Production Register is not justifiable.

(xix) The department has not disclosed the facts which fact has been suppressed by them with intent to evade payment of Central Excise duty; that the Appellant had always disclosed the true facts in the periodical monthly ER-1 Returns, ER-6 Returns and had filed yearly returns showing receipt of raw materials, goods

manufactured and the goods removed along with particulars of payment of Central Excise duty; that the Appellant had not contravened any of the provisions of Central Excise Law; therefore, the Appellant is not liable for penal action as proposed under Rule 25(1) of the Central Excise Rules, 2002 read with Section 11AC(1)(a) of the Central Excise Act, 1944.

(xi) The demand of Central Excise duty of Rs. 39,65,958/- is not justified in the eyes of Central Excise Law, Shri [illegible], Partner of our firm is also not liable for penal action under Rule 26(1) of the Central Excise Rules, 2002.

(xii) The case laws as referred in the impugned order are not applicable in the present case as the lower adjudicating authority has not followed norms of principle of natural justice as he did not consider the case laws relied upon by them as under:

- Order No. A/[illegible]/2015 dated 17.07.2015 of the Hon'ble CESTAT Ahmedabad in the case M/s. Bajrang Castings Pvt. Ltd.
- Om Aluminium Pvt. Ltd. – 2011 (263) ELT 397 (Tri. Ahmd.)
- [illegible] Steels Pvt. Ltd. – 2017 ([illegible]) ELT 128 (Tri. Del)
- PKI Abrasives Pvt. Ltd. – 2017 (345) ELT 255 (Tri. Del)
- Akshay Rolling Mill Pvt. Ltd. – 2016 (342) ELT 277 (Tri. Kolkata)
- Jasmine Prints – 2013 (287) ELT [illegible] (Tri. Del)
- Eco Track Sleepers Pvt. Ltd. – 1995 (75) ELT 358 (Tribunal)
- [illegible] Synthetics – 2006 ([illegible]) ELT 287 (Tri. Del)
- Shree Sidhbali Ispat Ltd. – 2017 ([illegible]) ELT 724 (Tri. Mumbai)

4. The Personal hearing in the matter was attended by Shri N. K. Maru and Shri S. H. Qureshi, both consultants, who reiterated the grounds of appeal and made written submissions; they said that there are no evidences available in the case for clandestine clearance [illegible] due to difference arising on account of [illegible], [illegible] burning loss also needs to be accounted for; the appeal may be allowed on above grounds.

4.1 The Appellants vide letter dated [illegible].04.2019 made written submission during [illegible] that they reiterate the submissions made in the Appeal and further submit that the burning loss is incurred depending upon [illegible] of the rollable scrap into reheating furnace; [illegible] a Certificate dated [illegible] of the Registered Chartered Engineer [illegible] relied upon following case laws:

- 2009 (239) ELT 495 (Tri. Ahmd.) – [illegible] Rolling Works
- 2015 (317) ELT 259 (Tri. Mumbai) – [illegible] Forging Pvt. Ltd.
- 2015 (318) ELT 175 (Tri. Del.) – [illegible] Ltd.
- 2015 (322) ELT 722 (Tri. Del.) – [illegible] Steel Rolling Mills
- 2017 (357) ELT 334 (Tri. Chennai) – [illegible] Pvt. Ltd.
- 2018 ([illegible]) ELT [illegible] (Tri. Del.) – [illegible] Pvt. Ltd.
- 2016 ([illegible]) ELT 985 (Tri. Del.) – [illegible] Industries
- 2007 ([illegible]) ELT 485 (Tri. Del.) – [illegible] Ltd.

FINDINGS

5. I have carefully gone through the facts of the case, the impugned order and the grounds of appeal made by the appellant in the Appeal Memoranda and written as well as oral submissions made by them. The issue to be decided is whether the impugned order, in the facts of this case, confirming demand and imposing penalties on the Appellants is correct or otherwise.

6. I find that the appellants contested the impugned order on the grounds that the shortage of finished goods of 973.64 MTs was found as per Panchnama dated 03.08.2015 because they maintained daily stock account register on approximate basis and not on the basis of actual quantity; that there was burning loss from 6% to 12% and the same was also accepted by various departments. The impugned order has been passed only on assumptions presumptions and therefore, is required to be set aside.

6.1 I find that it is an admitted fact on record that on day of search shortage of physical stock of the finished goods to the tune of 973.640 MTs, when compared to the daily stock register. I further find that entries of the finished goods available in the factory in the daily stock account register and ER-1 Return filed by the Appellant No. 1 for July 2015 was 975.140 MTs, whereas only 1.500 MTs quantity of the finished goods was physically found in the factory at the time of search carried out on 03.08.2015. I find that the Appellant No. 1 has been submitting periodical stock statements/reports showing inventory of raw materials and finished goods, book debts etc. with the respective banks for the purpose of fund loan, these statements/reports were prepared on basis of Books of Accounts and Records/ Registers including central excise records maintained by Appellant No. 1. During investigation, statement of Relation Manager (ME) of SBI, Bhavnagar and Chartered Accountant appointed by the bank were recorded, as per details contained in Para No. 10.8 and 10.9 of the impugned order as under:

> *"10.8 Further, I find that Shri [illegible], Chartered Accountant, C/o. [illegible] & Co., Bhavnagar in his statement dated [illegible].2017 has admitted the methodology of quantification of goods and there was only marginal difference in quantity of finished goods reported by the Noticee in their monthly stock statement submitted to bank and physically verified by them.*
>
> *10.9 I find that Shri [illegible], Relation Manager (ME), SBI, Bhavnagar in his statement dated [illegible].2017 admitted that bank officers accompanied with [illegible] Noticee No. 1 [illegible] verified the last stock statement with entries in books and records including those maintained for the purpose of central excise and/or statutory controls, to ascertain correctness of stock statement filed by borrower; thereafter, physical position of stock of raw materials, finished goods and waste & scrap are being taken and reconciled as on date of last stock statement by adding inwards and deducting items from subsequent [illegible] and [illegible] as recorded in their books/Registers; these quantities of stock are then physically verified and discrepancy noticed, if any, is being reported in the Inspection Report."*

6.2 In view of above, I find that the Bank Officials and Chartered Accountant had physically verified the stock of the finished goods and found as per the records maintained by Appellant No. 1 including records as prescribed under Central Excise Act and rules framed thereunder. I find that these facts have affirmed by Appellant No. 2 vide his statements dated 04.09.2015 and dated 13.02.2017; that Appellant No. 2 (Partner of Appellant No. 1) has categorically confessed on 03.09.2015 before the Revenue that physical stock of the finished goods was available 1.500 MTs only in the factory premises instead of 973.510 MTs. as shown closing stock in ER-1 for the month of July, 2015; that 3 Panchanamas dated 03.09.2015 drawn at factory premises, office premises and residential premise along with seized documents were perused by Appellant No. 2 and he agreed with the contents narrated therein. These are admitted facts by Appellant No. 2 (Partner of Appellant No. 1) in his statements dated 04.09.2015 and dated 13.02.2017 and admitted facts need not be proved as held by the Tribunal Mumbai in the case of Alex Industries reported at 2008 (230) E.L.T. 73 (Tri. - Mumbai), wherein the Hon'ble Tribunal has held that "*Statements by proprietor and his employee in which each one has corroborated are sufficient evidence [illegible] Confessional statement before Customs Officers is admissible and binding – Allegation that the statement recorded under duress and coercion requires evidence [illegible] plea of transfer of Rs. 25 lakhs towards [illegible] is of no use as the Director and Managing Director has admitted duty liability on behalf of [illegible] need of [illegible] as they have not given any [illegible]*"

6.3 I would like to further rely on the order passed by the Hon'ble CESTAT in the case of Divine Solutions reported as 2006 (206) E.L.T. 1005 (Tri. - Chennai) wherein it has been held that "*Clandestine removal – Evidence – Confessional statement – Retraction of partners admitted manufacture of computers and clear the same without payment of duty – Retraction made in April 2000 of earlier statements made in May 1999 is too belated to be accepted as genuine – Confessional statements would hold the field – No need to search for evidence.*" In the case of Karori Engg. Works Vs. Commissioner Central Excise, Delhi reported as 2004 (166) E.L.T. 373 (Tri. Del.) wherein Hon'ble CESTAT New Delhi has held that "Evidence – Statement – Admission/Confession is a substantial piece of evidence which can be used against the maker." I find that, in present appeals, the statements have not been retracted by the Appellants.

6.4 In view of above, the argument of the Appellants that shortage of finished goods found because of maintained daily stock register on approximate basis considering weight loss around 5% to 7% during the

manufacturing process is not tenable. I find that the affidavit filed by appellant is nothing but an afterthought to substantiate the quantity of finished goods clandestinely removed as due to higher weight loss during manufacturing process. The statements of Appellant No. 2 have not been retracted till date and hence, the statements have sufficient evidentiary value, which cannot be belied on mere bald arguments and vague affidavit. Therefore, I hold that shortage of 372.540 MTs in stock of the finished goods found on 05.05.2017 was because of clandestinely removal by the appellant. I find that the entire facts of clandestine removal of goods have been found out only during the search operation. Not maintained proper accounts of finished goods and suppressing the facts of actual clearance of finished goods in ER-1 Returns which tantamount to mis-statement and suppression of facts from the department with intent to evade payment of Central Excise duty.

7. The appellant also argued that the department wrongly worked out duty liability by considering average value of the goods. The lower adjudicating authority correctly worked out central excise duty liability under Section 4 of the Act. As already held above, the appellant had cleared the finished goods clandestinely without cover of any documents and therefore, the value of goods cleared needs to be determined as per Section 4 of the Act read with Rule 3 and Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000. I would like to reproduce the said Section 4 of the Act, which is as under:

> *"Section 4. Valuation of Excisable goods for purpose of charging of duty of excise. – (1) Where under this Act, the duty of excise is chargeable on any excisable goods with reference to their value, then, on each removal of the goods, such value shall –*
>
> a. *in a case where the goods are sold by the assessee, for delivery at the time and place of the removal, the assessee and the buyer of the goods are not related and the price is the sole consideration for the sale, be the transaction value;*
> b. *in any other case, including the case where the goods are not sold, be the value determined in such manner as may be prescribed."*

Rule 3 and Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 are as under:

> *"Rule 3. The value of any excisable goods shall, for the purposes of clause (b) of sub-section (1) of Section 4 of the Act, be determined in accordance with these rules."*
>
> *"Rule 4. The value of the excisable goods shall be based on the value of such goods sold by the assessee for delivery at any other time nearest to the time of the removal of goods under assessment, subject, if necessary, to such adjustment on account of the difference in the dates of delivery of such goods and of the excisable goods under assessment, as may appear reasonable to the proper officer."*

In view of above, value of the goods removed without valid document would be the value of such goods sold by the appellant for delivery at any other time nearest to the time of the removal of goods under assessment. In the

present appeal. I find that the lower adjudicating authority had properly and correctly taken into account the value of the finished goods as per Section 4 (1) (b) of the Act read with Rule 3 and Rule 4 of the Central Excise Valuation (Determination of Price of Excisable Goods) Rules, 2000 and thus, correctly determined central excise duty liability of Rs. 39,87,078/- vide impugned order.

7.2 It is settled law that in cases of clandestine removal, department is not required to prove the case with mathematical precision as have been held by the Hon'ble Apex Court and Hon'ble High Courts in many judgments including in the cases of Shah Guman Mal reported as 1983 (12) ELT 1546 (SC) and Kaiyoot Textiles (India) Pvt. Ltd. reported as 2008 (236) ELT 587 (SC). I find that the department has adduced sufficient evidences to establish that Appellant No. 1 & 2 were actively engaged in clandestine removal of the goods and therefore, the case laws cited by the appellants are of no help to them.

7.3 I further find that Appellant No. 1 & Appellant No. 2 have intentionally adopted unlawful means to evade payment of central excise duty and their evasive mind and mens-rea are clearly established. Therefore, I hold that Appellant No. 1 & 2 have indulged themselves in removal of excisable goods in clandestine manner with intent to evade payment of central excise duty as held by the impugned order. In view of above, I hold that Appellant No. 1 is liable to pay Central Excise duty of Rs. 39,87,058/- under Section 11A(4) of the Act along with interest at applicable rate under Section 11AA of the Act and Appellant No.1 is liable to penalty equal to Central Excise duty under Rule 25 of the Rules read with Section 11AC of the Act.

8. Regarding penalty imposed under Rule 26(1) of the Rules on Appellant No. 2, I would like to reproduce Rule 26(1) of the Rules, which are as under:

> *"RULE 26. Penalty for certain offences. — (1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.*
>
> *Provided that where any proceeding for the person liable to pay duty have been concluded under clause (a) or clause (d) of sub-section (1) of section 11AC of the Act in respect of duty, interest and penalty, all proceedings in respect of penalty against other persons, if any, in the said proceedings shall also be deemed to be concluded."*
>
> (Emphasis supplied)

8.1 Appellant No. 2 has contended that the lower adjudicating authority failed to correctly appreciate the facts of the case and has wrongly imposed penalty under Rule 26(1) of the Rules. I find that Appellant No. 2 was the key person of Appellant No. 1 and was directly involved in clandestine removal of goods. He

was looking after day-to-day functions of Appellant No. 1 and has concerned himself in matters related to excisable goods including manufacture, storage, removal, transportation, selling etc. of such goods, which he was knowing and had reason to believe that they were liable to confiscation under the Central Excise Act, 1944 and rule made there under. Therefore, I find that imposition of penalty of Rs. 3 lakhs upon Appellant No. 2 under Rule 26(1) of the Rules is proper and justified.

9. In view of above, I uphold the impugned order and dismiss both appeals of above two appellants.

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

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

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By RPAD

To

1.	M/s. Raj Steel Re-rolling Mill, GIDC, Plot No. 16-17, Vartej, District: Bhavnagar.	मैसर्स राज स्टील री रोलिंग मिल, जीआईडीसी प्लॉट नं. 16-17, वरतेज, जिला भावनगर.
2.	Shri Murarilal Rameshwardayal Gupta, Partner of M/s. Raj Steel Re-rolling Mill, GIDC, Plot No. 16-17, Vartej, District: Bhavnagar.	श्री मुरारीलाल रामेश्वरदयाल गुप्ता, पार्टनर, मैसर्स राज स्टील री रोलिंग मिल, जीआईडीसी प्लॉट नं. 16-17, वरतेज, जिला भावनगर.

प्रतिलिपि:

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

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

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

4) गार्ड फ़ाइल F. No. V2/183/BVR/2018-19