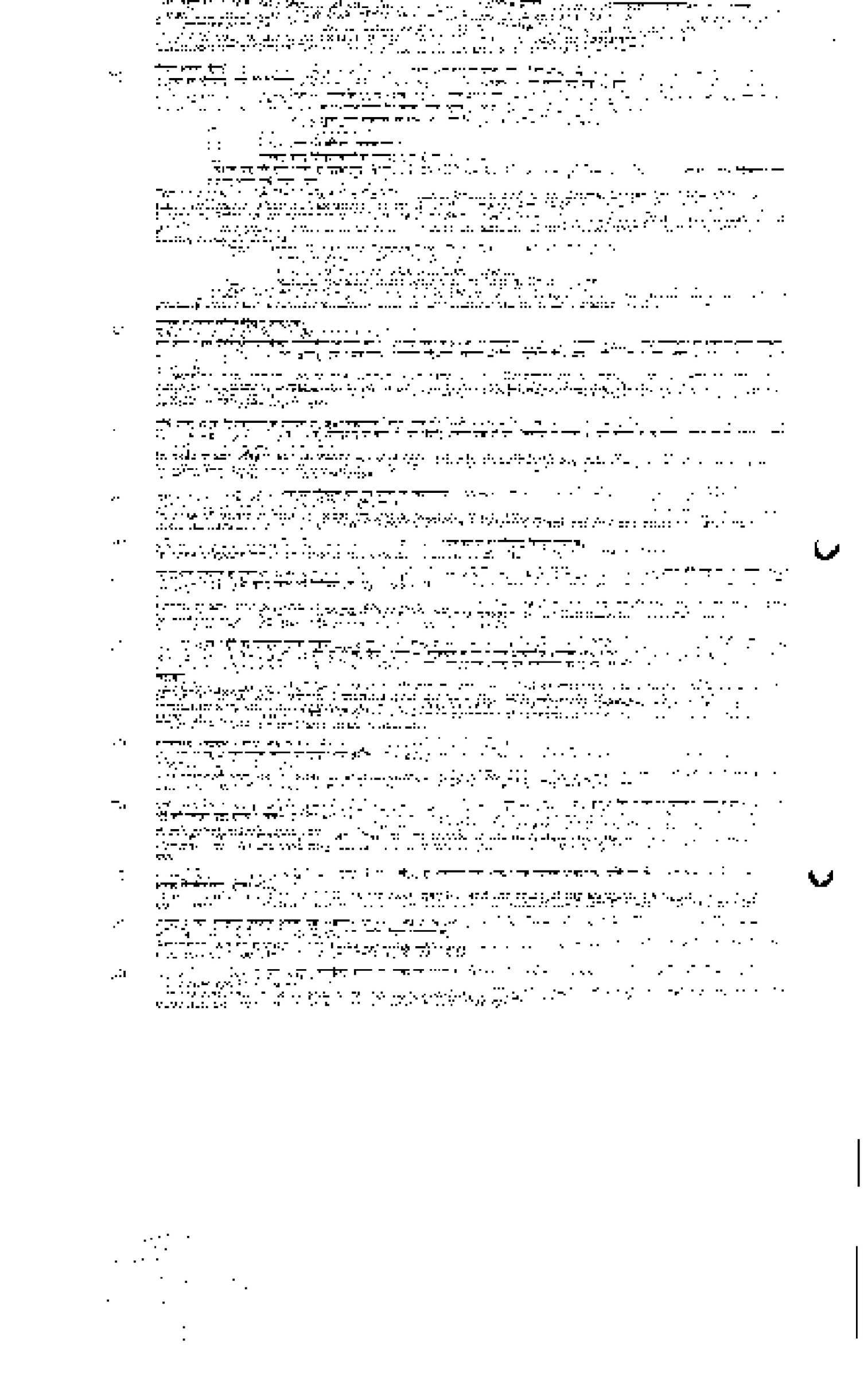
[illegible]



:: 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. 15/EXCISE/DEMAND/18-19 dated 17.07.2018 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central GST Division Bhavnagar – 1, Bhavnagar (hereinafter referred to as the lower adjudicating authority):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/181/BVR/2018-19	Appellant No.1	M/s. Vijay Steel, 207-209, GIDC-II, Sihor, District: Bhavnagar.
2	V2/182/BVR/2018-19	Appellant No.2	Shri Murarilal Rameshwardayal Gupta, Partner of M/s. Vijay Steel, 207-209, GIDC-II, Sihor, 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 [illegible] wherein the physical stock of finished goods viz. MS Angles [illegible] MTs was found short as compared to quantity shown in Daily Stock Account. Show Cause Notice No. V.15-40/Demand/Vijay Steel/16-17 dated 28.04.2017 was issued alleging clandestine clearance of goods and proposing demand of recovery of Central Excise duty of Rs. 35,45,368/- 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. 35,45,368/- was confirmed under Section 11A(4) of the Act along with interest under Section 11AA of the Act, penalty of Rs. 35,45,368/- 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)(a) of the Act and penalty of Rs. [illegible] 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 prevalent in India that the stock of the manufactured goods is being accounted for in the Daily Production Register on approximate basis; that the quantity of

final products manufactured by the Appellant was depending upon the [illegible] of the melting waste and scraps of Iron and Steel products, procured by them from various Ship Breakers of SBY Alang/Sosiya; that if the said imported ships were heavily rusted or deteriorated due to [illegible] the quality of the raw materials varied from ship to ship having no fixed [illegible] 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 material while feeding into the "Furnace" having 1500°C temperature and hence, waste and Scraps of Iron and Steel products is estimated/approximated to get the finished products; that the disputed short stock was negligible and found only due to the reasons that the stock of manufactured goods during the day was being maintained by considering the weight loss 8% to 12% approx. and hence, physically stock was not lying in the factory; that they [illegible] maintained books of account; that the quantity of finished products was [illegible] being entered into Daily Production Register and quantity of the raw material was also being ascertained on approximate basis; that balance [illegible] only due to the arithmetical calculation, which was ascertained by [illegible]; they relied upon case law of the Hon'ble Tribunal in case of Prakash Industries Ltd. reported as 2017 (358) ELT 1149 (Tri. Del); that therefore, the allegation made in the show cause notice is not correct.

(ii) The appellant had closed their manufacturing activities from 20.[illegible] due to abnormal circumstances of the company and fluctuation 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 [illegible] Appellant was involved in evasion of Central Excise duty.

(iv) It was alleged that shortage of physical stock of finished goods found in the factory was 1058.705 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 stock of raw material [illegible] as well as Daily Production Register were being maintained on approximate basis; that the authorized CA of the Bank has never reported regarding the [illegible]; that only the physical verification of the stock was ascertained with reference to the space of the finished goods shown in the factory; that [illegible] 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 evidence/factor.

(vi) That the allegation made on basis of stock verification report of CA the Bank (i.e. third party evidences); that the burden to prove clandestine removal is on the department, which has not been proved.

(vii) 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. 25,45,368/-; that the department simply worked out evasion of duty by considering the 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 placed any evidence to justify the rate taken to determine the duty liability of Rs. 25,45,368/-; that the average value is not justifiable without any material evidences; that the value of Iron & Steel Products always fluctuates on day to day basis; therefore, the value ascertained by the department for evasion of Central excise duty of Rs. 25,45,368/- is not justifiable.

(viii) The statement dated 07.02.2017 of Shri Niraj Jagdishbhai Joshi, Relation Manager (MD), R. M. M. E. 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 P. Gohil, 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 so-called demand issued on the basis of the figures shown in the Daily Production Register is not justifiable.

(ix) The department has not disclosed as to which fact has been suppressed by them with intent to evade payment of Central Excise duty; that the Appellant has always disclosed the true facts in the periodical monthly ER-1 Returns, ER-6 Returns and audited 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.

(x) The demand of Central Excise duty of Rs. [illegible]/- is not sustainable 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.

(xi) 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 [illegible].2015 of the Hon'ble CESTAT, Ahmedabad in the case M/s. Rajrang Castings Pvt. Ltd.

- Om Aluminium Pvt. Ltd. – 2011 (3[illegible]) ELT 331 (Tri. Ahmd.)
- Ramdevji Steels Pvt. Ltd. – 2017 (3[illegible]) ELT 128 (Tri. Del.)
- JMI Abrasives Pvt. Ltd. – 2017 (348) ELT 285 (Tri. Del.)
- Akshay Rolling Mill Pvt. Ltd. – 2016 (342) ELT 277 (Tri. Kolkata)
- [illegible] Paints – 2013 (297) ELT 239 (Tri. Del.)
- [illegible] Trunk Stampers Pvt. Ltd. – 1995 (77) ELT 825 (Tribunal)
- Rockey on Synthetics – 2003 (158) ELT 337 (Tri. Del.)
- Shree Sidhbali Ispat Ltd. – 2017 (357) ELT 724 (Tri. Mumbai)

4. The Personal Hearing in the matter was attended by Shri M. K. Mistry and Shri G. H. Qureshi, both consultants, who reiterated the grounds of appeal and also made written submission; submitted that there are no evidences against them for clandestine clearances but on paper stock being shown due to bank overdraft/cash flow and they requested to be allowed.

4.1 The Appellant vide letter dated 15.04.2019 made written submission stating, inter alia, saying that they reiterate the submissions made in the appeals and further stated that the burning loss is incurred depending on the use of [illegible] into re-melting furnace; that a Certificate dated 16.04.2019 of a Registered Chartered Engineer submitted by them; that they further relied upon following case laws:

- 2009 (238) ELT 495 (Tri. Ahmd.) – [illegible] Rolling Works
- 2015 (317) ELT 285 (Tri. Mumbai) – [illegible] Forging Pvt. Ltd.
- 2015 (318) ELT 175 (Tri. Del.) – Shyam Udyog Ltd.
- 2015 (322) ELT 723 (Tri. Del.) – Om [illegible] Rolling Mills
- 2017 (357) ELT 684 (Tri. Chen.) – [illegible] Structures Pvt. Ltd.
- 2016 (337) ELT 3[illegible] (Tri. Del.) – Shree [illegible] Pvt. Ltd.
- 2016 (343) ELT 385 (Tri. Del.) – Gopal Steel Industries
- 2007 (217) ELT 495 (Tri. Del.) – Narmada Steels 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 Memorandum 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 1058.705 MTs was found as per Panchnama dated 03.09.2015 because they maintained daily stock account register on approximate basis and not on the basis of actual quantity; that there was burning loss was from 5% to 7% 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 1058.705 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 1060.705 MTs., whereas only 2.000 MTs. quantity of the finished goods was physically found in the factory at the time of search on 03.09.2015. I find that Appellant No. 1 has been filing monthly periodical stock statements/reports showing inventory of raw materials and finished goods, book debts etc. with the respective banks for the purpose of financing; 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 (RM) of SBI, Bhavnagar and Chartered Accountant appointed by the Bank were recorded, as per details mentioned in Para No. 9.8 and 9.9 of the impugned order as under:

> *"9.8 Further, I find that Shri [illegible], Chartered Accountant, M/s. R. G. Mehta & Co., Bhavnagar in his statement dated 07.02.2017 has admitted the methodology of quantification of stocks and there was only marginal difference in quantities of finished goods reported by the Noticee in their monthly stock statement submitted to bank and physically verified by them.*
>
> *9.9 I find that Shri Niraj Joshi, Relation Manager (RM), SBI, Bhavnagar in his statement dated 07.02.2017 admitted that bank officers, accompanied with partner/authorized person of Noticee No. 1 firstly 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 etc. being taken and reconciled w.r.t. position of last stock statement by adding receipts and deducting issues from subsequent receipts and deliveries as recorded in their books/Registers; these quantities of stock are then physically verified and discrepancy, 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 frame thereunder. I find that these facts have affirmed by Appellant No. 2 vide his statements dated 04.09.2015 and dated 27.02.2017; that Appellant No. 2 (Partner of Appellant No. 1) has categorically admitted, on 03.09.2015 before the Panches that physical stock of the finished goods was available 2.000 MTs. only in the factory premises instead of 1090.705 MTs. as shown closing stock in ER-1 for the month of Aug. 2015; that all Panchnamas 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 content narrated therein. These are admitted facts by Appellant No. 2 (Partner of Appellant No. 1) in his statements dated 04.09.2015 and dated 27.02.2017 and admitted facts need not be proved as held by the Tribunal Mumbai in the case of Alex Industries reported as 2008 (230) E.L.T. 73 (Tri. - Mumbai), wherein the Hon'ble Tribunal has held that *"Statements by proprietor and his employees which were never retracted are sufficient evidence as statement of co-accused is admissible-Confessional statement before Customs Officers is admissible and binding - Allegation that the statement obtained under duress and coercion requires evidence, which has not been done - Assessee's plea of transfer of Rs. 25 lakhs towards all three units is of no use as the Director and Managing Director has admitted duty liability on behalf of all three units - no need of information as they have not given any information otherwise etc."*

6.3 I would like to further rely on an 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, [illegible] 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 substantive 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/pleas of the Appellants about shortage of finished goods found because of maintained daily stock register on approximate basis considering weight loss about 8% to 12% 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 brushed aside by said arguments and vague affidavit. Therefore, I hold that shortage of 1068.705 MTs in stock of the finished goods found on 23.09.2015 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 has correctly worked out duty liability under Section 4 of the Act. As already held above, the appellant has cleared the finished good clandestinely without cover of any licit documents and therefore, the value of disputed goods is 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 purposes 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."*

7.1 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 related to the time of the removal of goods under assessment. In the present appeal, I find that the lower adjudicating authority has correctly and correctly taken rate of 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. 25, 5,368/- 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 (13) ELT 1543 (SC) and Arihant Textiles (India) Pvt. Ltd. reported as 2009 (235) ELT 387 (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 said issue raised 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. 25,45,368/- 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(i) of the Rules on Appellant No. 2, I would like to reproduce Rule 26(i) of the Rules, which reads as under:

> "RULE 26. Penalty for certain offences. - (1) Any person who acquires possession of or is in any way concerned in transporting, removing, depositing, 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 proceedings for the person liable to pay duty have been concluded under clause (a) or clause (b) 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 this case and has wrongly imposed penalty on

him under Rule 26(1) of the Rules. I find that Appellant No. 2 was the key person of Appellant No. 1 in the capacity of active partner 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 rules made there under. Therefore, I find that imposition of penalty of Rs. 2 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.

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

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

(कुमार संतोष)
प्रधान आयुक्त (अपील्स)

By RPAD

To

1.	M/s. Vijay Steel, 207-208, GIDC-II, Sihor, District Bhavnagar.	मेसर्स विजय स्टील, 207-208, जीआईडीसी-II, सिहोर, जिला भावनगर,
2.	Shri [illegible] Gupta, Partner of M/s. Vijay Steel, 207-208, GIDC-II, Sihor, District Bhavnagar.	श्री [illegible] गुप्ता, पार्टनर मेसर्स विजय स्टील, 207-208, जीआईडीसी-II, सिहोर, जिला भावनगर,

प्रति:-

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

(2) 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, [illegible] को आवश्यक कार्यवाही हेतु।

(4) गार्ड फ़ाइल [illegible]