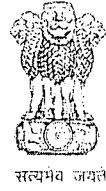




::प्रधानआयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर केन्द्रीय उत्पाद शुल्क:  
O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE



द्वितीय तल,जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan  
रेस कोर्स रिंग रोड / Race Course Ring Road  
राजकोट / Rajkot - 360 001

Tele Fax No. 0281 - 2477952/2441142 Email: cexappealsrajkot@gmail.com

सत्यमेव जयते

रजिस्टर्ड डाक ए.डी.द्वारा :-

क	अपील / फाइलसंख्या/ Appeal /File No.	मूल आदेश सं / O.I.O. No.	दिनांक/ Date:
	V2/112 & 111/BVR/2018-19	52/Excise/Demand/17-18	2/28/2018

ख अपीलआदेशसंख्या(Order-In-Appeal No.):

**BHV-EXCUS-000-APP-161-TO-162-2019**

आदेश का दिनांक / Date of Order:	<b>18.06.2019</b>	जारी करने की तारीख / Date of issue:	<b>19.06.2019</b>
------------------------------------	-------------------	--	-------------------

श्री कुमार संतोष, प्रधान आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals),Rajkot

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर,  
राजकोट / जामनगर / गांधीधाम द्वारा उपरलिखित जारी मूल आदेश से सृजित: /  
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise/ST / GST,  
Rajkot/Jamnagar/Gandhidham :

घ अपीलकर्ता & प्रतिवादी का नाम एवं पता /Name & Address of the Appellants & Respondent :-

1. M/s Navbharat Steel Re- Rolling Mill, Survey No. 268/1, Bhavnagar- Rajkot Highway, Sihor- 364240, Dist: Bhavnagar.
2. Shri. Bhagirathsinh G. Sarvaiya, (Partner of M/s Navbharat Steel Re- Rolling Mill, Survey No. 268/1, Bhavnagar- Rajkot Highway, Sihor- 364240, Dist: Bhavnagar).

इस आदेश(अपील) स ब्याथेत् कोई ब्याके निम्नलोखेत तरीके म उपयुक्त प्राधिकारी / प्राधिकरण क समक्ष अपील दायर कर सकता है।/  
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

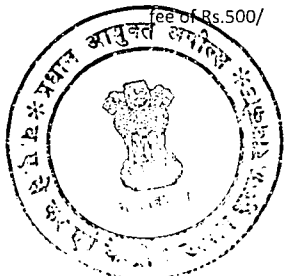
(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है।  
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरणमूल्यांकनसेसम्बन्धितसभीमामलेसीमाशुल्क,केन्द्रीयउत्पादनशुल्कएवंसेवाकरअपीलीयन्यायाधिकरणकीविशेषपीठ,वेस्टब्लॉकनं2,आरकेपुरम,नईदिल्ली, कोकीजानीचाहिए।/  
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठका,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016को की जानी चाहिए।/  
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील)नियमवली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/  
The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of dutydemand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994की धारा 86(1) के अंतर्गत सेवाकर नियमवली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग, ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजनिक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/  
The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/



- (i) विन अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उक्त माथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। / The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.
- (ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की विन्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जमाना विवादित है, या जमाना, जब केवल जमाना विवादित है, का भुगतान किया जाए, वशत कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।  
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है  
(i) धारा 11 डी के अंतर्गत रकम  
(ii) सेनवेट जमा की ली गई गलत राशि  
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम  
- वशत यह कि इस धारा के प्रावधान विन्तीय (सं- 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होंगे।  
For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,  
Under Central Excise and Service Tax, "Duty Demanded" shall include :  
(i) amount determined under Section 11 D;  
(ii) amount of erroneous Cenvat Credit taken;  
(iii) amount payable under Rule 6 of the Cenvat Credit Rules  
- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.
- (C) भारत सरकार कोपुनरीक्षण आवेदन :  
**Revision application to Government of India:**  
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलों में, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, मसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /  
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:  
(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। /  
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse  
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर बरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिवेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /  
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.  
(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /  
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.  
(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो झूटी क्रेडिट इस अधिनियम एवं इसके त्रिभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा विन अधिनियम (नं 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समयावधि पर या बाद में पारित किए गए हैं। /  
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.  
(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संघर्षण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साध्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /  
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.  
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।  
जहां संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000/- का भुगतान किया जाए।  
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.  
(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filed to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.  
(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /  
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.  
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /  
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.  
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने में संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट [www.cbec.gov.in](http://www.cbec.gov.in) को देख सकते हैं। /  
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website [www.cbec.gov.in](http://www.cbec.gov.in).



:: ORDER IN APPEAL ::

The present two appeals have been filed by the Appellants (*herein after referred to as* "Appellant No. 1 & Appellant No. 2) as detailed in the Table below against Order-in-Original No. 52/EXCISE/DEMAND/17-18 dated 28.02.2018 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner of Central Excise, Rural Division, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority'):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/112/BVR/2018-19	Appellant No.1	M/s. Navbharat Steel Re-Rolling Mill, Survey No. 268/1, Bhavnagar-Rajkot Highway, Sihor - 364 240, District: Bhavnagar.
2	V2/111/BVR/2018-19	Appellant No.2	Shri Bhagirathsinh G. Sarvaiya, Partner of M/s. Navbharat Steel Re-Rolling Mill, Survey No. 268/1, Bhavnagar-Rajkot Highway, Sihor - 364 240, District: Bhavnagar.

2. The brief facts of the case are that search operations conducted at the premises of brokers, various manufacturers and transporters revealed that Appellant No. 1 manufactured MS Round/TMT Bars were not mentioned in daily stock account; that they removed finished goods without cover of invoice and without payment of central excise duty. Show Cause Notice No. V/15-90/Dem/HQ/2015-16 dated 22.02.2016 was issued proposing demand of recovery of Central Excise duty of Rs. 6,66,421/- 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 and for imposition of penalty under Section 11AC(1)(a) of the Act and Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') upon Appellant No.1 and proposed to impose penalty under sub-rule (1) of the Rule 26 of the Rules upon Appellant No. 2. The Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order, under which (i) Central Excise duty of Rs. 6,66,421/- was confirmed under Section 11A(4) of the Act along with interest



under Section 11AA of the Act and penalty of Rs. 6,66,421/- was imposed under Section 11AC(1)(a) of the Act with reduced penalty option upon Appellant No. 1 and Penalty of Rs. 1,00,000/- under Rule 26(1) of the Rules was imposed on Appellant No. 2 i.e. Shri Bhagirathsinh Girishsinh Sarvaiya, Partner of Appellant No. 1.

3. Being aggrieved with the impugned order, Appellant No.1 & 2 have preferred appeals on various grounds as under:-

Appellant No. 1:

- (i) The lower adjudicating authority failed to appreciate the facts of the case and submissions made by the appellant and issued the impugned order without considering their written reply and various orders/judgements cited by them.
- (ii) It is well-settled principle of law that charges of clandestine removal are serious charges and cannot be established on the basis of diaries of unverified nature; that the charges of clandestine removal are required to be proved by sufficient evidences and cannot be decided on the basis of documents foolproof evidence and relied upon decision of the Hon'ble Tribunal in case of Tejwal Dyestuff Industries reported as 2007 (216) ELT 310 (Tri.-Ahmd.) duly confirmed by the Hon'ble Gujarat High Court reported as 2009 (234) ELT 242 (Guj.). That they never cleared the excisable goods in clandestine manner as alleged in the show cause notice and upheld in the impugned order; that the subject case has been developed on imaginary and on assumptions and presumptions without corroborative evidences and on the basis of third party's evidence only.
- (iii) The lower adjudicating authority failed to collect corroborative documentary evidences from the appellant; that the subject case is purely based upon the records/documents/diaries and misc. papers seized from the premises of Shri Himanshu Jagani, Broker and his statements; that inquiry carried out with third party and hence, not possible for the appellant to explain on write up of Shri Himanshu Jagani; that the Department neither provided list of relied upon documents in the show cause notice and names appearing in the pocket diaries/notebooks seized from the brokers; that no evidence whatsoever, produced by the department, of alleged illicit transaction; that burden of proof is on the department; that the said burden was not discharged; that they deny all the charges/allegation made against them regarding their involvement in clandestine removal of the goods; that the investigating officer failed to gather





any non-existent evidence, albeit for a very meager quantity, to prove their involvement in clandestine removal of the goods; that the department failed to provide corroborative evidences and produce movement of cash between consignor and consignee; that money flow back not established in case of suppliers/purchasers; that no name of any purchaser of so-called clandestine removal has been placed on record; that duty on account of clandestine removal cannot be fastened against the appellant based upon recovery of some private records from the premises of a Broker as the same are required to be supported with material corroborating and independent evidences; that in this no such evidence is available.

(iv) Shri Himanshu Jagani and Shri Yogesh Sanghvi, Brokers have stated that they had not brokered the clandestine supply of goods from the appellant not they have stated that they have purchased the dutiable goods clandestinely from the appellant; that Appellant No. 2, partner of the Appellant No. 1 never stated that they sold the goods clandestinely; that the appellants produced all the evidences as and when called for and stated the correct facts during the investigation and therefore, it is not correct that the appellant did not produce evidence during the investigation; that no transporter has confessed that they had transported the goods cleared clandestinely by the appellants; that therefore, the findings recorded by the Assistant Commissioner are vague.

(v) The department did not bring proof beyond reasonable doubt to substantiate the allegations of clandestine removal based upon documents, which are not correct; that if these documents are accepted, the same would result in huge unwarranted financial liabilities on the appellant along with launching of criminal proceedings against them; that they placed reliance on case law of Tukaram Dighole reported as (2010) 4 SCC 329; Chandan Tobacco Co. – 2011 (270) ELT 87.

(vi) The penalty imposed under Section 11AC of the Act is not an established principle that intentions about commission of any offence are to be proved; that in present appeal, in the absence of any evidence that excisable goods manufactured by the appellant had been cleared without proper invoices by them; that no evidence was on records to establish that the appellant committed alleged acts in violation of provisions of law or with intention to evade duty; that no penalty was imposable on them when there was no malafide intent to evade payment of duty and therefore, the appellant not liable for penalty under Section 11AC (1) (c) of the Act.



**Appellant No.2:**

Appellant No. 2 contested imposition of penalty of Rs. 1,00,000/- on him on the grounds as mentioned by Appellant No. 1; that the appellant is partner of Appellant No. 1 and has not acted with any personal motive and thereby the question of personal penalty upon him is not proper; that the department has not produced any positive evidence to prove that Appellant No. 2 actively involved himself in so called clandestine removal of the excisable goods and therefore, penalty imposed on him is bad in law; that it is well settled law that when the partnership firm itself is penalized, separate penalties cannot be imposed on the partners of that firm; that firm is not a legal entity even though it has some attributes of personality; that imposing penalty on the firm is imposing penalty on partner; that they relied on case law of Swem Industries reported as 2003 (154) ELT 417 (T).

4. The personal hearing in the matter was attended by Shri Mahadev N. Vadodariya, Advocate, who reiterated the grounds of both appeals and made written submissions; that unit and partner both have been penalized which is not correct as per judgment of the Hon'ble High Court of Gujarat in case of Motabhai Iron & Steel Industries.

4.1 Appellant No. 1 and Appellant No. 2 both vide letter dated 16.04.2019 reiterated contentions made in their grounds of appeals and relied upon the following case laws:

- Shree Industries Ltd. – 2010 (261) ELT 803 (Tri.-Ahmd.)
- D. P. Ind. – 2007 (218) ELT 242 (Tri. Del.)
- Pole Star Industries Ltd. – 2007 (216) ELT 257 (Tri.-Ahmd.)
- Motabhai Iron & Steel Industries – 2015 (316) ELT 374 (Guj.)
- Ratna Fireworks – 2005 (192) ELT 382 (Tri.)
- Anjlus Dung Dung - (2005) 9 SCC 765
- Kuber Tobacco Products O. Ltd. – 2013 (290) ELT 545 (Tri.-Del.)
- Gopi Synthetics Limited – 2009 (236) ELT 731 (T)
- Omkar Textile Mills Pvt. Ltd. – 2010 (259) ELT 687 (Guj.)

4.2 No one appeared from Department despite PH notices issued to the Commissionerate.

**Findings:-**

5. I find that the Appellants filed appeals beyond period of 60 days but within further period of 30 days giving acceptable reasons. Since both appeals



Page 6 of 11



have been filed within further period of 30 days prescribed under Section 35 of the Act, I condone delay in filing appeals and proceed to decide the appeals on merits.

5.1 I also find that the appellants have deposited 7.5% of demand/penalty as prescribed under Section 35F of the Act, as claimed by them in Appeal Memorandum and no contradiction reported by the Commissionerate in this regard.

6. 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 is whether the impugned order, in the facts of this case, confirming demand and imposing penalty on both the Appellants is correct or otherwise.

7. I find that coordinated searches were conducted and various incriminating documents like various diaries, files, loose papers, etc. and lorry receipts, booking/trip registers etc. recovered from the premises of brokers, transporters. The investigation revealed that the Appellants had indulged themselves in violation of Central Excise law as detailed in the Show Cause Notice. The appellants claimed that the adjudicating authority, while passing the impugned order, has ignored the submissions made by them, however, I find that the lower adjudicating authority has discussed their submissions and also given his detailed findings in the impugned order.

7.1 I find that Appellant No. 2 (Partner of Appellant No.1) was shown Panchnama dated 12.09.2012 drawn at the office premises of Shri Himanshu Jagani, Broker as well as Panchnama dated 06.10.2012 drawn at the residence of Shri Yogesh Sanghvi, Broker and Panchnama dated 21.03.2012 drawn at office premises of Shri Radhe Steel (Prop. Virsingh) along with all relevant documents recovered from the premises of Brokers, Transporters and their statements; that he has specifically stated that he had seen all Panchnamas and other evidences in form of documents recovered from Brokers, statements of various transporters and brokers, annexures prepared on the basis of investigation conducted; that he had perused these documents seized and statements made by others before giving his testimony about the truthfulness and correctness thereof. It is seen from the statements of Shri Himanshu Jagani,



Broker, Shri Yogesh Sanghvi, Broker and Shri Veersingh Bhadouriya, Broker that the documents that were in the form of diaries maintained by them which contained daily transactions carried out by the Appellants, including clandestine purchases/sales/removal of goods. Appellant No. 2 was also given full opportunity to examine various documentary evidences duly corroborated by the oral evidences collected from Shri Himanshu Jagani, Broker, Shri Yogesh Sanghvi, Broker and Shri Veersingh Bhadouriya, Broker. At the time of recording of statement of Appellant No. 2, he was shown the Panchnamas and also various statements given by Brokers and Transporters etc. and Annexures prepared on the basis of investigation conducted in respect of records seized from Brokers showing details of the transactions carried out through Brokers by Appellant No.1. The seized diaries of the Brokers and statements of all involved prove that Appellant No. 1 had removed the goods clandestinely with the help of Appellant No. 2 and Shri Himanshu Jagani, Broker, Shri Yogesh Sanghvi, Broker and Shri Veersingh Bhadouriya, Broker, and all admitted transfer of cash. I find that the Appellant No. 2 categorical admitted in his statements dated 28.03.2013 and dated 23.04.2015 that Appellant No. 1 removed the finished goods without cover of invoices and without payment of central excise duty in respect of entries (as per Annexures to Panchnama dated 12.09.2012 and dated 06.10.2012) and for that they received payment in cash. These are substantial evidences on record, which can't be overlooked on basis of arguments only. I find that the investigation has clearly corroborated evidences for systematic evasion of Central Excise duty by Appellant No. 1 with active support of Appellant No. 2 and involved Brokers. It is proved beyond doubt that Appellant No. 1 has evaded Central Excise duty of Rs. 6,66,421/- as detailed in Annexure of the Show Cause Notice. The records show that Brokers whose statements were perused by Appellant No. 2 before giving his own statements, have never filed any retraction at any point of time and all these evidences substantiating the charges against Appellant No. 1 & 2 are valid, admissible and legal in the eyes of law.

7.2 I also find that investigation proved the authenticity of records seized from the Brokers, and duly corroborated the same with records seized from other premises. Paras 4.6 to 4.12, 4.15 to 4.19, 4.22 to 4.24 and 4.26 to 4.36 of the impugned order have illustrated the facts and details as to how Appellant No. 1 has removed the finished excisable goods clandestinely with the help of Appellant No. 2 and Brokers.






7.3 Regarding demand of duty on the basis of diaries recovered from the brokers, it has been contended that the demand made on the basis of third party documents is not sustainable, I find that the diaries maintained by the brokers have recorded licit and as well as illicit transactions and many transactions recorded in the diaries, invoices have actually been issued by Appellant No. 1, which establishes the authenticity of the diaries and other records recovered from the brokers. The brokers have also admitted to have purchased the goods from Appellant No. 1 without invoices. Thus, the case is based not only on third party evidences but duly corroborated by other evidences. Appellant No. 2 (Partner of Appellant No. 1) has, in his statements admitted that they had cleared the goods without issue of Central Excise invoices and without payment of Central Excise duty and these statements have never been retracted and hence, have full evidentiary value. The combined effect of all such evidences establish that the evasion of Central Excise duty has taken place and both Appellants have indulged themselves in it. The contention made by the Brokers has never been retracted. It is on record that all transactions were recorded in ciphered and coded manner, and the case was made out after deciphering and decoding the same. The transactions recorded in diaries seized from the Brokers were further corroborated with relevant records. Therefore, these are vital and crucial evidences as per the Indian Evidence Act, 1872 and are sufficiently proving the case against the Appellants.

7.4 Regarding buyers of such goods, it is seen that the seized documents/diaries do not show full names/addresses of the buyers. Therefore, no investigation could be conducted at the end of buyers but this in itself does not absolve the Appellants from their act of out and out indulgence of evasion of Central Excise duty by clandestinely cleared the excisable goods without central excise invoices and without payment of Central Excise duty. It is settled law that in cases of clandestine removal, department is not required to prove the cases 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 1546 (SC) and Aafloat Textiles (India) Pvt. Ltd. reported as 2009 (235) ELT 587 (SC).

7.5 In view of above, 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 them are of no help to them.

7.6 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. 6,66,421/- 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.

7.7 In view of above, I find that Appellant No. 1 with active support of Appellant No. 2 has evaded payment of Central Excise duty by way of clandestine removal of goods and hence, the impugned order has to be held as correct, legal and proper in respect of both the Appellants.

8. Regarding penalty imposed under Rule 26(1) of the Rules on the 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 establish the manner in which he has abated the so called evasion of Central Excise duty and thus 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 as well as undervaluation of the goods by Appellant No. 1. 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 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 reject both appeals.

९.१ अपीलकर्ताओ द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

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

*[Handwritten Signature]*  
19/6/19

*[Handwritten Signature]*  
18/6/19  
(कुमार संतोष)  
प्रधान आयुक्त (अपील्स)

By RPAD

To

1.	M/s. Navbharat Steel Re-Rolling Mill, Survey No. 268/1, Bhavnagar-Rajkot Highway, Sihor - 364 240 Dist: Bhavnagar.	मेसर्स नवभारत स्टील रोलिंग मिल, सर्वे नं. २६८/१, भावनगर-राजकोट हाइवे, सीहोर, - ३६४ २४०, जिल्ला-भावनगर.
2.	Shri Bhagirathsinh G. Sarvaiya, Partner of M/s. Navbharat Steel Re-Rolling Mill, Survey No. 268/1, Bhavnagar-Rajkot Highway, Sihor - 364 240 Dist: Bhavnagar.	श्री भगीरथसिंह जी. सरवैया, मेसर्स नवभारत स्टील रोलिंग मिल, सर्वे नं. २६८/१, भावनगर-राजकोट हाइवे, सीहोर, - ३६४ २४०, जिल्ला-भावनगर.

प्रति:

- (1) प्रधान मुख्य आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, अहमदाबाद क्षेत्र, अहमदाबाद को जानकारी हेतु।
- (2) आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर को आवश्यक कार्यवाही हेतु।
- (3) सहायक आयुक्त, केन्द्रीय वस्तु व सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल, जूनागढ़ को आवश्यक कार्यवाही हेतु।

✓ (4)

गार्ड फ़ाइल

(5) F. No. V2/111/BVR/2018-19

