

3
IN ORDER IN APPEALS

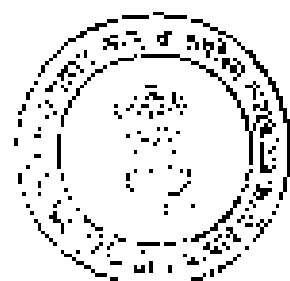
The below mentioned appeals have been filed by the Appellants (hereinafter referred to as 'Appellant No. 1' to Appellant No. 4') as detailed in the Table below against Order in Original No. 21 V-DCEL-5-200-CC 51 2017-18 dated 16.02.2018 (hereinafter referred to as 'the impugned Order') passed by the Joint Commissioner, Centre No. 1, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority'):

S. No.	Appeal No.	Appellant No.	Name of the Appellant
1.	2017/2019-19	Appellant No. 1	Sri Kanchan Arvind Shah Retail, Proprietor of M/s. Shree Shipra Enterprises, 201, 5/1/2017 Police, General Class, Wagholwad Road, Bhavnagar - 361001.
2.	2017/2019-19	Appellant No. 2	Sri Vinod Generalist Retail, Flat No. 102, Laxmi Pura City, Opp. Vidya Park, Bhavnagar - 361001.
3.	2017/2019-19	Appellant No. 3	Sri Sanjeev Gupta, Proprietor of M/s. K. C. Gupta & Co. Musicians, Manji Gubrakheri, P.O. Panchganga, Sarda Taluka.
4.	2017/2019-19	Appellant No. 4	Sri Nishanta Anshul Karia, Partner of M/s. Nishant Meas. Luggage, 4700, Leek Road, Wagholwad Road, Bhavnagar - 361001.

1. The brief facts of these appeals are that M/s. Sri Krishna Steel Corporation, Plot No. 102, Ship Docking Yard, Sochara, District Bhavnagar (hereinafter referred to as 'the Unit') was engaged in the process of obtaining goods and materials by breaking ships, vessels and their loading structures, with an aim to manufacture items of Value 9 of Section XX 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 under the provisions of Central Credit Rules, 1986 (hereinafter referred to as 'the CCR'). Sri NIKHIL Gupta, Partner of the Unit was alleged to have clandestinely diverted the excisable goods and avoided payment of Central Excise Duty. Appellant No. 1, Appellant No. 2 and Sri Harant Meas. were makers, dealer when the goods were allegedly cleared clandestinely by the Unit. Appellant No. 3 & Appellant No. 4 were buyers of the excisable goods clandestinely cleared by the Unit.

2. The officers of the Directorate General of Central Excise Intelligence (hereinafter referred to as 'DGCEI') gathered intelligence indicating that some ship breaking units of Manjivadiya were engaged in evasion of Central Excise duty by way of clandestine removal of the goods from the holding M/s. diversion of goods, undervaluation of goods etc. with support of some brokers.

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These brokers were obtaining orders from different Rolling Mills/Furnace units and getting these materials dispatched through Transporters 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 Central Excise without any physical supply of such goods. DGCI conducted extensive search at the premises of brokers and manufacturers at Dhanuagar and recovered several incriminating documents. Search was also conducted at the residence and office premises of Shri Bharat Sheth as well as Appellant No. 1 & Appellant No. 2 and various incriminating documents were recovered. The investigation revealed that the unit had clandestinely cleared the excisable goods and fraudulently passed on the excise duty without physical supply of the excisable goods to the active head of Shri K. K. Gupta, Partner of the unit, to pay Appellant No. 3 & Appellant No. 4 and brokers - Shri Bharat Sheth and Appellant No. 1 and Appellant No. 2.

12. The investigation led to issuance of Show Cause Notice No. 2017/242026/8120/3-14 dated 31.04.2013 concerning recovery of Central Excise duty of Rs. 50,40,739/- from the unit under proviso to Section 14 (1) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act'), along with interest under Section 11B/Section 11A of the Act and for imposition of penalty under Section 11C/Section 14C(1)(c) of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules'), imposition of pecuniary penalty on Shri K. K. Gupta, Partner of the unit, penalty on Appellant No. 1 & Appellant No. 2, Broker under Rule 26(1) and Rule 26(2) of the Rules and penalty on Appellant No. 3 & Appellant No. 4 under Rule 26(1) of the Rules. The said S.C.N. was adjudged by the lower adjudicating authority vide impugned order concerning Central Excise duty of Rs. 50,40,739/- along with interest and imposed penalties on the unit and Partner of the unit and Shri Bharat Sheth. Brokers also imposed penalty of Rs. 24,15,354/- and Rs. 36,43,411/- on Appellant No. 1 & Appellant No. 2 under Rule 26(1) and Rule 26(2) of the Rules respectively; imposed penalty of Rs. 67,040/- on Appellant No. 3 and penalty of Rs. 8,28,000/- on Appellant No. 4 under Rule 26(1) of the Rules.

13. Being aggrieved with the impugned order, Appellant No. 1 to Appellant No. 4 preferred appeals vide nos. on the following grounds:

Appellant Nos. 1 & 2:

(i) The appellants had requested to cross examine Appellant No. 4. The lower adjudicating authority instead of granting permission of cross examination,

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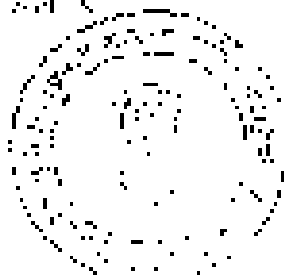
not indicated the case and thereby the impugned order has been passed without following principles of natural justice. They relied on following precedents in support of their contention.

- Sahakar Agencies - 2001 (129) F.T. 66 (Tribunal)
- Chandrasekar - 1990 (12) LIT 288 (Trib.)
- Taxpayers' Schemes - 2001 (201) LIT 588 (Tribunal)
- Saxena Charities - 2001 (201) LIT 271 (Tribunal)

(ii) The impugned order has not dealt with the pieces made in written copy and the judgments affirmed so 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 cursorily and mechanically dealt with the pieces of the appellants; that the findings are hasty and 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 refer to the various pleas made by them in reply to SOA and wider submission filed before the adjudicating authority.

(c) Regarding findings recorded at Para 3.10.1 & Para 3.10.2 of the impugned order, the appellants submitted that the entries made in the diary received from the masters of the applicants are statements written by the appellants after complying with the concerned ship broker, that regarding findings recorded at Para 3.10.3 of the impugned order, the appellants submitted that the department neither provided any list nor relied in SOA in which they have listed documents like number of enclosed copies and names appearing in the pocket diaries/notebooks seized from the brokers, that there is no evidence produced by the department of alleged illicit transaction, that the burden of proof is lying on the department; that regarding findings recorded at Para 3.10.5 & 3.10.6 of the impugned order, the appellants submitted that the allegation that the ship broker has cleared the excisable goods clandestinely through the appellants is not proved as the appellants have not admitted to the fact, nor any documentary evidence was produced suggesting that the appellants were involved in clandestine removal of any such goods involving Central Excise duty of Rs. 24,15,354/- as mentioned in Annexure-KA to the SOA; that there had to be an evidence regarding sale of so called sturdly packed goods through the appellants to some persons, that the appellants have neither purchased nor brooked the excisable goods clandestinely cleared from the premises of the ship

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however and also the authorized signatory of the ship broker has never stated that they have seen the goods concerned; that the deposition made by different person in their statements are not relevant; that none of the witnesses have professed that the goods manifestly decreed by the appellants had been transported by them or none of the purchasers have professed that the said goods were purchased by them or none of the bargades professed that amount has been paid to the appellants;

(i) The appellants are not covered under rule 25(1) of the Rules as the appellants have not dealt with the excisable goods in any manner; that the sole question in a writ 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 confiscation under the Act or Rules or has been in any way concerned in making or procuring or any other manner deal with the excisable goods; that the appellants relied on decisions in the case of *Godraj Boyer & Mfg. Co.* reported as 2132 (1954) F. 131 (1) and *Kam Nath Singh* reported as 2000 (1951) F. 1175 (1) (1951) 107;

(ii) With due prejudice to the above, the appellants submitted that the penalty imposed under Rule 25(1) of the Rules on the partner of the firm is Rs. 6,03,005/- for the alleged duty evasion of Rs. 60,40,784/- means 10% of the duty evaded and penalty imposed under Rule 26(1) of the Rules on each of the appellants is Rs. 24,15,354/- for allegedly duty evasion of Rs. 24,15,354/- means 100% of the alleged duty evaded; that this is travesty of justice and clear case of pre-determination and prejudiced attitude of quasi-judicial authority;

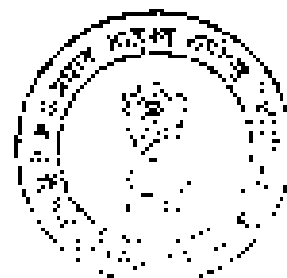
(iii) Regarding penalty under Rule 26(2) of the Rules, both appellants submitted that the lower adjudicating authority not discussed the various grounds and pleas taken by the appellants in support of their contention that they had not taken the concealment of the invoices issued by the ship broker without receipt of the excisable goods mentioned therein; the lower adjudicating authority not discussed as to how the appellants accused the ship broker in making such documents, on the basis of which the charlants availed concealment of Rs. 38,49,411/- each of them, without receiving the corresponding goods; that no corroborative evidence has been produced in the impugned order for imposing penalty under Rule 26(2) of the Rules.

Appellant No.3:

(i) The appellant submitted that during the period under dispute Proprietor of M/s. R. C. Gupta & Co. was Shri Kam Gopal Gupta who reported as 1301 (2003);

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that Shri Vinay Chandra Gupta, son of deceased Shri Ram Chandra Gupta, became proprietor of the firm as legal heir; that liability cannot be imposed on deceased person and if imposed cannot be recovered from the legal heir, that JEs relied on case of law of Tarak Nath Nayak - 1987 (2) E.T. (651); that liability imposed on proprietary firm cannot be recovered from the legal heir after the death of the proprietor as held in case of Abbey Intelligence & Security Service - 2010 (20) STR 391 (Tri.Ahmed.); Hania Macpa - 2010 (262) E.T. 705 (Tri.Mumbai); Manjiv Singh - 1995 (35) E.T. 121 (Tri.); Jaleel Ali Tawar, and others - 2011 (114) E.T. 225 (Tri.Chennai) and Modern Industries - 2008 (24) E.T. 214 (Tri.Mumbai).

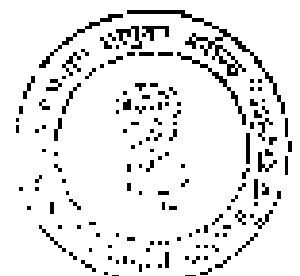
(ii) The impugned order has been passed in a mechanical way without applying mind and without considering written submissions, without supplying a copy upon respondents even without supplying the copy of statement. Appellant was registered with Central Excise Range, Kand Gobindpur, Bikaner - Kand Gobindpur under Central Excise, Chandigarh-I Commissionerate, Central Excise Division having 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 I.I.T. International Software Ltd. reported as 2011 (130) E.T. 156 (Tri. Chennai), (Cantonment Area based Cantonment Syst. (P) Ltd. reported as 2008 (116) E.T. 153 (Tri.Chennai).

(iii) Shri Ram Chandra Gupta, proprietor of the firm at the relevant time was deceased on 13.11.2011 and at the time of recording statement on 16.08.2012, his sole legal heir was the sole proprietor. It has been got signed from the legal heir that he knows everything, bank number, name of banker, name of bank/post, etc. and he had got the material clandestinely. This does not prove that the work of the investigator is lawfully done and steady. The appellant has in sworn affidavit cleared the confusion about 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 measuring with the factual position.

(iv) The appellant vide letter dated 22.05.2012 requested to the lower adjudicating authority to supply certain related loose documents but 12 single documents supplied to the appellant including statement/record of banker, statement/record of manufacturer/supplier/banker, statement/record of bank/post, 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 every office had been obtained by the appellant in his own and against fraudulent/illegal and unlawful manner.

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(iv) The scanned copy of records of the Transport has been incorporated in SCM do not contain the particular of the goods in dispute to have been received by the appellants. The department failed to supply evidence available with them from the records of Maritime Board. It has been mentioned in SCM that some record of Maritime Board is not available, entries of truck having registration of Maharashtra District are not made as entry points issued on monthly basis. The appellants failed to understand the investigation at the end of Maritime Board as no any documents, entry has been supplied to the appellants showing alleged customs duty surrenders. Without any evidence or record, statement is got signed that the appellants purchased scrap illegally without payment of Central Excise duty and against such surrenders and surrenders in manuals and against payment of cheques the appellants received same from trucking brokers through angadia from broker and sub broker jointly. The statements without any such evidences not signed through pressure tactics in the same manner and same style by copying and pasting the para verbatim which shows that whole of the investigation & Take a judicial and cannot be relied upon.

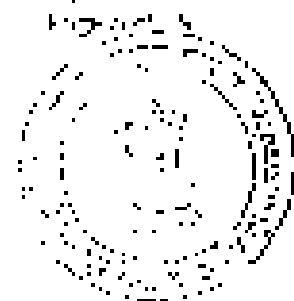
(v) Not a single truck/vehicle can carry goods without valid documents as truck/vehicle from Awaraj, Bhavnagar has to cross Sales Tax Check post of Gujarat, Rajasthan, Jharkhand and Punjab so as to reach appellants' premises. The investigation failed to exchange areas as it has not checked the records of State Government Farmers situated at the entry exit points of territory of Gujarat, Rajasthan, Jharkhand and Punjab. The department has not summoned the truck owners/truck sub-brokers in these transactions.

(vi) Once to prove a legitimate business transaction and the department cannot shift the same to appellants without exchanging its areas as law in following cases:-

- Dama Nani & Partners Ltd. - 2006 (22) 117 4079
- Sharda Tobacco Co - 2011 (31) 117 579 (T. App.)
- Anand International Ltd. - 2014 (37) 117 617 (T. App.)

(vii) Appellants had requested to supply Relied Upon Documents which are in statement of Jt. Manager of Transport Company. It has been mentioned that the department has recorded statement of SPT Marhalal Shah, Member of Psa, Vardaman Transport on 06.09.2011 and 24.09.2011 but these statements were not incorporated in the SCM. Appellants had not been supplied with the copies of the statements. Until and unless these copies are not supplied, the appellants are unable to comment on the statements and these statements cannot be relied upon by the department for imposition of penalty on the

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appellant. There is no evidence in SCN of transport company showing the goods received by appellant from the unit. It has been mentioned in SCN that statements of Broker Pradeep Gupta was reviewed on 26.08.2017 and 28.11.2017, however no evidence in the record of the said broker supplied to appellant showing above said purchases. The appellant had also requested to supply the copies of the statements of brokers which are yet not supplied.

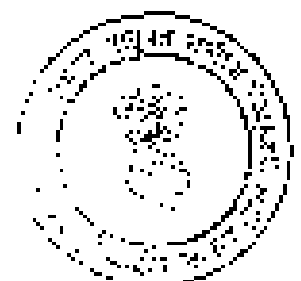
(iv) It has been alleged that appellant was agreed in the statements that sale purchases were made without cover of invoices and that payment of the cancelled or removal was made by cheques and after receipt of cheque stubs by said broker, appellant has received cash through account for such theft transactions from the broker/ship broker party. The facts stated in the statements cannot be believed as no person after 4/5 years can recollect statement and can identify the Truck 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 verified & have been accepted and agreed by the appellant and it cannot be believed that a person can give such statement recorded without records.

(v) The department cannot frame the allegation on the basis of presumptions and assumptions as held in case of *Mateh Polynes Ltd - 2004 (173) EIT 385 (Trib.)*. It is well settled law that statement of co-appellant without any corroborative evidence cannot be made the sole basis for imposing penalty on other co-appellant as held in the case of *Vikram Singh Jai's* reported as 2003 (223) EIT 619.

(vi) Some transporters who have agreed in the statements to have supplied the trucks for cancelling removal of goods and some brokers who have agreed in the statements to have supplied trucks for clandestine removal of goods. But the SCN were not issued to such transporters and brokers, therefore imposition of penalty under rule 26 of the Rules is not sustainable. No investigation was conducted at the premises of the appellant. The Hon'ble High Court of Gujarat in the case of *Khadmal Iron and Steel Industries* reported as 2011 (316) EIT 321 (Guj.) 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.

(vii) Appellant has requested for cross examination of Partner of the unit, Broker Shri Pradeep Gupta. Transporter: Mrs. Vaidhyan Transport and removal officers of UDCU, Ahmedabad. Neither cross examination was provided nor any

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reason was given in the impugned order denying cross examination and Justice the impugned order is liable to be quashed. The appellant relied upon following judgments in this regard.

- *Souder v. P. Vasudeva* – 2013 (243) I.T.D. 673
- *Gopal Srinivasulu Reddy* – 2014 (212) I.T.D. 222 (T.I. – Ahmed.)
- *A. V. Vignesh Reddy* – 2014 (210) I.T.D. 229 (T.I. – Ahmed.)
- *Srinivasulu Reddy* – 2009 (242) I.T.D. 603 (T.I. – Delhi)
- *T. V. Suresh Reddy* – 2009 (242) I.T.D. 203
- *Shrinivasulu Reddy* – 2009 (236) I.T.D. – (28H)

(xii) The penalty under Rule 26 of the Rules is inoperative when there is concealment of goods as held in the case of *Srinivas Reddy* reported as 2014 (273) I.T.D. 466 (T.I. – Delhi).

(xiii) The only evidence available with the department relied upon in the impugned order is the statements of the appellant. The appellant placed important facts which prove that pre-printed statements were obtained without showing its contents to the appellant. The lower adjudicating authority has not discussed the submission on these important facts and passed the impugned order by ignoring the same. That such lengthy statements of six persons can be recorded without their consent is proved from the affidavit filed sworn in by all the respondents. And the taxpayer saves in the computer and records of date and time of provision of TDS 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 persons making the statement even without change of para number and other facts. When under RTI Act this information was requested to supply, the Public Information of the Office of DCCEI informed that original on files are not available meaning thereby that the files are deleted to wash out the important fact. The appellant has filed written complaint to the Revenue Secretary, Government of India to take enquiry of this incident.

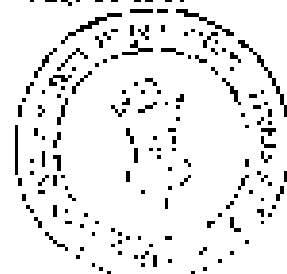
(xiv) Six persons visited DCCEI office on same day to record the statements. It has been got recorded mention of the persons Shri A. S. Gupta that he had got the material clandestinely, while his firm A.G. Gupta had received material with invoices as mentioned in Para 13 of Affidavit.

Appellant No. 4:

(i) The impugned order has not been set aside even though in written 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-

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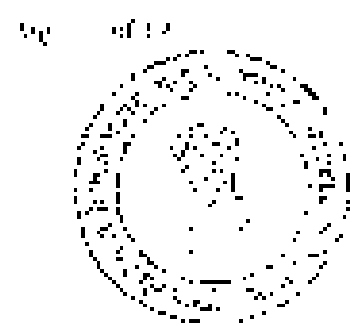
opening and/or reversed order that no findings have been recorded on the arguments raised before the lower adjudicating authority and he has merely and mechanically dealt with the pleas of the appellants; that the Tribunal are careless and self-serving in nature; that the lower adjudicating authority has shown judicial independence not assisted by the various judicial pronouncements relied upon by the appellants in support of their submissions; the appellants do not and refer to the various pleas made by them in reply to SOA and other submissions filed before the adjudicating authority.

(ii) The appellant has requested to supply copies of all the Annexures and relied upon documents as mentioned in the Annexure of the SOA but the lower adjudicating authority had not entertained their request and the impugned order has been passed. The lower adjudicating authority has contravened the principles of natural justice by not providing copies of relied upon documents.

(iii) Regarding findings recorded at Para 3.00.1 of the impugned order, the appellants submit that they never purchased any fresh goods, alleged to have been clandestinely removed, through the crew of the ship steamer or Ship Vindol Tale; that the appellants never admitted the facts that they have evaded sales tax excisable goods belonging to the ship steamer through ship breaking process in clandestine manner, i.e. the charges of clandestine removal and theft offence is required to be proved by production of circumstantial and tangible evidence; that it is well settled principle of law that charges of illegal activities are serious charges and cannot be established on the basis of mere hearsay of unverified nature; that the appellants has not purchased the goods under bonds, they cannot be liable to penalty under Rule 26(1) of the Rules; without prejudice to the above, the appellant submitted that the penalty imposed under Rule 26(1) of the Rules on the partner of the firm is Rs. 6,00,000/- for the alleged duty evasion of Rs. 60,40,780/- means 10% of the duty evaded and penalty imposed under Rule 26(2) of the Rules on each of the appellants is Rs. 8,20,500/- for allegedly duty evasion of Rs. 82,05,000/- means 10% of the alleged duty evaded.

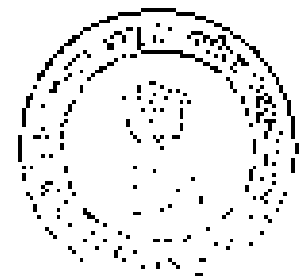
1. Personal hearing in the matter was attended by Mr. Matthew M. Vaidyanathan, learned counsel for all of Appellant No. 1, Appellant No. 2 & Appellant No. 3, who reiterated the grounds of appeals and made written submissions in all three appeals. That they have not been studied with regard upon documents Exhibit C-1 & C-2; that in absence of TSDs they are not able to properly defend themselves.

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1.1 Appellant No. 1 & Appellant No. 2 in their FI submissions stated that the lower adjudicating authority did not allow cross examination of Shri. Ramesh Rana, Partner of M/s. Manoj Meta Industries, Bhawanagar, who not provide RUDs as requested vide orders dated 31/03/2017 & dated 01/04/2017; that the lower adjudicating authority did not grant affidavits regarding hearing and thus, the impugned order is violated, being in violation of principle of natural justice; that it is noted that the department is not sure whether Appellant No. 1 was involved or Appellant No. 2 was involved in so called fraudulent transactions or not; that when such allegations or facts should have been stated and/or at least for the sake of justice the adjudicating authority should have commented or discussed these matters which has not been done in the impugned order; that both these appellants have openly mentioned and revealed their business activity and they do not undertake business jointly; that neither the SGT nor the impugned order mentions this fact and the facts to be set out for imposition of penalty under Rule 26 of the Rules; that in absence of such indices, both these appellants cannot be penalized; that the investigation has not covered the cases in explanation given by the appellants with regard to entries in the diaries; that many entries were estimates/survey of the goods lying at various points of ship breaking yards; that the lower adjudicating authority has considered merely tallying work case in diaries with case in depute office as corroboratory; that how can be holding same entries in records seized from the same person can be considered as corroboratory; that the lower adjudicating authority has failed to appreciate that the submissions of the appellant without any reason recorded in the impugned order with regard to tracking of entries in ship breaker's records; that the entries made in the diaries No. A/3, A/4, & A/10 recovered from the residence of the appellants are not final but estimates; that Appellant No. 1 and Appellant No. 2 are not liable for penalty under Rule 26(i) of the Rules since they were not involved in possession of the excisable goods removed clandestinely; that they had not done any sales besides without physical delivery of the corresponding goods and they relied on case law of Nappur Alloy Castings Limited - 2002 (142) ELT 315 (SC) wherein it was held that the imposition of penalty on the assessee, who had nothing to gain by evading payment of duty is illogical; that the judgments relied upon by the lower adjudicating authority are not relevant with the facts of this case.

1.2 Appellant No. 2 in his FI submissions stated that the investigation has not covered the cases in explanation given by Appellant No. 2 for entries in



to CD, that many entries were estimates/survey of the goods lying at various jobs at ship breaking yard; that the lower adjudicating authority has conscientiously gone through in details with these materials; revised documentation; that matching same entries in records seized from the same concern can't be considered as corroboration; that the lower adjudicating authority has failed to appreciate the submissions of the appellants without recording reasons in the impugned order for retaining of entries in ship breakers records; that the entries made in data retrieved from CD was exactly same as Appellant No. 2 in Strategy for production. According that it cannot be considered that entries retrieved from CD are of clerical in removal; that the appellant is not liable for penalty under Rule 26(1) of the Rules; that the judgments relied upon by the lower adjudicating authority are not relevant to the facts of this case.

6. Personal hearing in this matter was attended by Shri. Kakashi K. Sheth, Advocate on behalf of Appellant No. 1, who requested the grant of special and substituted written PH submissions to emphasize their arguments; that he had nothing more to say.

7. Appellant No. 2 in PH submission stated that at the time of recording of statement, 4 commitments from Flat No. 9-7; Flat No. 78; Flat No. 132 alleged to have been accepted by the appellant, received without Central Excise reasons against which the ECN has been issued, that the demands against consignments received from Flat No. 132 (of 1st shift) has been confirmed; that the Commissioner (Appeals) vide OIA No. PHV-EXCUS 100 APN 13/01/01 dated 12.06.2018 had issued penalty against consignments received from Flat No. 96; that since above statement was recorded against all 4 consignments, this appeal is required to be accepted and penalty to be quashed.

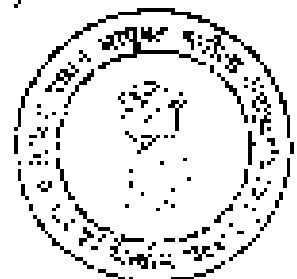
Findings:

8. Appellant No. 1, Appellant No. 2 and Appellant No. 4 have filed appeals beyond period of 60 days but within further period of 90 days. Since these appeals have been filed within further period of 90 days as mentioned under the Act, I remaine stay in filing these appeals and proceed to decide these appeals on merits.

9. 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 appeals is whether the impugned order in the facts and circumstances of this case. Imposing penalty on all four appellants is correct or otherwise.

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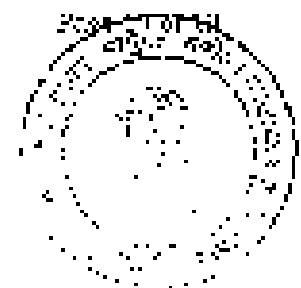


8. I find that the officers of XIC-4 conducted coordinated searches at the places of workers and transporters, from where various incriminating documents like diaries, files, loose papers, computer, pen drive, ear and Army receipts, mailing & the registers etc., were recovered. Further, searches were also conducted at the premises of a tin smelting unit, and mining mine, which resulted in recovery of various incriminating documents.

9. It has been submitted that the lower adjudicating authority while passing the impugned order has ignored the submissions made by the appellants, however, I find that the lower adjudicating authority has discussed defence submissions of the appellants in detail at various sub-para(s) of the impugned order and also given his reasons. Hence, the impugned order can't be set aside just the way appellants desire.

10. I find that it is a matter of record that statements of the partner of the unit have been recorded after all the evidences in the form of documents, diaries recovered from the premises of Smt. Bhanu Devi, Appellant No. 1 and Appellant No. 2 during the investigation, were placed before him. The partner of unit has also seen Benchmarks dated 10.06.2010 drawn at the premises of the unit and the statements given by the appellants as well as witnesses. That he has been given sufficient opportunities to cross-examine through various evidences before giving his own testimony about the truth and correctness thereof. It is seen from the statements of Appellant No. 1 and Appellant No. 2 that there are documents in form of diary maintained for clandestine removal of the excisable goods. Thus, the statements of the partner of the unit have been fully corroborated by the real evidences collected from the appellants. At the time of recording statements of the partner of the unit, he was shown Benchmarks, various statements given by appellants, tickers, transporters etc. also. He was also shown annexures prepared on the basis of investigation conducted in respect of records seized from Appellant No. 1 and Appellant No. 2 showing details of the transactions carried out through Appellant No. 1 and Appellant No. 2 by the unit. I find that from the documentary evidences i.e. seized diaries of Appellant No. 1 and Appellant No. 2 and the statements of transporters, it is proved that the unit had removed the goods through Appellant No. 1 and Appellant No. 2, clandestine nature and diversion of goods. These transactions are in line with the records of Appellant No. 1 and Appellant No. 2, which are corroborated with the records of Angad as also, with admission regarding transfer of cash amount. There are substantial evidences in the form of documentary and

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oral evidences on record resulted from Appellant No. 1 and Appellant No. 2 in respect of the Unit issued in transaction with Appellant No. 1 and Appellant No. 2. I find that the investigation merely corroborated various evidences as regards evasion of Central Excise duty by the Unit. Therefore, the Department has proved beyond doubt that the Unit has evaded duty of Rs. 56,40,788/- as detailed in reverse Annexure(s) of tax SCN. The records clearly show that Appellant No. 1 and Appellant No. 2, whose statements were perused by the partner of the Unit before going to court statements never filed any objection at the stage of trial. Therefore, all these evidences substantiate the charges against Appellant No. 1 and Appellant No. 2 and are well, permissible and legal in the eyes of law.

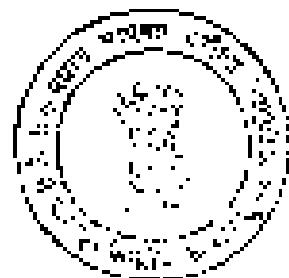
10.1 I find that the excisable goods were procured only by the Unit on cash basis from firm buyers through Appellant No. 1 and Appellant No. 2, who were the persons involved in cash transactions in respect of amount payable to the Unit either directly or through agents as Appellant No. 1 and Appellant No. 2 are the persons that Appellant No. 1 and Appellant No. 2 have also received brokerage in cash and also diversion of the excisable goods. During investigation, it is revealed that such transactions were done in cash mode against clandestine removal of excisable goods and a 5% or cash payment to the Unit. It is also observed that Appellant No. 1 and Appellant No. 2 have provided the accounts for the said purpose; that they have matched the transactions shown in seized records. Hence, Appellant No. 1 and Appellant No. 2 have concealed themselves by way of admission to clandestine clearances of excisable goods and facilitation of cash transactions between the buyers and the seller, thus, in removing, selling and in all such manner deal with excisable goods on which appropriate amount of Central Excise duty was not paid. Therefore, I find that Appellant No. 1 and Appellant No. 2 are liable to penalty under Rule 26 (1) of the CE Act.

10.2 I also find that the Unit had issued invoices in the name of some persons who only received the invoices without physical delivery of goods to such Central credit and the Unit diverted the goods procured under these invoices to other persons in contravention of what they provided. Appellant No. 1 and Appellant No. 2 are the persons who contrived such irregularity as discussed in the SCN and the impugned order. In view of above, I find that Appellant No. 1 and Appellant No. 2 are liable to penalty under Rule 26(2) of the Rules.

10.3 The facts in hand are distinguishable from the facts of cited cases

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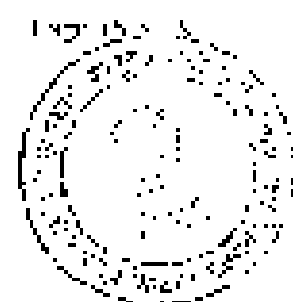


Judgment including the documents resumed/collected from Appellant No. 1 and Appellant No. 2 as well as statements of Appellant No. 1 and Appellant No. 2 were never extracted. The investigation of DCCF revealed that the excisable goods were cleared clandestinely and Appellant No. 1 and Appellant No. 2 were persons who did financial related work such as making follow up or payments against receipts made by the various buyers, banks etc. The sale proceeds of clandestinely removed goods as well as diverted excisable goods were managed by the partner of the unit and he played vital role in evasion of Central Excise duty by the unit by contravening various provisions of the Central Excise Act and Rules framed there under. The court regarding authority has given his proper findings in this regard and I am in agreement with the same as I don't find any reason to disagree with him. Appellant No. 1 and Appellant No. 2 relied upon various decisions which are not applicable in the present case.

10.4. Appellant No. 1 and Appellant No. 2 have dealt with the goods in the manner prescribed under Rule 25 of the Central Excise Rules, 2002 and therefore they are liable to penalties as they maintained diaries in coded language and have details of bills as well as bill numbers by the unit. When asked about the entries in the diaries, he gave evasive replies like, these accounts are imaginary, he was providing accounts on Sundays, etc. However, DCCF officers got the coded data decoded and all details of clandestine removal got revealed. The decoded data matched with the official data maintained in the electronic form as well as goods cleared under Central Excise invoices whereas for many transactions, no Central Excise invoices were issued and no Central Excise duty was paid. This role of unit authorizes the data maintained by Appellant No. 2, Appellant No. 1, Brother of Appellant No. 2 was handling business of registered dealers and was involved in facilitating clandestine removal through his dealer firm. The records showed such transactions for various buyers and sellers through agencies. Appellant No. 1 and Appellant No. 2 in their submissions argued that they had not been indulging in clandestine activities but accounts found in the seized computer established their involvement directly and argument of having accounting software is nothing but an attempt to get out of a net of law, duty liability. It is also a fact that any software is to be installed either in computer desktop or laptop and not in Pen drive. The collection of data resumed by DCCF with the data available in Pen Drive is neither a miracle nor is sustainable.

10.5. Appellant No. 1 and Appellant No. 2 also argued that they had given explanations for the documents to the investigating officers during search itself.

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It is observed, that Appellant No. 1 and Appellant No. 2 had not co-operated with the investigator and had given evasive replies if at all. Therefore, Jc's order (S. 25 (6) (c)) covered under Rule 15 of the Rules and Order of S. 24, 15, 354A for abating the unit in clandestine clearance of the excisable goods and Rs. 36,45,117 for abating the unit in fraudulent passing of Cervelet Credit by issuing Central Excise invoices only without physical supply of goods imposed on Appellant No. 1 as well as Appellant No. 2 by the adjudicating authority under Rule 26(1) and 26(2) of the Rules is justified and proper and there is no need to interfere with the order.

10. I find that the facts of the case are distinguishable from the facts of the cases in which earlier judgments have been quoted by these two appellants inasmuch as the documents resumed, analysis thereof and data storage devices have been corroborated by the statements of former of the unit, Shri Bharat Shetty, Broker, Shri Manish Patel, Accountant of San Bharat South, Dwar, statements of Appellant No. 1 and Appellant No. 2, statements of Inspectors, agencies and the records obtained from GMS authorities. These two have closely monitored, arranged and managed all the clandestine clearances made by the unit. The veracity of the documents resumed from Appellant No. 1 and Appellant No. 2 has been testified by the partner of the unit. All the circumstances and evidences collected by DCCD prove beyond doubt that the unit and the partner of the unit were involved in clandestine clearances of the goods. The statements given are valid and equal to the eyes of law and hence, the same have to be considered as corroborative evidences and no further evidence is required. In this regard, I would like to rely upon the following judgments:-

- AIR 1978 SC 1400 (1978) 111 (1978) 258 (S.C.)
- AIR 1978 SC 1400 (1978) 111 (1978) 258

The ratio of these cases as well as discussed in earlier paras would be more applicable in the present case particularly in the facts and circumstances of this case. The plea of Appellant No. 1 and Appellant No. 2 for not imposing penalty under Rule 25 (1)(c) is not legal and proper and hence, the same are rejected.

11. As regards verities of Cross Examination, I find that the lower adjudicating authority did not find it fit to examine the veracity of cross examination and while dealing, the lower adjudicating authority has relied upon the verities more laws as detailed at Para 3.1.1 to 3.1.4 of the impugned order. This course of clandestine removal and ably supported by the host of oral and documentary evidences. I do not see any infirmity in the decision of the lower adjudicating

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authority in denying the cross-examination to the appellants, especially when the main reason for seeking cross-examination has been given by the appellants.

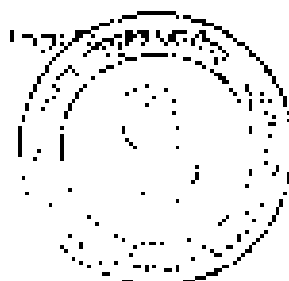
11.1 I find that the fact that the impugned order, the lower adjudicating authority has not made demand of Central Excise duty, interest and penalties upon the appellant mentioned in Mys. Har. Mithun Saei Corporation, File No. 22, Krip. Bhadrang, Kandi, Walya, Taluka Taleja, Dist. of Shajapur and also imposed terminal penalty upon Mr. Nikal Gulab, Partner of the unit and San. Harat Sarda, Kinvar. However, neither the unit nor the partner of the unit or San. Harat Sarda, Kinvar. have preferred appeal before this authority against the impugned order.

11.2 I find that Appellant No. 3 and Appellant No. 4 have been alleged to have purchased goods clandestinely cleared by the unit without payment of Central Excise duty and without central excise invoices. The lower adjudicating authority has imposed penalty upon them under Rule 26(i) of the Rules as he found that these appellants were concerned in purchases of clandestinely cleared goods. Appellant No. 2 and Appellant No. 4 have contended that they cannot be punished on the basis of third-party evidence when no investigation has been carried out at their premises.

11.3 I find that name of Appellant No. 3 is not found in the booking registers of the transporters and no credible evidences are available in the SOA/impugned order establishing involvement of Appellant No. 3 in purchases or clandestinely cleared goods. There are no sufficient evidences available in this case to hold that Appellant No. 3 has abused clandestine clearances of the goods and/or he was concerned in purchase of clandestinely cleared goods by the unit. It is important to note that Appellant No. 3 was not proprietor of this firm at the material time in 2009, when purchases have been alleged and he started working elsewhere from early after death of his father on 15.01.2011. Hence, I find that this is not a fit case to impose penalty upon Appellant No. 3 and therefore, I set aside penalty of Rs. 67,147/- imposed upon Appellant No. 3 under Rule 26 of the Rules.

11.4 I find that the Appellant No. 4 engaged in purchases through Appellant No. 1 and Appellant No. 2 and Appellant No. 4 categorically admitted in his statement dated 11.01.2011 that they had purchased 13665 kgs of propeller from the said unit through Appellant No. 2 without cover of Central Excise invoice and without payment of central excise duty. In this Appellant No. 4 also admitted pattern of use utilized for lifting and other transactions mentioned in

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The dates of Appeal No. 1 and Appeal No. 2, which are never included till date. I find that Appellant No. 4 with the help of Appellant No. 2 conducted himself by way of purchasing, acquiring the possession or clandestine deal of goods which were liable to confiscation. Appellant No. 1 is liable to penalty under Rule 25(1) of the Rules as imposed in the impugned order.

13. In view of above, I uphold the impugned order and reject all appeals except appeal of Appellant No. 2 and penalty of Rs. 52,100/- imposed on Smt. Sa Geeta Gupta, Appellant No. 3 is also upheld.

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



 प्रकाश प्रसाद (अधीक्षक)

FOR P.A.R.

1	Shri Kshiro Anandshahel Nate, Proprietor of Mrs. Suresh Vidhata Enterprises, 201, Shepards Road, Patala Chowk, Wagholwad Road, Shivajinagar - 411 001.	श्री कशिरो अनांदशाह नटे, प्रोप्रायटर ऑफ म. श्री सूरेश विधाता एंटरप्राइज, 201, शेपर्ड रोड, पतला चौक, वाघोवाडी रोड, शिवाजी नगर - 411 001. फोन नं. - 2228 77
2	Smt. Geeta Anandshahel Nate, H.O. No. 122, Eastern Nagar City, Opp. Vardaan Park, Bhamburda - 364 002.	श्री कशिरो अनांदशाह नटे, पत्नी जी. सूरेश अनांदशाह नटे, वि. नं. 122, ईस्टर्न नगर सिटी, वि. नं. 364 002. फोन नं. - 2228 77
3	Shri Jagdish Gupta, Proprietor of Mrs. F. G. Gupta & Co., Madheshi, Mandi Anandnagar, Jala Bhatnagar Sahib, Punjab.	श्री जगदीश गुप्ता, प्रोप्रायटर ऑफ म. एफ. जी. गुप्ता एंड कंपनी, मधेशी, मंडी आनंदनगर, जला बठनगर साहिब, पंजाब. फोन नं. - 2228 77
4	Smt. Anandha Anandlal Rana, Partner of Mrs. Mahesh Mata Industries & 275, Leela Etern, Wagholwad Road, Bhamburda - 364 001.	श्री अनंदा आनंदलाल राना, पार्टनर ऑफ म. माहेश माता इंडस्ट्रीज एंड 275, लीला ईटर्न, वाघोवाडी रोड, भाम्बुर्दा - 364 001. फोन नं. - 2228 77

नोट

- (1) प्रकाश प्रसाद आच्युल, केंद्रीय वस्तु न सेवा कर, इंडियन टैक्स सीड, अहमदाबाद नवी जलनगरी रोड,
- (2) आच्युल, केंद्रीय वस्तु न सेवा कर, आनंदनगर जी. आ. 275 का बांधेबांधी है।
- (3) इश्वरल आच्युल, केंद्रीय वस्तु न सेवा कर, अहमदाबाद नवी जलनगरी रोड,
- (4) राजगण आच्युल, केंद्रीय वस्तु न सेवा कर, अहमदाबाद नवी जलनगरी रोड,
- (5) नवी जलनगरी
- (6) आइटी नं. 127/89/2016-17
- (7) आइटी नं. 127/89/2016-17
- (8) आइटी नं. 127/16/2016-17

