

II ORDER-IN-APPEAL II

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1" to Appellant No.4", as detailed in Table below) against Order-in Original No. BHV EXCUS-600-JC-67-2017-18 dated 30.3.2018 (hereinafter referred to as 'impugned order') passed by the Joint Commissioner, Central GST and Central Excise, Bhavnagar (hereinafter referred to as 'lower adjudicating authority') :

Sl. No.	Appeal No.	Appellants	Name & Address of the Appellant
1.	V2/105/BVR/2018-19	Appellant No.1	M/s Shiv Corporation, Plot No. 111, Saxiya Shipbreaking Yard, Saxiya, Dist. Bhavnagar.
2.	V2/106/BVR/2018-19	Appellant No.2	Shri Dhara Parmar Authorised Person, M/s Shiv Corporation Plot No. 111, Saxiya Shipbreaking Yard, Saxiya, Dist. Bhavnagar.
3.	V2/152/BVR/2018-19	Appellant No.3	Shri Kishor Patel Proprietor of M/s Shree Krishna Enterprise, 304, Shoppers Point, Parimal Chowk, Waghvadi Road, Bhavnagar.
4.	V2/59/BVR/2018-19	Appellant No.4	Shri Vinod Patel, Plot No. 122, Iscon Mega City, Opp. Victoria Park, Bhavnagar.

2. The brief facts of the case are that Appellant No. 1 (holding Central Excise Registration No. AKF57618FKN201) was engaged to obtain goods by breaking ships impounded for breaking purpose at their plot at the Ship Breaking Yard, Saxiya. Intelligence gathered by the Directorate General of Central Excise Intelligence indicated that most of the Shipbreaking units of Alang/Saxiya of Bhavnagar District were evading payment of Central excise duty by resorting to clandestine removal and under valuation of their finished goods viz. MS plates and scrap. Investigation carried out by the officers of DGCET revealed that Appellant No. 1 evaded payment of Central Excise duty by resorting to clandestine removal of their finished goods, with active support of Appellants No. 3, 4 and Shri Dhara Sheth, all brokers. The investigation also revealed that Appellant No. 1 was indulged in under valuation of their goods and thereby evaded payment of Central Excise duty and Appellant No. 1 passed on fraudulent Central Excise without delivery of goods in collusion with Appellants No. 3, 4 and

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Shri Bharat Saeth, all brokers.

2.1 Show Cause Notice No. DGCEI(A7)/2013-14/45/2013-14 dated 20.5.2013 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty of Rs. 1,06,01,392/- should not be demanded and recovered from them under proviso to Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as 'Act') along with interest under Section 11AB of the Act and also proposing imposition of penalty under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2006 (hereinafter referred to as 'Rules'). It also proposed imposition of penalty upon Appellants No. 2, 3 & 4 under Rule 26(1) and 26(2) of the Rules.

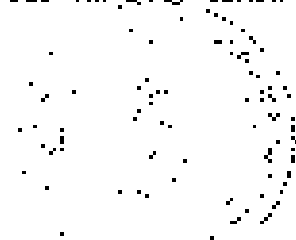
2.2 The above said Show Cause Notice was adjudicated vide the impugned order which confirmed Central Excise duty of Rs. 1,06,01,392/- under proviso to Section 11A(1) along with interest under Section 11AB of the Act and imposed penalty of Rs. 1,06,01,392/- under Section 11AC of the Act on Appellant No. 1 and penalty of Rs. 10,00,201/- under Rule 26(1) and Rs. 10,36,927/- under Rule 26(2)(i) of the Rules upon Appellant No. 2 and penalty of 1,80,334/- each under Rule 26(1) of the Rules and Rs. 51,746/- each under Rule 26(2)(i) of the Rules upon Appellants No. 3 and 4.

3. Being aggrieved with the impugned order, Appellants No. 1 to 4 have preferred appeals on various grounds, inter alia, as below :

Appellants No. 1 & 2:-

(i) The adjudicating authority erred in not granting cross examination of Appellants No. 3, 4, Shri Bharat Saeth, Transporters and Angadias from whose possession diaries/notebooks/registers were seized, which were used for framing charge of clandestine removal. that the impugned order has been passed without following the provisions contained in Section 9 of the Act and hence, the impugned order is liable to be set aside.

(ii) The charge of clandestine removal has been framed on the basis of the entries found in the seized Private Records seized from the residential, cum office premises of Shri Bharat Saeth, Broker under Panchnama etc. 30.03.2010 and records seized from the broker Shri Vinod Patel and Smt Kishor Patel. The adjudicating Authority has erred in holding that these entries have been corroborated with the recorded statements of the Angadias and Transporters etc. But, these all evidences are third parties' evidences which are far away from the Central Excise records maintained by the Appellant. The quantity of the so called goods has been taken from the said seized diaries. But, the stated



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quantity reported to have been cleared clandestinely has not been verified from the angle of Daily Production Register maintained by the Appellant. The third parties' evidence are not to be relied upon evidences unless and until the same are not cross examined by the Appellant.

(iii) The charge of clandestine removal is required to be established by the date of the production and the date of the raw material from which the final products have been manufactured. In the present case, the Adjudicating Authority has failed to establish the clandestine receipt of the raw material and clandestine manufacture of the said final products from the said clandestine receipt of the raw materials. There is also evidence incurred in utilizing the electricity consumption. But no such evidences have been placed on record to sustain the charge of clandestine removal. Thus, it is established that the impugned order was passed only on the basis of the assumption presumption basis. Therefore, the impugned order is liable to be set aside.

(iv) The Adjudicating Authority has erred in sustaining the allegation of fraudulently passed the Central Credit totally to the tune of Rs. 70,00,226/- on the basis of said seized dairies seized from the said Bharat Sheela Broker and Smt Vinod Patel. The Adjudicating Authority has wrongly and without authority of law has confirmed duty of excise and penalty imposed is not proper and legal.

(v) The charge of undervaluation was framed on the basis of investigation made with M/s Steel Rates, M/s Major and Minor Exms Pvt Ltd and statements recorded of concerned persons. But, the rates of iron iron and steel products by them are not the direct evidences to sustain the charge of undervaluation; that they had declared the genuine transaction value in each and every consignment in accordance with the provisions of Section 4 of the Central Excise Act, 1944 read with the rules framed there under. But accepting the said transaction value is nothing but the violation of provisions of Section 4 of the Act. The Adjudicating Authority failed to establish that they had received more sale proceeds than declared in the each and every transactions. No such investigation has been extended to the buyers' end to sustain that the price declared in every consignment was less than the rates declared in the invoices.

(vi) The Appellant No. 1 is not liable to penalty under Section 11A/C of the Act; that the adjudicating authority has failed to disclose the grounds regarding what facts were suppressed by them; that such charges cannot be proved on the basis of third party evidences and hence penalty under Section 11A/C of the Act is liable to be set aside.

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Appellant No. 3:-

(i) Appellant No. 3 has stated that the impugned order is unreasonable and non-reasoned due inasmuch as the lower adjudicating authority has not dealt with the pleas made by them in their written submissions, as well judgments returned by them were completely ignored; that the diaries recovered from their residence were not relating to clandestine clearance but were estate estimates of scrap after inquiry with concern shop/breakers or relating to business of the elder brother San Wad Patel; that onus to prove clandestine removal of goods is on the Department, however the burden was not discharged. The Appellant was in no way concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable for confiscation and that the Appellant had not acted with mens rea. Hence, the Appellant is not liable to penalty under Rule 26(1) of the Rules.

(ii) The adjudicating authority has not discussed any evidence relevant for imposing penalty under Rule 26(2) of the Rules. There is no documentary evidences which suggest that they had fraudulently passed or passed credit. There is no evidence on record regarding non-transport of goods cleared by the shipbreaker to the appellant's premises.

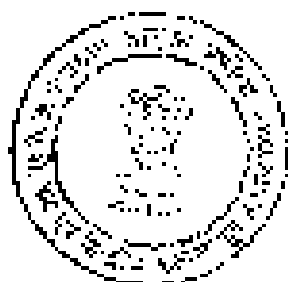
Appellant No. 4:-

(i) Appellant No. 4 has stated that penalty under Rule 26(1) of the Rules is not imposable upon him; that the order was issued in violation of principles of natural justice inasmuch as adjudicating authority did not supply reason upon documents; that diary recovered during search carried out by the officers of DGCE, contained estimates without after making inquiry with concerned shop/breakers; that the Department has not produced any evidence of alleged illicit transactions, that onus to prove clandestine removal of goods is on the Department, however, this burden was not discharged by the Department. No corroborative evidences were produced by the Department; that they had not dealt with excisable goods in any manner as well as not acted with mens rea.

(ii) The adjudicating authority has erred in imposing penalty under Rule 26(2) of the Rules. There is no documentary evidences which suggest that they had fraudulently passed or passed credit. There is no evidence on record regarding non-transport of goods cleared by the shipbreaker to the appellant's premises; that the impugned order is bad in law and liable to be set aside.

4. Persons hearing in the matter was attended by S/SHD H.K. Bhatt and U.H. Gureli, both Consultants on behalf of Appellants No. 1 & 2 and reiterated the

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grounds of appeals and stated that the cases were not based on evidence but on assumptions and presumptions; that GMB Register is not document to establish clandestine clearances; that the appeals may please be allowed.

4. Shri Madhav Madudariya, Chartered Accountant, appeared on behalf of Appellants No. 3 & 4 and reiterated the grounds of appeals stated in Appeal Memorandum.

Discussion & Findings:

5. I find that Appellants No. 1 to 4 have deposited amount of 67.5% of duty or penalty in dispute and hence, have complied with the provisions of Section 35I of the Act. I find that Appellants No. 3 & 4 have filed applications for condonation of delay in filing appeals stating that they had received the impugned order on 20.4.2018 but could file appeals on 17.7.2018. They requested to condone delay of 28 days in filing appeals on the grounds that their consultant was busy with work related to adjudicating proceedings of various authorities and in reply of notices issued by Income Tax Department. Considering that delay is within further period of 30 days as provided under proviso to Section 35(3) of the Act, condone delay in filing of these appeals and take up these appeals also for decision on merits.

5.1 I have carefully gone through the facts of the case, the impugned order, the grounds of appeals detailed in appeal memoranda 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 on Appellant no. 1 and imposing penalty on Appellants No. 1 to 4 is correct, legal and proper or not.

6. I find that the Officers of the DGCet carried out investigation and covered shipbreakers, including Appellant No. 1, brokers including Appellants no. 3, 4 and Shri Bharat Sheth, market research agencies, transporters etc. to unearth alleged evasion of Central Excise duty by way of clandestine removal of goods. Searches carried out at the premises of various Tinsmiths resulted in recovery of registers/ documents showing details of transportation of goods from the premises of Appellant No. 1, viz. date, Truck No., Plot No., Broker names etc. The transporters deposed in their statements that as and when ship breaker or broker contact them for trucks, they used to send trucks at the ship breaker's port after making entry regarding port no. where the truck was sent to and name of ship breaker/broker etc. The entries appearing in trip registers of the

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Statements of Transporters who transported the finished goods from the premises of Appellant No. 1, form of the considered view that Appellant No.1 has indulged in evasion of Central Excise duty.

6.3 Appellant No. 1 has contended that the lower adjudicating authority has not allowed cross-examination of Appellants No. 2, 4, Sri Jhansu Singh, transporters and Angadras and therefore, articles of natural justice have been violated. In this regard, I find that the impugned order has held as under:-

3.11.1 I further find that there is no provision in the Central Excise Law for seeking cross-examination. However Madras High Court in the case of *K. Jagan Mohan Chettiar vs. Commr. of Excise* reported in 1982 (111) ITR 386 had held that right to cross-examination is not necessarily a part of reasonable opportunity and depends upon the facts and circumstances of each case. It largely depends upon the adjudicating authority, who is not guided by the rules of evidence as such who may offer such opportunity to the party concerned as would ensure a fair and proper opportunity to defend himself. The case of *K. Jagan Mohan Chettiar vs. Commr. of Excise* reported in 1982 (111) ITR 386 was disapproved by the Hon'ble Tribunal at Ahmedabad in *Angadras vs. C.E.S. (1987) 101 V.S. 100* Commission of C.E.S. Appeal No. 100 reported at 2011 (311) E.P.T. 155 (19-4-11) wherein it was held as under:-

"33. In *K. Jagan Mohan Chettiar vs. Commr. of Excise* the Hon'ble Madras High Court states that the necessity of cross-examination depends upon the facts and circumstances of each case. The Adjudicating Authority has to give an opportunity to the party concerned as would assure him proper opportunity to defend himself. Opportunity of cross-examination is given whenever it is not vain, unjustified and abusive and is not for protracting the proceedings. The decision in *CEI vs. Angadras case* (supra) is again to the effect that cross-examination cannot be granted as a matter of routine and is to depend upon the facts and circumstances. This Tribunal's decision cited in the case of *U.P. vs. 2001* is also to similar effect. But cross-examination is not always a mandatory procedure to be adopted in all cases. The request should not be dismissed automatically or without examining the discretion of the authority concerned. The Adjudicating Authority may refuse cross-examination for judicially relevant reasons."

3.11.2 Similarly, in the case of *Sarwan Pvt. Ltd. vs. Commr. of C.E. & C.T.*, Ahmedabad reported at 2004 (10) EIT 150 (Tri. Mumbai), Hon'ble Tribunal, in that order, at para 5, has held as under:-

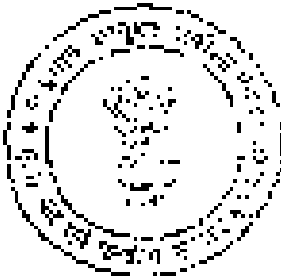
"6. The learned Tribunal contentions that principles of natural justice are violated inasmuch as cross-examination of persons whose statements are relied upon, has to be weighed in the light of the facts that all the statements relied upon were placed before them. They had all the opportunity to correct these statements during the proceedings. Cross-examination cannot be claimed as a matter of right in such proceedings."

3.11.3 Further, the Hon'ble Tribunal, in the case of *CEI's Deputy Dyce vs. CEI*, Chennai reported in 2001 (136) EIT 118 (Tri. Chennai) has observed that cross-examination of witnesses for cross-examination is not a right when the findings are based on documents about which there is no oral explanation and nothing on record to show statements not voluntarily or effectively released within close proximity of the time they were obtained.

3.11.4 In view of above facts, I find that request for cross-examination by the Appellant does not merit consideration and hence cannot be acceded to."

6.4 I find that the documents recovered from the premises of the transporters

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contained details of transportation of consignments from the premises of shipbreakers, including Appellant No. 1. In a case, truck no, shipbreaker's part no., destination, name of broker etc and these details were also corroborated with the records maintained by Gujarat Maritime Board in the form of permit registers. Thus, evidences gathered from transporters' end were independently corroborated with the evidences gathered from GMB. I also find that none of the statements of transporters has been retracted. The transporters' role was limited to the transportation of goods and they had no reason to depose, in their statements, something which was contrary to the facts. I also find that diaries/private records recovered from the premises of Appellants No. 3, 4 and Shri Bharat Smedh, broker's recorded diaries as well as B/L's transactions of ship breaking units/rolling mills, Shri Manish Patel, Accountant of Shri Bharat Smedh, who were maintained diaries, explained the modus operandi adopted for removal of goods clandestinely from ship breaking units of Alank, as well as coding/shut forms used to record transactions in the diaries. I also find that being a broker, Appellants No.3, 4 and Shri Bharat Smedh were required to record details of all transactions, both as well as shut, in order to get commission from respective parties. I also find that said diaries/private records contained records of many other ship breakers and veracity of the said diaries/private records has been proved. After examining the facts and evidences available on record, I am of the considered opinion that non-granting of opportunity of cross examination of Appellants No.3,4, Shri Bharat Smedh, transporters etc. by the lower adjudicating authority has not vitiated the adjudication proceedings. I, therefore, agree with the impugned order that this contention is devoid of merits.

7. Regarding confirmation of demand of duty of Rs. 34,27,342/- on the ground of under-valuation, Appellant No. 1 submitted that they had not indulged in under-valuation of goods and had not received differential payment in cash from their buyers towards the goods sold by them; that they had sold goods either equal or higher than the prices stipulated by the market research agencies; that prices of the market research agencies are not acceptable as transaction value of the goods sold by them.

8. I find that the lower adjudicating authority has confirmed the charge of under-valuation, *inter alia*, giving findings as under :

3.17. The Show Cause Notice alleged evasion of central Excise duty by way of under-valuation of the goods shipped and not all existing agreements, it is not in dispute that various research agencies evaluate the price considering all the factors of demand and supply and there is no reason that prices circulated by

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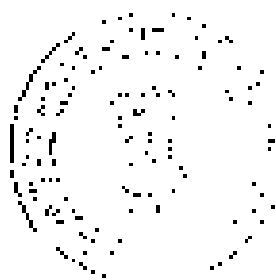
and buyers are insular. It is in this backdrop that Ship Breakers/Brokers/Buyers also subscribe to such market research agencies to have an idea of prevailing prices so as to enable them to sell their goods at maximum rate. It is also not in dispute that this is reliable place ranging from size 3 mm (1/2mm) to 25mm (1.1mm) are engaged out of breaking up of ships and the majority of recyclable plates engaged in breaking of ships are of 13mm size. In order to substantiate this allegation, the DDO conducted inquiry with various marketing research agencies including M/s. Major & Minor to get reference to pricing data which revealed that the daily price of 13mm size of Plates is almost equivalent to the average price of all size within the range of 3mm to 25mm.

3.15 On the basis of the price mentioned in the invoices of M/s Shiv Corp. copies of the price circulated by M/s. Major & Minor, it can also be said that in many cases the transactions are conducted by the M/s Shiv Corp. with the less than actual value prevailing in the market during the respective period. The Ship Breakers here, by not declaring the actual size / thickness of MS Plates engaged by them, undervalued MS Recyclable Plates so as to enable them to declare only part of the value of such goods in the invoices and also to file an invoice, over and above the declared invoice value, by way of unaccounted cash payments.

3.16 I, therefore, find the substance in the allegation of undervaluation in the present show cause notices particularly when Shri's record for Shiv Shant Shree, Shri Vinod Patel & Shri Nichur Patel already containing details of such transactions with various Brokers/Shipbreakers/Buyers. But no substantial allegation of undervalueation been not shown. There would not have been involvement of transfer of huge amount of cash which includes part of the undervalued cost of ship breaking materials.

3.17 In view of the reasons, I agree with the contention of the DDO that market valuation of price is a process involving various factors like payment terms, Quantity & Quality of the goods, demand & supply situation, therefore, 2% difference in price is not unreasonable. As stated above, Brokers/Ship Breakers/Buyers have the reference of the price quoted by market research agencies like M/s. Major and Minor, therefore, find and hold that there is no reason to doubt that price quoted by M/s. Major and Minor is correct and variation of 11-20% i.e. rates of 13mm and Scrap 2% lesser than the rates of M/s. Major and Minor is considerably I therefore fully agree with the view adopted by DDO that duty short paid on account of variation of price more than 2% is on account of undervaluation of the goods and rightly recoverable from M/s Shiv Corp. Further, I also find that a large number of Ship Breakers/Buyers/Brokers from Alang and Brokers were member of M/s Steeltraders and were circulating daily e-mails on the daily price rates of ship breaking materials through SMS alerts and e-mails. It is also revealed that M/s Steeltraders were adopting the most scientific and appropriate analysis of the data gathered by them. The Ship Breakers were fully aware of the price of the scrap generated from ship breaking and intentionally undervalued the goods with intent to evade payment of Central Excise duty. Thus, from the investigation conducted and evidence collected from various agencies and persons involved in the business of ship breaking materials use, it is clear that M/s Shiv Corp. has undervalued the taxable goods - 1) in order to evade payment of Central Excise duty. I further find that for calculation of duty payable through undervaluation by M/s Shiv Corp. DDO adopted the method as discussed above considering the price declared by M/s Major & Minor as shown in Annexure 3 of Shiv Corp. S-1741. As per the said Annexure, M/s Shiv Corp. have evaded Central Excise duty of Rs. 3,72,342/- and I find the same to be

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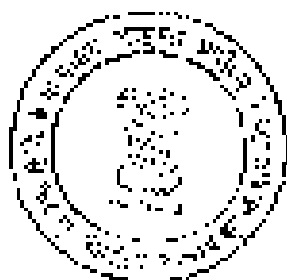


concern.

4.2 I find that the prices of MS Plate/Scrap circulated by market research agencies like M/s Steel Rates Info and M/s Major and Minor Exims Pvt Ltd were considered to ascertain whether the transaction value declared by the Appellant was reasonable or not. I find that said Market Research Agencies determined the price of MS Plate/Scrap after taking into account various factors like demand and supply, prices prevailing in different parts of country etc and then circulate the price. The fact that large number of Ship breakers, brokers and dealers from Alang and Bhavnagar have subscribed to their services itself give sanctity to the services rendered by the said agencies and there is no reason to discard the price as unreasonable or unrealistic. I, therefore, find that the impugned order has rightly confirmed demand on the ground of goods cleared at value, which was lower than the prevailing market price.

8. Appellant No. 1 has argued that clandestine removal has to be proved by the Department and cannot be established based upon some diaries seized from the premises of appellants No. 3,4 and Shri Shanti Sheth. In this regard, I find that the diaries/private records recovered from the premises of Appellants No. 3,4 and Shri Bharat Sheth recorded Jdt. as well as Hdt. transactions of Appellant No. 1 and only those entries for which corresponding sale invoices were not issued by Appellant No. 1 were taken into account for the purpose of demanding duty. I also find that transactions reflected in the said private records were further corroborated by Statements of the transporters, was accepted to have transported the goods from the premises of Appellant No. 1. The registers maintained by the Transporters contained details of transportation of goods from the premises of Appellant No. 1 which were further corroborated with the records maintained at Hdt. check post. Therefore, demand cannot be said to be based only on third party documents but duly corroborated by host of evidences recovered during investigation. Further, appellants No. 3,4, and Shri Bharat Sheth being brokers, they were required to record details of all transactions, Jdt. as well as Hdt., in order to get commission from respective parties. So, there is no compulsion for them to record something in their diaries/private records which is contrary to facts. I also find that said diaries/private records contained records of many other ship breakers and veracity of the said diaries/private records has been proved. Apart from that, evidences of clandestine removal have been gathered by the investigating officers successfully from many places and therefore, these documents cannot be called third party documents but corroborative and supporting evidences. I rely upon

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The Order of the Hon'ble CESTAT in the case of On Prakash Agarwal, reported as 2017 (146) ELT 124 (T1-De), wherein it has been held that:-

"2. I find that in view of the proceedings about business set up, etc. were completed. The allegations are not based on evidence collected from the suppliers, i.e., industrial waste and further manufacture of electricity by the appellants was sought to be established. Accordingly, the case is not only based on the material evidence collected from the suppliers but also is corroborated by the documentary records of the suppliers and the invoices and bill of the goods manufactured and materials for further manufacture but apparently have not been by the appellants and the duty about paid has also been discharged since the issue of business set up. The appellants great emphasis on non-availability of the proper evidence in the way of showing of transport money receipt etc. in the present case, the evidence collected from the suppliers is sufficient and cannot be disputed. The primary records of the suppliers have been corroborated and verified for the correctness of their returns by the persons who were in charge of the suppliers' units. Hence, such evidence is enough to fix the burden of the appellants' case. It is not necessary to produce independent evidence of similar nature. However, to put it more the force is, when such evidence was not in your possession, it is strange that the appellants have taken upon them the responsibility and not established the details of buyers and amount of the finished goods to your books. It is seen that the records maintained by the suppliers which were verified by the persons in charge cannot be treated with a lot of caution of the appellants that the suppliers maintained such records may not fairly implicate the appellants. In fact, the supply of manufactured raw materials has been established in the favour of the appellants' firm. In such situation, it is not correct for the appellants to raise in the appeal stage, raise the point by requirement of strictly evidentiary and primarily goods of the private records of the appellants' firm have been examined and later used for their activities. In the appeal before the ITAT, the appellants are making a belated assertion that the statements by the persons of the appellants' firm is not relevant. The case laws relied upon by the appellants are not of any support in the present case. In the case requiring documentary evidences, the evidence of each case are to be appreciated on the basis of what is already, the third party's records of the suppliers' bills are sufficient for the purpose to show and further corroborated by the suppliers' records. The documents submitted on the ground of further evidence by management and receipt of bills are not being proved to a satisfactory manner and otherwise, each stage of procedure cannot be established with evidence. In a case, evidentiary of the records of goods and the findings in the impugned order, I find no reason to interfere with the findings recorded by the lower authority. Accordingly, the appeals are dismissed."

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8.6 Appellant No. 1 has contended that the Department has not discharged burden of proof for alleged illicit transactions and that evidences regarding usage of raw material and excess consumption of electricity are non-existent. In this regard, I have already discussed in paras supra that the Department has gathered sufficient evidences in the form of incriminating documents recovered from the premises of Appellants No. 3, 4 and Shri Shivan Sheta, which contained details of goods purchased by them on behalf of their clients from Appellant No. 1 without cover of Central Excise Invoices and without payment of Central Excise duty. These evidences were further corroborated by the statements of

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transports, was deposed that they had transported the goods from the premises of Appellant No.1 and these Statements have not been retracted. Considering substantial evidences in the form of these documentary evidences on record, I am of the considered opinion that the Department has discharged its burden of proof for clandestine removal of goods by Appellant No.1. In cases of clandestine removal, Department is not required to prove the case with mathematical precision. My views are supported by the order passed by the Hon'ble Tribunal in the case of A.N. Guha & Co. reported in 1976 (86) E.L.T. 333(Tri.), wherein it has been held that:

"In all such cases of clandestine removal, it is not possible for the Department to prove the same with mathematical precision. The Department is deemed to have discharged their burden if they place so much of evidence which prima facie shows that there was a clandestine removal of such evidence & prohibits by the Department. Then the onus shifts on to the Appellants to prove that there was no clandestine removal."

8.2 The Hon'ble CESTAT in the case of Ramachandra Baxir Pvt Ltd reported as 2012 (295) E.L.T. 116 (Tri. - Bangalore) has held as under:

"8.2 In a case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by the Department with mathematical precision. Also, a person indulging in clandestine activity takes sufficient precaution to hide/destroy the evidence. The evidence available shall be those left in spite of the best care taken by the persons involved in such clandestine activity. In such a situation, the fact to be considered in course of the case has to be looked to, and a decision has to be arrived at on the paradigm of 'preponderance of probability' and not on a higher degree of 'beyond reasonable doubt'."

8.3 The Hon'ble Supreme Court as reported in 2014(307) E.L.T. 461(SC) has upheld the above order of the CESTAT.

8.4 I also rely on the order passed by the Hon'ble CESTAT, Ahmedabad in the case of Ananya Aluminium Corporation reported as 1996 (261) E.L.T. 575(Tri. Ahmed.), wherein at Paragraph of the order, the Tribunal held that:

"Once again, the onus of proving that they have accounted for all the goods produced, shifts to the appellants and they have failed to discharge this burden. They seek the department to show chainwise details of goods transported or not transported. There are several decisions of Hon'ble Supreme Court and High Courts wherein it has been held that in such clandestine activities only the person who indulges in such activities knows the details and it would not be possible for any investigating officer to mount all the evidences required and prove with mathematical precision, the existence of the other illegal activities."

8.5 The Hon'ble CESTAT in the case of M/s. N R Sponage Pvt Ltd reported as 2015 (328) E.L.T. 452 (Tri-Dehi) has also held that when preponderance of probability was against the appellant, placements of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase

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found unaccounted for and no input/output ratio prescribed by law etc. are of no use. The Hon'ble High Court in the case of International Cylinders Pet Ltd. (reported at 2060(255) ELT58(H.P.)) held that once the Department proves that something illegal had been done by the manufacturer which prima facie shows that illegal activities were being carried, the burden would shift to the manufacturer. It is a basic common sense that no person will maintain authentic records of the illegal activities or manufacture being done by it. Therefore, contention of the Appellant is devoid of merit in light of the positive evidence available in this case as discussed above and in the impugned order.

5. In view of above, the various contentions raised by the Appellants are of no help to them since the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that Appellant No.1 has evaded payment of Central Excise duty by resorting to clandestine removal of the finished goods and undervaluation of goods. I, therefore, find that confirmation of demand of Gen. 3, Excise duty of Rs. 1,06,01,392/- by the lower adjudicating authority is correct, legal and proper.

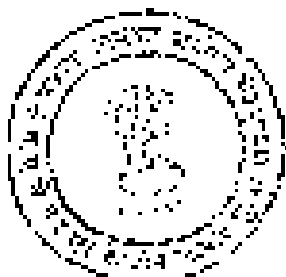
9.1 Since demand is confirmed, it is natural consequence that the confirmed demand is required to be paid along with interest at applicable rate under Section 114A of the Act. I, therefore, uphold order to pay interest on confirmed demand.

9.2 This is a case of clandestine removal of the finished goods as held in above paras and therefore, the impugned order has correctly imposed legal and mandatory penalty of Rs. 1,06,01,392/- on Appellant No. 1 under Section 114C(1)(a) of the Act. The impugned order has correctly given option of reduced penalty of 25% to Appellant No.1 as provided under proviso to Section 114C of the Act, hence, I concur with his decision on penalty on Appellant No.1.

10. Regarding penalty imposed upon Appellants No. 2 to 4 under Rule 26(2)(b) of the Rules for fraudulent passing of Carnat credit, I find that Appellant No. 1 was involved in sale of phony invoices without delivery of corresponding goods through Appellants No. 3,4 and San Bharat Sheth. The DDOFI unearthed the main demand accepted by Appellant No. 1 by deciphering the entries recorded in diaries and pen drive recovered during search from the residence premises of Appellants No. 3, 4 and Shri Bharat Sheth as elaborated in detail in Show Cause Notice. Thus, it is beyond doubt that Appellant No. 1, in collusion with Appellants No. 3,4 and Shri Bharat Sheth, issued invoices without physical



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Rule 26(1) of the rules by the lower adjudicating authority is correct and I uphold the same.

12. In view of above, I uphold the impugned order and reject the appeals of appellants Nos. 1 to 4.

2. अपीलकर्ताओं द्वारा उर्ज की गई बातों का विचारता उपरोक्त तर्कों से किया जाता है

2. The appeals filed by the Appellants are disposed of as above.

तत्परिणतः

विष्णु शर्मा
अधीक्षक (अपील)

प्रधान आयुक्त (अपील)

By S. P. A. 11.

In,

1. Mrs Shree Corporation Plot No. 111, Susiya Shipbreaking Yard, Susiya, Dist Bhavnagar.	श्री. शिव नरपरिजित प्लॉट नं. 111 लोरीया शिपब्रेकिंग यार्ड, सोसिया, जिल्हा भावनगर।
2. Shri Hareesh Parmar Authorized Person, M/s Shiv Corporation Plot No. 111, Susiya Shipbreaking Yard, Susiya, Dist Bhavnagar.	श्री हरीश पारमार, अधिकृत व्यक्ती, म. शिव नरपरिजित प्लॉट नं. 111, लोरीया शिपब्रेकिंग यार्ड, सोसिया, जिल्हा भावनगर।
3. Shri Kishor Patel Proprietor of M/s Shree Krishna Enterprise, 304, Whoppers Point, Parma, Chavk, Waghavadi Road, Bhavnagar.	श्री किशोर पटेल, मालिक, श्री कृष्ण एंटरप्राइज, 304, वॉपर पॉइंट, पारमा चौक, वाघवाडी रोड, भावनगर।
4. Shri Vinod Patel, Plot No. 102, Incon Mega City, Opp Victoria Park, Bhavnagar.	श्री विनोद पटेल, प्लॉट नं. 102, इन्कॉन मेगा सिटी, विक्टोरिया पार्क के सामने भावनगर।

रिपोर्ट

- 1) प्रधान आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, भावनगर को जानकारी हेतु।
- 2) आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 3) राज्यकर आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, भावनगर आयुक्तालय, भावनगर को आवश्यक कार्यवाही हेतु।
- 4) कार्य प्रारम्भ।



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