O/O THE PRINCIPAL COMMISSIONER (APPEALS), GST & CENTRAL EXCISE

[illegible]

Appeal File No. [illegible] | OIO No. BHV-EXCUS-[illegible] | Date [illegible]2018

BHV-EXCUS-000-APP-180-TO-183-2019

Date of Order: 27.06.2019 | Date of Issue: 27.06.2019

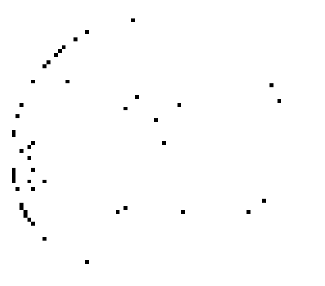
Passed by Shri Kumar Santosh, Principal Commissioner (Appeals), Rajkot

[illegible]

Name & Address of the Appellants & Respondent :

1. [illegible]
2. [illegible]
3. [illegible]
4. [illegible]

[illegible]



:: ORDER IN APPEAL ::

The below identified 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. BHV-EXCUS-000-JC-57-2017-18 dated 27.02.2018 (*hereinafter referred to as 'the impugned order'*) passed by the Joint Commissioner, Central GST, Bhavnagar (*hereinafter referred to as 'the lower adjudicating authority'*):

Sr No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/[illegible]/BVR/2018-19	Appellant No.1	M/s. A.G. Enterprise, Plot No. 16[illegible], Sosiya Ship Breaking Yard, Sosiya, Tal. Talaja, District: Bhavnagar
2	V2/9[illegible]/BVR/2018-19	Appellant No.2	Shri Jayant Nanalal [illegible] (Patel), Power of Attorney holder of M/s. A.G. Enterprise, Plot No. 16[illegible], Sosiya Ship Breaking Yard, Sosiya, Tal. Talaja, District: Bhavnagar
3	V2/39/BVR/2018-19	Appellant No.3	Shri Satish Amarshibhai Patel, Proprietor of M/s. Shree Mahesh Enterprise, 304, Shoppers Point, Parimal Chowk, Waghawadi Road, Bhavnagar
4	V2/[illegible]/BVR/2018-19	Appellant No.4	Shri Vinod Amarshibhai Patel, Plot No. 1[illegible], Fatak Mega City, Opp. Victoria Park, Bhavnagar – 364002

2. The brief facts of these appeals are that Appellant No.1 was engaged in obtaining goods by breaking ships, boats and other floating structures which amounted to manufacture in terms of Note-9 of Section XV 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 Cenvat credit under the provisions of Cenvat Credit Rules, 2004 (hereinafter referred to as 'CCR, 2004'). Appellant No. 2 (Power of Attorney holder of Appellant No. 1) allegedly helped Appellant No. 1 to clandestinely clear the excisable goods and evade payment of Central excise duty. Appellants No. 3 & 4 and Shri Bharat Sheth were brokers through whom clandestinely goods were allegedly cleared by Appellant No. 1 & 2.

2.1 The officers of the Directorate General of Central Excise Intelligence (hereinafter referred to as 'DGCEI') gathered intelligence that some ship breaking units at Alang/Sosiya were engaged in large scale evasion of Central Excise duty by way of clandestine removal of plates to Rolling Mills, diversion of goods, undervaluation of goods etc. and that most of such illicit activities were being carried out by Ship Breakers with support of some brokers of Bhavnagar who were able to get orders from different Rolling Mills and Furnace units and many times getting the material 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 Cenvatable invoices without any

physical supply of goods. DGCEI conducted coordinated search at the premises of the brokers at Bhavnagar and recovered several incriminating documents. Another round of search operation conducted at the premises and the residence of the premises of Shri Bharat Sheth and Appellant No. 3 & Appellant No. 4 and further investigation revealed that Appellant No. 1 had clandestinely cleared excisable goods involving Central Excise duty of Rs. 74,65,477/- and fraudulently passed on cenvat credit of Rs. 15,55,128/- without physical supply of the excisable goods.

2.2 The above investigation led to issuance of Show Cause Notice No. DGCEI/AZU/[illegible]/2013-14 dated [illegible] demanding recovery of Central Excise duty of Rs. 74,65,477/- from Appellant No. 1 under proviso to Section 11A(1) (Now Section 11A(4)) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") along with interest under Section 11AB (now Section 11AA) of the Act and for imposition of penalty under Section 11AC (now Section 11AC(1)(a)) of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules"), imposition of personal penalty on Appellant No. 2 and Shri Bharat Sheth, Broker under Rule 26(1) and Rule 26(2) of the Rules and imposition of penalty on Appellant No. 3 & Appellant No. 4 under Rule 26(2) of the Rules. The said SCN was adjudicated by the lower adjudicating authority vide impugned order confirming Central Excise duty of Rs. 74,65,477/- along with interest and imposed penalties on Appellant No. 1 to Appellant No. 4 and upon Shri Bharat Sheth, Broker as proposed in the SCN.

3. Being aggrieved with the impugned order, Appellant No. 1 to Appellant No. 4 preferred appeals, inter-alia, on the following grounds:

Appellant No. 1 & 2:

(i) The impugned order has been passed only on the basis of assumptions and presumptions without any direct corroborative evidences and the impugned order has been passed on the basis of third party evidences only as the private note books seized from the premises of Shri Bharat Sheth, Broker, Appellant No. 3 and Appellant No. 4 and on the basis of various statements of transporters, brokers as recorded but no documents recovered from them. The inquiry has not been extended to the buyers premises to sustain charge of clandestine removal of excisable goods and the impugned order has been passed without considering the submissions of the appellants.

(ii) The appellants had requested to cross examine the transporters, brokers Shri Bharat Sheth and Appellant No. 3 & 4, other Brokers, however the lower adjudicating authority instead of granting cross examination adjudicated the SCN without following Section 9D of the Act. They relied on decisions in the case of

Mahalaxmi Dyeing Mill reported as 2018 (9) G.S.T.L. 455 (Tri. - Ahmd.), Reliance Alloys Pvt. Ltd. reported as 2018 (359) E.L.T. 749 (Tri. - Chennai) and Jindal Drugs Pvt. Ltd. reported as 2016 (340) E.L.T. 67 (P&H) in support of their contentions.

(iii) The charge of clandestine removal has been framed on the basis of entries found in private records seized from the premises of Shri Bharat Sheth, Broker and statements of transporters and angadias. These evidences are nothing but third party evidences which runs far away from the Central Excise records maintained by Appellant No. 1. The alleged clandestine removal of the excisable goods has been taken from the entries maintained by Shri Bharat Sheth, Broker has not been verified the Daily Production Register. The third party evidences cannot be relied upon unless and until the same are not cross examined by the adjudicating authority. No investigation has been extended to the end of "traders & buyers" to establish the clandestine removal of the goods from the premises of Appellant No. 1. The charge of clandestine removal is required to be established by details of production, details of raw materials used for production of such alleged clandestine removal, No. of labours employed, electricity consumption; however, no such evidences have been placed on record to sustain the charge of clandestine removal of the excisable goods.

(iv) No statements of the recipient of invoices shown in Annexure to the SCN have been recorded to establish the charge of diversion of goods and the differential value has not been worked out genuinely. The charge of passing of fraudulent cenvat credit was framed on the basis of diaries seized from Shri Bharat Sheth, Broker. It is submitted that after passing the loaded trucks from the factory gate of Appellant No. 1, there was no control over the subsequent transportation of the goods. It is a fact that Appellant No. 1 has received sale proceeds from concerned buyers of the said goods through cheques or RTGS. Unless and until statement of the recipient of invoice without receipt of the concerned goods is not recorded, the charge of fraudulent passing of cenvat credit is not sustainable and therefore, charge of fraudulent passing of cenvat credit is not sustainable and imposition of penalty of Rs. 45,50,000/- upon Appellant No. 2 under Rule 26(2) of the Rules is not justifiable. They relied upon Order-in-Original No. [illegible]-COM-058-16-17 dated 24.3.2017 passed by the Commissioner, Central Excise, Vapi.

(v) The charge of undervaluation was framed on the basis of investigation conducted with M/s. Steel Rates and M/s. Major & Minor Exims Pvt. Ltd. and on the basis of statements of concerned persons of the said firms but the rates of such iron & steel products published by them is not the direct evidence to sustain the charge of undervaluation. Appellant No. 1 had declared the genuine transaction value in each and every consignment under Section 4 of the Act read with Rules framed

defectors. The lower adjudicating authority failed to establish that Appellant No. 1 has received sale proceeds more than declared in each and every transaction. No investigation has been conducted by the department/buyers to sustain that price declared in every consignment was less than the sales declared in the invoices. Appellant No. 2 in his statements stated that the price of the marble goods is depending upon the market condition, demand and supply conditions and on the basis of quality of the products. Therefore, the method adopted and relied upon by the lower adjudicating authority to sustain the allegation of undervaluation is not proper and legal and has wrongly and without authority of law has confirmed the charges framed in the SCN only on third parties evidences, without appreciating the submissions of Appellant No. 1. Therefore, Appellant No. 1 is not liable to pay Central Excise duty of Rs. [illegible].

(vi) Since the demand confirmed is not justifiable, Appellant No. 1 is not liable to penalty of Rs. 32,27,0[illegible]/- imposed under Section 11AC(1)(c) of the Act. The lower adjudicating authority has failed to mention the facts and circumstances had been suppressed by Appellant No. 1.

(vii) The SCN issued on the basis of few unknown diaries and note books seized on 30.3.2011 from Shri Bharat Sheth, Broker and from Appellant No. 3 & 4 whereas statement of Appellant No. 2 was recorded on 1.6.2010 wherein all facts and circumstances were disclosed. The second statement of Appellant No. 2 was recorded on 4.8.2012 on similar line to the statement dated 4.8.2010. Appellant No. 1 has filed periodical returns from time to time. The department audited the records maintained by Appellant No. 1, but no audit objection had been raised in past. Hence, SCN was time barred.

Appellant No. 3 & 4:

(i) The impugned order has not dealt with their pleas made 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 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 pleas of the appellants; that the findings are baseless and self serving in nature; that the lower adjudicating authority has shown complete indiscipline in not abiding by the various judicial pronouncements relied upon by the appellants in support of their submissions; the appellants adopt and reiterate the various pleas made by them in reply to SCN and written submission filed before the adjudicating authority.

(ii) 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 recovered from the

the prices of the appellants are estimated value by the appellants after inquiry with the concerned ship breaker; 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 SCN in which they have been deciphered large number of encoded entries 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 always 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 breaker has cleared the excisable goods clandestinely through the appellants is not correct as the appellants have not admitted to this fact nor any documentary evidence even remotely suggesting that the appellants were involved in clandestine removal of any such goods; that there is no evidence regarding sale of such clandestinely cleared goods through the appellants to some persons; that the appellants have neither purchased nor [illegible] the excisable goods clandestinely cleared from the premises of the ship breaker and also the power of attorney holder of the ship breaker has never stated that they have sold the goods clandestinely; that the deposition made by different person in their statements are not relevant; that none of the transporters have confessed that the goods clandestinely cleared by the appellants had been transported by them or none of the purchasers have confessed that the said goods were purchased by them or none of the angadias confessed that amount has been paid to the appellants.

(iv) The appellants are not covered under Rule 26(1) of the Rules as the appellants have not dealt with the excisable goods in any manner; that the sine qua non for a penalty under the 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 he has been in any way concerned in selling or purchasing or any other manner dealt with the excisable goods; that the appellants relied on decisions in the case of Chirag Rayon & Mfg. Co. reported as 2002 (148) E.L.T. 181 (T) and Ram Niwas Singh reported as 2003 (151) ELT 451 (T - Del) and contended that they are not liable for penalty of Rs. 1,04,574/- imposed under Rule 26(1) of the Rules.

(v) Without prejudice to the above, the appellants submitted that the penalty imposed on the power of attorney holder of the firm is Rs. [illegible] for the alleged duty evasion of Rs. [illegible] means [illegible] of the duty evaded and penalty imposed on each of the appellants is Rs. 1,04,574/- for allegedly duty evasion of Rs. 1,04,574/- means 100% of the alleged duty evaded; that this is travesty of justice and clear case of pick and choose and prejudiced attitude of quasi judicial authority.

4. The personal hearing notices were issued to Appellant No. 1 & Appellant No. 2 on 15.3.2019, 27.3.2019, 15.4.2019, 25.4.2019 and 21.5.2019. However, these two appellants did not appear for personal hearing on any of the given dates. Hence, I proceed to decide their appeals on the basis of the available records and grounds of appeal filed by them in Appeal Memoranda.

5. Personal hearing was attended by Shri Madhav N. Vadodariya, Chartered Accountant on behalf of Appellant No. 3 & Appellant No. 4 who reiterated the grounds of appeals of both appeals and also submitted written submissions; stated that there are not sufficient evidences available against these two appellants and hence, penalty should be set aside.

5.1 Shri Madhav N. Vadodariya, Chartered Accountant on behalf of Appellant No. 3 & 4 in P.H. submissions has stated that the department is not sure whether Appellant No. 3 or Appellant No. 4 was involved in so called fraudulent transactions or both were involved; that ideally such observations or flaws should have been sorted out 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 clearly mentioned and revealed their business activity and they do not undertake [illegible] of the SCN and the impugned order controvert this fact and the same is to be spelt out for imposition of penalty under Rule 26 of the Rules; that in absence of such findings, all [illegible] involving duty of Rs. [illegible] were removed clandestinely, both these appellants cannot be penalized; that the investigation has not corroborated the deposition/explanation given by the appellants with regard to entries in the diaries and in computer printouts; that there is no [illegible] estimate/survey of the goods lying at various plots of ship breaking yard and for accounting practice; that the lower adjudicating authority has considered merely by tallying some data in diaries with those in storage device as corroboration; that [illegible] same entries in records seized from the same person can be considered as corroboration; that the lower adjudicating authority has failed to appreciate the submissions of the appellants without any reason recorded in the impugned order with regard to recording of entries in ship breaker's records; that the entries made in diary lying in file marked as [illegible], Diary No. A/5, A/6, A/7 & A/10 and printouts obtained by the Directorate of Forensic Science from pen drives recovered from the residence of the appellants is nothing but details of deal locally & [illegible] and some of the excisable goods may have been cleared by Appellant No. 1 under proper invoices and entries made by Appellant No. 3 & 4 on Sundays & holidays for [illegible] of account; that Appellant No. 3 & 4 are not liable for penalty under Rule 26(1) of the Rules since they were not involved in possession of the excisable goods removed clandestinely; that the

judgments relied upon by the lower adjudicating authority are not relevant because of facts of this case.

6. I find that Shri Bharat Sheth, Broker has not filed appeal against the impugned order. Appellant No. 1 to Appellant No. 4 have filed appeals beyond period of 60 days but within further period of 30 days with request to condone the delay. Since these appeals have been filed within further period of 30 days as prescribed under the Act, I condone delay in filing these appeals and proceed to decide these appeals on merits.

<u>Findings</u>: -

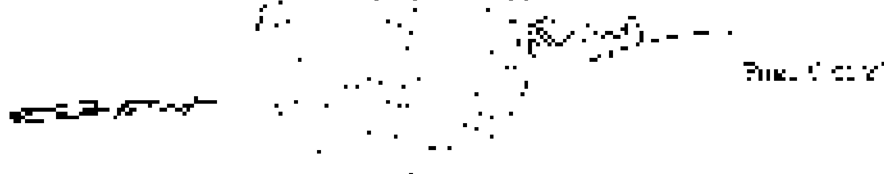
7. I find that Appellant No. 1 has deposited 7.5% of demand confirmed vide Challan dated 1[illegible]-4-2019 as stated by them in their Appeal Memorandum and Appellant No. 2 to Appellant No. 4 have deposited 7.5% of penalty imposed on each of them respectively as submitted by them in their appeal Memoranda and there is no contrary report received from the Bhavnagar Commissionerate. I find that compliance of Section 35F of the Act has been made by the appellants.

8. 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, confirming demand and imposing penalty on the appellants is correct or otherwise.

9. I find that the officers of DGCEI, Ahmedabad conducted coordinated searches at the places of brokers and transporters from where various incriminating documents like sauda files, loose papers, computer, pen drives etc. and lorry receipts / booking / trip registers etc. were recovered. Further, searches were also conducted at the premises of ship breaking units and rolling mills.

9.1 It has been submitted that the adjudicating authority while passing the impugned order has completely ignored the submissions made by the appellants. However, I find that the adjudicating authority has stated / noted defense submissions of the appellants at various paragraph(s) of the impugned order and also given his findings.

9.2 It is on record that before recording the statement of Appellant No. 2 (Power of attorney Holder of Appellant No. 1), all evidences in form of documents recovered from the premises of Appellant No. 1, 3 & 4, Shri Bharat Sheth, Broker and transporters during investigation were placed before him; that he had been shown the evidences at the premises of Appellants No. 1, 3 & 4, Shri Bharat Sheth Broker and at the premises of various transporters and the statements given by



Appellant No. 3 & 4, Shri Bharat Sheth, Broker, Shri Manish Patel, Accountant of Shri Bharat Sheth, Shri Shrenik Sheth, Son of Shri Bharat Sheth and various transporters and various other brokers that he has been given full opportunity to go through the same before giving testimony about the truthfulness and correctness thereof. Thus, Appellant No.2 & Power of Attorney Holder of Appellant No.1 was given sufficient opportunity to examine documentary evidences duly corroborated by oral evidences collected from the premises of Appellant No. 3 & 4, Shri Bharat Sheth, Broker and transporters and also shown annexures prepared on the basis of investigation conducted in respect of records seized from Appellant No. 1, 3, 4, Shri Bharat Sheth, Broker and transporters showing the details of the transactions carried out through Appellant No. 3 & 4, Shri Bharat Sheth, Broker and other brokers by Appellant No. 1. I find that from the documentary evidences recovered therefrom Appellant No. 3 & 4 and Shri Bharat Sheth, Broker and statements of the transporters, brokers angadia, it is proved that Appellant No.1 had removed the goods with the help of Appellant No. 3 & 4 and Shri Bharat Sheth, Broker, clandestinely and also fraudulently passed on Cenvat credit by issuing Central Excise invoices without actual supply of excisable goods. These transactions also tallied with the records of Appellant No. 3 & Appellant No. 4 and Shri Bharat Sheth, Broker, which are corroborated with the records of invoices issued by Appellant No. 1, transporters and angadia, who have also admitted transfers of cash amount as well as excisable goods. These are substantial evidences, in the form of documentary and oral evidences, on record recovered from the firm and persons involved in transaction with Appellant No.1. I find that the investigation has corroborated various evidences and established evasion of Central Excise duty and fraudulent passing of Cenvat Credit by Appellant No.1. Therefore, it is proved beyond doubt that Appellant No.1 has evaded duty of Central Excise of Rs. 19,23,128/- as detailed in Annexure (A-6) [illegible] Annexure (A-6) [illegible] Annexure (A-8) [illegible] and Annexure (A-7) [illegible] and also fraudulently passed on cenvat credit of Rs. [illegible] without physical supply of goods as detailed in Annexure (A-3) [illegible] 2.2 and Annexure (A-6) [illegible]. The records also show that Appellant No. 3 & 4, whose statements were seen by Appellant No. 2 before giving their own statements, never filed any retraction of statements at any point of time. Therefore, all these evidences substantiate the charges against the Appellants and are valid, admissible and legal evidences in the eyes of law.

9.3 I find that the investigation undertaken by DGCEI proved the authenticity of records seized from various transporters, Appellant No. 3 & Appellant No. 4 and Shri Bharat Sheth, Broker, and corroborated the same with records seized from their premises. Regarding demand of duty based on Booking register of the transporters, it has been contended by the appellant that department has not adduced evidence with regard to supplier of goods and buyer of the goods, despite the fact that out of 108

[illegible]

Page 10 of [illegible]

entries found in the booking register of the transporters except for 57 entries Appellant No. 1 had issued invoices. Thus authenticity of the booking register is beyond doubt. During investigation, statements of Appellant No. 2, who is Power of Attorney Holder of Appellant No. 1 were recorded in which he failed to produce copy of central excise invoices in respect of dispatches mentioned therein and admitted to have cleared goods without issue of invoices. I find that the registers maintained by the CISF at the gate of ship breaking yard provided corroborative evidence to establish that the truck number mentioned in the booking register of the transporter actually entered the premises of ship breaking yard on the given date and time. The appellants have not challenged the fact that only after finalization of deal, the trucks are engaged in order to save money in lieu of cancellation of booking of truck. Therefore, there is no doubt that both the registers viz. booking registers of the transporters as well as the registers maintained by CISF are authentic and genuine. Regarding buyers of such goods, it is seen that the booking register does not show names of the buyers. It shows only destination for which the trucks were hired. It is settled law that in cases of clandestine removal, department is not required to prove the case with mathematical precision as held by the Apex Court in the case of D. Bhoormull – 1983 (13) E.L.T. 1546 (SC), wherein it was held that –

> 31. The other cardinal principle having an important bearing on the incidence of burden of proof is that sufficiency and weight of the evidence is to be considered – to use the words of Lord Mansfield in *Blatch v. Archer* (1774) 1 Cowp. 63 at p. 65 "According to the proof which it was in the power of one side to prove, and in the power of the other to have contradicted". Since it is exceedingly difficult, if not absolutely impossible for the prosecution to prove facts which are especially within the knowledge of the opponent or the accused, it is not obliged to prove them as part of its primary burden.

(Emphasis supplied)

9.4 I find that the department has produced sufficient evidences to establish that Appellant No. 1 was engaged in clandestine removals of the goods and therefore the case laws relied by them are of no help to them as the facts of the present case clearly show evidences that Appellant No. 1 was engaged in evasion of duty by way of clandestine removals of the excisable goods without payment of Central Excise duty and without issue of invoices.

9.5 Regarding demand of duty on the basis of diaries recovered from brokers i.e. Appellant No. 3 & 4, it has been contended by the appellants that the demand made on the basis of third party documents is not sustainable. However, I find that in the diaries maintained by the brokers, all the details of transactions of the appellants were recorded. It is found that in case of many entries in the diary, invoices have actually been issued by Appellant No. 1. Thus, the authenticity of the diaries and

other records recovered from the Brokers is established. Further, the brokers have admitted to have received the goods from Appellant without Central Excise invoices and sold the goods without Central Excise invoices. Thus, the case is based not only on third party documents but duly corroborated by other evidences. Appellant No. 2 and Power of Attorney Holder of Appellant No. 1 has not furnished any satisfactory explanation in respect of details available in the seized diaries showing purchases of Appellant No. 1 from where goods were removed and could not produce corresponding central excise invoices in this regard. The statements have never been retracted by Appellant No. 2 and hence have sufficient evidentiary value. The combined effect of all such evidences is that the evasion has indeed taken place and Appellant No. 1 to Appellant No. 4 and Shri Bharat Sheth, Broker have indulged themselves in such Central excise duty evasion. Hence, in this case third party evidences backed by confessional statements are admissible. 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, even though Shri Vinod [illegible] Patel and Shri Kishor Amrutbhai Patel did not cooperate during investigation. The transactions recorded in diaries and storage devices seized from Shri Vinod Amrutbhai Patel and Shri Kishor Amrutbhai Patel were further corroborated with relevant records. These are vital and crucial evidences as per the Indian Evidence Act, 1872 and are sufficient to prove evasion of duty by Appellant No. 1 to Appellant No. 4.

3.6 Regarding allegation of undervaluation, it has been contended that the rates quoted by M/s. Major and Minor as well as other agencies/papers are not the rates prevailing during that period. I find that ship breakers and brokers subscribe to publications issued by them and other research agencies in order to ascertain prevailing market prices so as to enable them to transact the goods. Inquiry conducted by DGCEI with various marketing research agencies revealed that day to day price of 12mm size of plate is almost equivalent to average price of all size of [illegible] plates within the range of 8 mm to 25 mm. The price adopted by DGCEI is relied upon by most of the ship breaking units of Alang and the goods emerging out of breaking up of ships are sold at those prices. I find that in order to be just and fair, the investigation has allowed variation up to 2% in the price published by M/s. Major and Minor. In cases where appellants have indulged in clandestine clearances as well as undervaluation of the goods produced by them, no one can establish one to one correlation of goods sold and payments received in cash or through angadia. In my view, it is sufficiently proved from the entries in the diaries recovered from brokers that cash transactions took place between various ship breaking units and Appellant No. 1 through brokers (Appellant No. 3 & 4 and Shri Bharat Sheth). Therefore, I find that the reliability of transaction value and replacement of the same

be the one prevailing is correct in view of Valuation Rules read with Section 4 of the Central Excise Act, 1944.

10. The following case-laws are relevant to decide the correctness of the impugned order, which are discussed as under:-

(1) The statements of the accused, if not retracted, the same is legal and valid in the eyes of law. And the same cannot be treated as corroborative evidence and no further evidence is required. The above has been held in the cases of (i) Naresh J. Sukhwani [1996 (83) E.L.T. 258 (SC)] (ii) Rakesh Kumar Garg [2016 (331) ELT 321 (Del.)].

(2) That the admission of company is a substantial piece of evidence which can be used against the maker of it as has been held in the cases of (i) Alex Industries [2008 (230) 073 ELT (Tri. Mumbai)] (ii) M/s. [illegible] Studios [2008 (226) ELT (Tri. Chennai)] (iii) M/s. Karan Engg. Works [2004 (168) E.L.T. 373 (Tri. Del.)]

(3) Statement of Director and authorized persons of assessee admitting clearance of goods without payment of Central Excise duty and without issuing Central Excise invoices is substantive and specific and never retracted later on is admissible as admission as held in the case of Hi-Tech Abrasives Ltd. reported as 2017 (345) ELT 303 (Tri. - Del.):

> *"14. On careful consideration of the facts and circumstances as narrated above, I find that the statement of Director is the basis for the demand. The statement is voluntary and is specific. The Director clearly admitted that the documents/private records recovered by the officers contained details of procurement of raw materials as well as clearance of finished goods with and without payment of duty. This fact is further strengthened by the observation that many entries in the private documents are covered by the invoices issued by the assessee on which duty stands paid. The Director has clearly admitted the truth of the entries as well as clandestine clearance of goods covered by the entries in the private notebooks which are not covered by the invoices. Such statement is admissible as evidence as has been held by the Apex Court in the case of Systems & Components Pvt. Ltd. (supra). The allegation of clandestine removal is required to be proved by sufficient positive evidence. However, the facts presented in each individual case are required to be scrutinized and examined independently. The department in this case has relied upon the confessional statement of the Director which is also supported by the [illegible] entries in the private records to arrive at the conclusion that the*

statement has been taken under duress. The assessee also does not appear to have asked for cross-examination during the process of adjudication.

15. In view of the foregoing, I find that the Commissioner (Appeals) has erred in taking the view that there is not enough evidence of clandestine removal of goods. Even though the statement of Shri Sanjay Agarwal, who is said to be the author of the private records recovered has not been recorded, a person admitted by Shri [illegible] Dwivedi about the truth of the contents of the private notebooks. Consequently, I find no reason to disbelieve this piece of evidence.

16. The evidence of clandestine removal has been brought on record only as a result of investigation undertaken by the department. The evidences unearthed by the department are not statutory documents and would have gone unnoticed but for the investigation. Therefore, this is a clear case of suppression of facts from the department and certainly the extended period of limitation is invocable in this case and hence the demand cannot be held to be time-barred."

(Emphasis supplied)

(f) The penalty on director of company is invocable when he is directly involved in the evasion of Central Excise duty has been held in the case of [illegible] Singh reported as 2011 (271) ELT 16 (Guj.)

(g) It is settled legal position that once a case of clandestine removal of excisable goods is established as has been done in the instant case, it is not necessary to prove the same with mathematical precision as held by the Hon'ble Supreme Court in the cases of (i) Shah Guman Mal reported as 1983 (13) ELT 1546 (SC) and (ii) Aafloat Textiles (India) Pvt. Ltd. reported as 2009 (235) ELT 587 (SC).

10.1 I also rely on the decision in the case of Haryana Steel & Alloys Ltd. reported as 2017 (355) ELT 451 (Tri. Del.) wherein it has been held that notebooks (diaries) seized from the possession of appellant's employee at the time of search showing entries for accounted as well as unaccounted goods which have been explained in detail and disclosed by GM of the factory tally with [illegible] passed [illegible] trustworthy; that statement of employees containing detailed knowledge [illegible] to be considered as reliable. I also rely on the decision in the case of Ramchandra Rexins Pvt. Ltd. reported as 2014 (30[illegible]) ELT [illegible] (S.C.) wherein similar view has been adopted by the Hon'ble Apex Court.

10.2 I am of the view that admitted facts need not be proved as has been held by CESTAT in the cases of Alex Industries reported as 2008 (230) ELT [illegible] (Tri. [illegible]

Mumbai), M/s. [illegible] Solutions reported as 2005 (XXX) E.L.T. 1005 (Tri. - Chennai). The Confessional statements would hold the field and there is no need to search for evidence. Hon'ble CESTAT in the case of M/s. Karori Engg. Works reported as 2004 (166) E.L.T. 373 (Tri. - Del.) has also held that Admission/Confession is a substantial piece of evidence, which can be used against the maker. Therefore, Appellant's reliance on various case laws relating to corroborative evidences and establishing clandestine removal cannot be made applicable in light of the positive evidences available in the case as discussed in the findings of the impugned order.

10.3 Hon'ble CESTAT in the case of M/s. N.K. Sponge Pvt. Ltd. reported as 2015 (329) ELT 455 (Tri. - Del.) has held that when preponderance of probability was against the Appellant, pleading of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted and no input-output ratio prescribed by law is of no merit. The relevant portion of the decision is reproduced below :-

> *"10.2 Recovery of the loose sheets and pencil written ledger from the premises of the Appellant in the course of search proved the cases thereof as representative of the clandestinely removed goods which were well within the knowledge of the Appellant. Entire involvement of Appellant in that regard came to record since those materials were in the custody of the Appellant. It is common sense that the materials having utility to the possessor thereof are only possessed by him. He proves ownership thereof and is answerable to the contents therein. Entries on such incriminating materials demonstrated clandestine clearance of 582.150 MT of Sponge Iron and 897.580 MT of such goods respectively and unaccounted by Appellant. That also proved clandestine removal of 21.010 MT of [illegible] by the Appellant. Such removals were further proved from the evidence seized from the transporters M/s. Purushottam Road Carriers and M/s. [illegible] Roadways. The evidence recovered from transporters brought out the evidence of clandestine removal of [illegible] MT of Sponge Iron and 66.555 MT of such goods respectively. Those clearances were not substantiated by Excise invoices. When certain entries in the pencil handwritten ledger matched with the Central Excise invoices and other entries did not match, the unmatched entries became testimony of clandestine removals and supported by evidence. Accordingly, such clearances became subject-matter of allegation in respect of removal of 897.580 MT of Sponge Iron without payment of Excise duty. Similarly, the loose sheets when evaluated also proved removal of excisable goods without payment of duty to the extent of aforesaid quantity of goods.*
>
> *10.3 The statement recorded from staff, supervisors being self-speaking cannot be brushed aside because they were the persons within whose knowledge the goods were manufactured and cleared. Their evidence was relevant, cogent and credible for the reason that they visibly discharged their duty of respective position.*
>
> *10.4 Added to the above, the entire evidence of clandestine removal of the goods not supported by Excise invoices, that resulted in loss of revenue. The Appellant failed to make payment of the duty evaded without controverting the Revenue's appreciation of the entries in pencil handwritten ledger and loose sheets recovered from possession of Appellant during search. Entire pleading of the Appellant therefore, failed to [illegible] of the Appellant came to record. Clandestine removal was [illegible] within the knowledge of the staff, supervisors, management, [illegible], transporters and [illegible]. Each*

other's evidence corroborated all of them and established [illegible] goods cleared without payment of duty. The voluntarily statement of Kailash Agarwal brought the Appellant-company in the chain of allegation. All of them established inextricable link of evasion. [illegible] by the evidence [illegible] all the persons involved in the chain of [illegible] clearance without [illegible] detachment.

10.4 <u>Preponderance of probability</u> [illegible] the Appellant. [illegible] of [illegible] [illegible] [illegible] [illegible] is of no use to it. Revenue discharged its <u>onus of proof</u> [illegible] the allegation in the show cause notice [illegible]. But the Appellant miserably failed to discharge its burden of proof [illegible] [illegible].

10.5 It is not only one evidence, but multiple evidence [illegible] obvious motive of the Appellant [illegible]. Therefore Appellant fails on all counts. [illegible] was successful and its [illegible] was established.

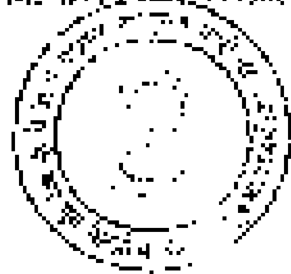
(Emphasis supplied)

10.4 [illegible] that the [illegible] in the case of M/s. Praveen Kumar & Co reported in 2015 (324) E.L.T. [illegible] has held as under :-

"23. Voluntary confessional statement which is retracted after two years without any basis, has no legs to stand. Too case facts have come on record to justify retraction [illegible] confession not once but twice. Further confessional statement tendered by Shri Praveen Kumar was also [illegible] by Shri Rajender Kumar authorised signatory. Contention that retracted records [illegible] [illegible] to [illegible] and [illegible] is clearly [illegible] as [illegible] and that [illegible] records [illegible] [illegible] [illegible] [illegible] [illegible] facts were on record and were not challenged and [illegible] admitted. Also [illegible] were paid in two [illegible] (2nd [illegible] being after a gap of four months). [illegible] [illegible] [illegible] contested [illegible] [illegible] [illegible]. There is no form [illegible] [illegible] [illegible] that [illegible] [illegible] investigations relating to [illegible] of [illegible] and [illegible] of huge quantity of [illegible] goods and [illegible] of goods. [illegible] an evasion is clearly [illegible] and [illegible] are [illegible] in the darkness of night, [illegible] [illegible] [illegible] [illegible] of these [illegible]. [illegible] fraudulent intent to evade is manifested and [illegible], proving such evasion by other activities which are not recorded, will be [illegible] to the evader. As per Supreme Court's judgment in [illegible] - 1983 (13) E.L.T. 1546 (S.C.) case, Department is not required to prove its case with mathematical precision, [illegible] [illegible] is the establishment of such a degree of probability that a prudent [illegible] on its basis believe in the existence of facts in the issue."

(Emphasis supplied)

10.5 I find that [illegible] statements have been retracted by any person and facts recorded in Panchnamas and contents of seized [illegible] have been accepted by Appellant No. 2 [illegible] Appellant No. 4 and Shri [illegible], Broker in their statements. It is not a case that a single statement has been relied [illegible] statements of Appellant No. 2 [illegible] Appellant No. 4, Shri [illegible], Broker, Shri [illegible], Accountant of Shri Bharat [illegible] and Shri [illegible] [illegible] of Shri



[illegible]

[illegible] establishing clandestine removal of final products by Appellant No. 1. In the circumstances, I am of the considered view that the statements recorded at different time and of different persons are not recorded under duress or threat. Facts of the statements have been independently corroborated by the facts and contents of the documents recorded at the time of search. Therefore, I am of the well-considered view that denial of cross examination by adjudicating authority does not violate principles of natural justice in the given facts of this case. My views are supported by the Hon'ble Bombay High Court's judgment in the case of M/s.Sharad Ramdas Sangle reported as 2017 (347) ELT 416 (Bom) wherein it has been held that where directors have themselves admitted the guilt and statements have not been retracted, there is no question of cross examination and denial of same does not to give rise to any substantial question of law. Relevant portion of the judgment is reproduced below:

> 3. The Tribunal recorded following reason:
>
> *"5.1 As regards the denial of cross-examination of Shri Ghorpe and Shri Ashok Kumar Yadav and whether the said denial has caused any prejudice to the Appellants, it is seen from the records that the entries made in the private records were corroborated by Shri Ramdas Shivram Sangle, Director of the Appellant firm and Shri Sharad Ramdas Sangle, Proprietor of M/s. Ambica Scrap Merchant through whom the clandestinely removed goods were sold wherein they had admitted that the entries recorded are true and correct and pertain to the unaccounted production, purchase of raw materials without accounting and sale of the finished goods in cash without payment of duty. Further from the records it is seen that about sixteen buyers [referred to in para 11.13 of the impugned order], who purchased the finished goods from the Appellants without payment of duty have also confirmed that they had received these goods without the cover of proper excise documentation and without payment of duty. Similarly, two scrap suppliers, Mr. Yunus Ahmed Shaikh and Mr. Shaikh Mushtaq Gulab have also admitted that they have supplied the MS scrap which is the raw materials for the manufacture of these goods without the cover of documents and they have received consideration for sale of such scrap in cash. Considering these evidences available on record, we hold that the denial of cross-examination of the authors of the private records has not caused any prejudice to the Appellants. In fact none of the statements recorded have been retracted or disputed. In such a scenario, when the fact is not disputed, cross-examination of the party is not necessary. The Hon'ble Apex Court in the case of Kanungo Company - 1983 (13) E.L.T. 1486 (S.C.) and the Hon'ble High Court of Andhra Pradesh in the case of Shalini Steels Pvt. Ltd. [supra] have held that there is no absolute right for cross-examination and if sufficient corroborative evidences exist, cross-examination of the deponent of the statement is not necessary. In view of the above we hold that the denial of cross-examination of Shri Ghorpe and Shri Ashok Kumar Yadav who maintained the private records has not caused any prejudice to the Appellants."*
>
> *From the above conclusions, we are also of the view that this was not a case which required cross-examination. The Directors themselves*

admitted the guilt. So, almost all allegations stood proved. As said above, the statements recorded were not retracted or disputed. Learned counsel for the Appellants reiterated that he can succeed in showing that these appeals should be admitted for deciding following question which, according to him, is substantial question of law:-

"Whether denial of cross-examination of witnesses caused any prejudice to the Appellant?"

We are not inclined to accept this submission at all. In these appeals, there was no question of cross-examination, and therefore, denial of the same would not give rise to any substantial question of law. We perused the judgment of the Tribunal and find the same is quite pertinent. It is not necessary to interfere in it."

(Emphasis supplied)

10.6. In view of above, I find that Appellant No. 1 has evaded payment of Central Excise duty by way of clandestine removal of goods as well as by undervaluation of the goods. Hence, I hold that the order of adjudicating authority is correct, legal and proper.

11. I find that Appellant No. 1 has intentionally adopted unlawful means to evade payment of central excise duty. The evasive mind and mens-rea of Appellant No.1 is clearly established. Therefore, I hold that the removal of excisable goods in this case was of clandestine nature, illicit removal with intent to evade payment of excise duty and hence, Appellant No. 1 is liable for penalty equal to the duty under Rule 25 of the Rules read with Section 11AC of the Act. In view of above, I hold that Appellant No.1 is liable to pay Central Excise duty of Rs. 74,65,077/- under Section 11A of the Act. It is natural consequence that the confirmed duty is required to be paid along with interest at applicable rate under Section 11AA of the Act.

11.1 Appellant No. 2 has contended that no direct evidences involving him in alleged clandestine clearance of goods are available, no penalty on Appellant No. 2 is imposable under Rule 26(1) of the Rules. I do not find any force in the argument of Appellant No. 2 since in the present case, there are cogent evidences that Appellant No. 2 had played an important role in evasion of central excise duty of Rs. 74,65,077/- and fraudulent passing on cenvat credit of Rs. [illegible]/- without physical supply of goods. It is seen that penalty under this rule is imposable on the person who has dealt with such excisable goods, which he knew that the same are liable to confiscation and therefore, the impugned order imposing penalty of Rs. 7,50,000/- under Rule 26(1) of the Rules and penalty of Rs. [illegible]/- under Rule 26(2) of the Rules are legal and proper. My view is also supported by the order of CESTAT in the case of Radhika Prints Pvt Ltd. reported as [2015 (324) E.L.T. 183 (Tri. - Ahmd.)] wherein it has been held that

"The show cause notice makes it clear that the goods were offending in nature and therefore liable to confiscation and adjudicating authority has

> *[illegible] finding that goods are offending [illegible]. There is only a technical omission in the notice that it has not specifically mentioned that these goods are liable to confiscation. In view of the specific allegation in the show cause notice [illegible] indicates the nature of offence as far as goods are concerned and the consequences of such offence, the findings recorded by the original adjudicating authority is sufficient to show that the goods were liable to confiscation and therefore, imposition of penalty is justified."*

(Emphasis supplied)

11.2 Shri Vinod Amarshibhai Patel and Shri Kishor Amarshibhai Patel, brokers (Appellant No. 2 & 4) have contended that they have not dealt with the goods in the manner prescribed under Rule 26 of the Central Excise Rules, 2002 and therefore they are not liable to penalty. I find that the diary maintained by Shri Vinod Amarshibhai Patel in coded language contained details of lots as well as their dealings by Appellant No. 1. When asked about the entries in the diaries, he gave evasive replies like, the accounts were imaginary, he was practicing accounts on Sundays, etc. He never cooperated with the investigation, however DGCEI officers got the coded data decoded and the whole modus of clandestine removal got revealed. The decoded data matched with the data maintained in the electronic form and in case of some transactions, Appellant No. 1 has issued Central Excise invoices whereas for many transactions no Central Excise invoices were issued and no Central Excise duty was paid. This corroborates the data maintained by Shri Vinod Amarshibhai Patel. His brother, Shri Kishor Amarshibhai Patel was handling business [illegible] and was involved in facilitating clandestine removal through the broker firm. The records also showed certain transactions for various buyers and sellers through angadias.

11.3 Appellant No. 2 & 4 in their submissions argued that they have not been involving into clandestine activities and records found in Pen Drive/Computer were written for learning accounting software etc. I find that they were not only indulging themselves in handling goods cleared clandestinely but were also indulged in abetting Appellant No. 1 in clandestine removal of the excisable goods. As far as data recovered from Pen Drive/Computer is concerned, the argument of learning accounting software is nothing but an attempt to get out of duty liability. It is a common practice that any software is to be installed either in computer desktop or laptop and not in Pendrive, [illegible] something special with intent to keep [illegible] in such a way that no one can know what at later stage about the data. It is a practice to keep the records in Pen Drive to avoid detection from the computers. The corroboration of data recovered by DGCEI with the data available in Pen Drive is neither a [illegible] nor [illegible] evidence.

11.4 Appellant No. 3 & 4 also argue that they have not given explanations for the documents to the investigating officers during search itself. It is on record that

Appellant No. 3 & 4 had not co-operated with the investigation and had given evasive replies at times. Therefore, their involvement [illegible] under Rule 26 of the Rules and penalties of Rs. 1,24,274/- for causing Appellant No. 1 in clandestine clearance of the excisable goods on each of Appellants by the adjudicating authority under Rule 26(1) of the Rules is proper and there is no need to interfere with the same.

11.3 Apart from the facts of the case and finding as made from the judgments relied upon by these two appellants inasmuch as the documents recovered, analysis thereof and data storage devices have been corroborated by the statements of Appellant No. 2, statements of Appellant No. 3 & 4, statements of transporters and records obtained from RTO authorities and the statements have never been retracted. The persons involved in this case have closely coordinated, arranged and managed all efforts of clandestine clearances made by Appellant No. 1 and hence penalty imposed on Appellant No. 3 & 4 is justified in view of discussion made from Para 9 to Para 11.3.

12. In view of above, I uphold the impugned order and reject appeals filed by Appellant No. 1 to Appellant No. 4.

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

12.2 The appeals filed by the appellants stand disposed off in above terms.

(कुमार संतोष)

[illegible] (अपील्स)

By R.P.A.D.

To,

1. M/s. A.G. Enterprise,
Plot No. 161, Sosiya Ship Breaking Yard,
Sosiya, Tal. Talaja,
District - Bhavnagar

2. Shri Jayanti Nanji Vanani (Patel)
Power of attorney Holder of M/s. A.G. Enterprise
Plot No. 161, Sosiya Ship Breaking Yard,
Sosiya, Tal. Talaja,
District - Bhavnagar

3. Shri Hitesh Amrutbhai Patel,
Proprietor of M/s. Shree Krishna Enterprise
204, Shoppers Point,
Parimal Chowk,
Waghawadi Road
Bhavnagar

[illegible]

4. Shri [illegible] Patel,
 Plot No. 10[illegible]
 [illegible] Mega City,
 [illegible] Victoria Park,
 Bhavnagar – 364002.

प्रति:

(1) [illegible]

(2) [illegible]

(3) [illegible]

(4) [illegible]

(5) [illegible] V2/[illegible]/BVR/2018-19 [illegible] V2/[illegible]/BVR/2018-19 [illegible] V2/[illegible]/BVR/2018-19