



प्रधान-सूत्र (अधीन): श्री. कार्तिक, नानु एच. रेखा बरहोत कर्नाट राज्य सूत्र:  
 DR. THE PRINCIPAL COMMISSIONER (APPRAISAL & CENTRAL EXCISE)



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TELEX No. 4061- BANGALAPURIN INDIANAPPOSTELKODIGAL/IN

अधिकार प्राप्त करी: 1980

क. आदेश/आदेश संख्या Order No.	दूत संख्या G.O. No.	दिनांक Date
BY/14/16/1450/2019	BY/14/16/1450/2019	16/07/2019

अनुदान संख्या (Order No.): **BHY-EXCUS-000-APP-207-10-208-2019**

आदेश का दिनांक: 15/07/2019 तारीख को जारी किया: 16/07/2019

श्री. कपूर लोभ, कानूनवादी (अधीन), कार्तिक द्वारा पारित।  
 Issued by: श्री. कार्तिक, नानु एच. रेखा बरहोत कर्नाट राज्य सूत्र (अधीन)

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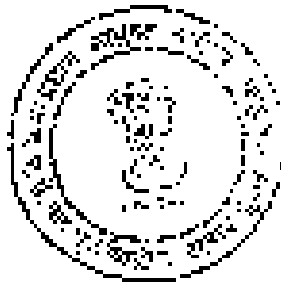
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**!! ORDER-IN-APPEAL !!**

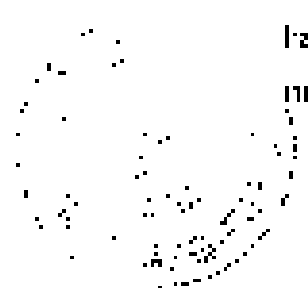
The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1 & Appellant No.2") as detailed in the Table below against Order-in-Original No. 59/Excise/Demand/2017-18 dated 28.03.2018 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner, Central GST and Central Excise, Bhavnagar-1 Division (hereinafter referred to as 'the lower adjudicating authority') :-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	VZ/144/BVR/2018-19	Appellant No.1	M/s. Chandradeep Steel Re-Rolling Mill, Plot No. 133/34/35, GIDC, Vartej, Bhavnagar.
2	VZ/145/BVR/2018-19	Appellant No.2	Shri Pravinbhai Narottambhai Rathod, Partner of M/s. Chandradeep Steel Re-Rolling Mill, Plot No. 133/34/35, GIDC, Vartej, Bhavnagar.

2. The brief facts of the case are that Show Cause Notice F.No. V/15-108/Dem/HQ/2013-14 dated 1.4.2014 was issued to Appellant No.1 & Appellant No. 2 for clearances of the excisable goods clandestinely to various customers alleging as under:

- (a) Appellant No.1 had clandestinely manufactured and cleared their finished excisable goods involving Central Excise duty of Rs. 15,66,243/- to various customers without issuing the invoices and without payment of Central Excise duty;
- (b) Interest should not be recovered under Section 11AA of the Act;
- (c) Penalty should not be imposed upon Appellant No. 1 under Section 11AC of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the CER');
- (d) Central Credit amounting to Rs. 43,065/- wrongly taken and utilized by Appellant No. 1 should not be recovered under Rule 14 of Central Credit Rules, 2004 (hereinafter referred to as 'the CCR') read with sub-section (1) of Section 11A of the Act along with interest under Rule 14 of the CCR read with Section 11AB of the Act;
- (e) Penalty should not be imposed upon Appellant No. 1 under Rule 15(2) of the CCR read with Section 11AC of the Act or wrongly availed Central credit;
- (f) Appellant No. 2 (Partner of Appellant No. 1), concerned himself in selling, storing, keeping and removing of the excisable goods which he knew and had reason to believe that the same were liable to confiscation, which has made him liable to penalty under Rule 26 of the CER.

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2.1 The above SCN was approved by the lower adjudicating authority vide the impugned order confirming demand of Central Excise duty of Rs. 15,66,243/- against Appellant No.1 under Section 11A of the Central Excise Act, 1944 (hereinafter referred to as the Act) along with interest on the confirmed demand under 11AA of the Act; along with penalty of Rs. 15,66,243/- upon Appellant No.1 under Section 11AB of the Act. Also confirmed demand of wrongly taken Central credit of Rs. 43,69/- under Rule 14 of the CCR read with Section 11A of the Act, along with interest under Rule 14 of the CCR read with Section 11AA of the Act against Appellant No.2 along with penalty of Rs. 2 lakhs under Rule 26(1) on Appellant No. 2.

3. Being aggrieved with the impugned order, Appellant No. 1 & Appellant No. 2 have preferred present appeals, respectively, on the following grounds :

**Appellant No. 1 :-**

(i) The impugned order is non-specific and non-reasoned in as much as the adjudicating authority has not at all dealt with the pleas made in written reply by the appellant nor the judgments relied to and relied upon also been completely ignored; that the adjudicating authority had not recorded any finding on the arguments raised and has completely dealt with the pleas of the appellant; that the adjudicating authority has shown judicial indiscipline in not abiding by the various judicial pronouncements relied upon by the appellant in support of their submissions; that appellant reiterate the pleas made by them in their reply to SCN before the lower adjudicating authority.

(ii) The charges of clandestine removal are serious charges and cannot be established on the basis of some registers of unverified nature; that apart from the registers of the transporters there is no other evidence on record to establish clandestine activities of the appellant; that charges of clandestine removal are serious in nature and cannot be established on the basis of some diaries; that average of weight per trip of truck which could have been loaded for delivery taken is a presumption; that quantification of central excise duty confirmed on the basis of Trip/Loading registers is wrong and not on the basis of evidence; and they relied on the majority order of the Tribunal in the case of *M/s. Tejwal Dyestuff Industries* reported in 2007 (216) E.L.T. 310 (Tri.-Ahmed.) which was confirmed by Hon'ble Gujarat High Court when the appeal filed by Revenue stands rejected as reported in 2009 (234) E.L.T. 242 (Gu).

(iii) The diary/notebook seized from Sri Bharat Sheth, broker during the search is third party evidence; that appellant was not provided the list of

*(Signature)*

deciphered large number of crossed entries and names appearing the producer diaries/ notebooks seized from the broker; that broker has not admitted the facts that the appellant was involved in clandestine removal of any such goods; that there had to be an evidence regarding illicit purchase of such goods by the buyers; that appellant did not received the amount indicated in private diaries as paid in cash; that there is no corroborative evidence of receipt of cash by the appellant; that deposition made by different person in their statements are not relevant; none of the transporters has confessed the goods were cleared clandestinely by appellants; that evidence at purchaser end of clandestinely cleared goods and sale proceeds have not been gathered.

(iv) The penalty imposed under Section 11AC of the Act is illegal in as much as intentions about commission of any offence are to be proved which are absent in the present case and in absence of any evidence that excisable goods manufactured by the appellant had in fact been cleared without proper invoices by them. that no evidence was adduced in the show cause notice to establish that they had committed the alleged acts or omissions deliberately or in violation of provisions of law or with intention to evade duty; that no penalty was imposed when there was no *malafide* intention to evade payment of duty and thus they are not liable for penalty under Section 11AC (1) (c) of the Act; that appellant relied upon the Hon'ble Supreme Court's decision in the case of *Amba Lal* reported as 1983 ELT 1321 (SC) to say that on proof is an investigation and section 106 of the Evidence Act does not shift the burden of proof from DGCPI to the appellant;

(v) Regarding denial of Cenvat credit of Rs. 43,065/- Appellant No. 1 contended that Cenvat credit cannot be denied where the assessee has properly accounted receipts and consumption of inputs and payments made against such purchase; that the adjudicating authority has not recorded any findings for denying Cenvat credit and for imposing penalty under Rule 14 of the CCR read with Section 11AC of the Act.

Appellant No. 2 :-

Appellant No. 2 contended that the lower adjudicating authority has erred in imposing personal penalty of Rs. 2 Lakhs under Rule 26(1) of the Rules on him as the goods all the pleas raised by him has not been dealt with by the adjudicating authority; that the case law relied upon by them has not been discussed; that being partner of the firm, he had no personal motive and therefore, imposition of personal penalty under Rule 26(1) of the Rules and relied upon the decision of the Hon'ble (CAT) in the case of *Swam Industries* reported as 2003(154)ELT 417(Tr); that separate penalty on firm and partner

*[Signature]*

cannot be imposed; that the Government has not produced any positive evidence to prove that Appellant No. 1 had actually involved himself in so called clandestine removal of the excisable goods and therefore, penalty imposed is not in law; that Hon'ble Guja. High Court in the case of Mahendra Kumar reported as 2010(260)ELT4103 held that no penalty is imposable on the partner if the firm's penalties are not imposed.

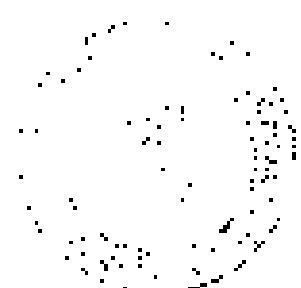
4. Personal Hearing is one of the factors of Law of Appellant No. 1 and Appellant No. 2 was attended to by Shri. Bhausaheb D. Kulkarni, Advocate, who reiterated the grounds of appeals and submitted that there is no evidence against them except the diary of Shri. Bhausaheb D. Kulkarni, Advocate that their partner has not given any statement admitting concerning circumstances of final products; that in view of various case laws, including Hon'ble CESTAT's Order dated 17.7.2015 in respect of M/s. Bajrang Casting Pvt. Ltd., their appeals may be allowed.

4.2 In writer's PH submissions dated 15.6.2014, Appellants No. 1 & 2 contended that the adjudicating authority has not discussed evidences relied upon for upholding the charge of clandestine clearances of the excisable goods. That investigation at the consigners and the transporters has not been carried out; that the Appellants relied upon decisions of the Hon'ble CESTAT in the case of 2010(261)ELT803(Tri-Allah), 2003(141)ELT28(Tri-Chennai); 2007(218)ELT242 (Tri-Delhi); 2007(216)ELT257(Tri-Allah); & 2014(268)ELT494(Tri-Delhi). The penalty imposed under Rule 25 of Rules read with Section 11A(c) of the Act is illegal inasmuch as the intentions along with intention of any offence are to be proved which are absent in the present case and in absence of any evidence that the excisable goods manufactured by the appellant had in fact been cleared without proper invoices; that no evidence was adduced in the show cause notice to establish that they had committed the alleged acts or omissions deliberately or contumaciously with intent to evade payment of duty; that no penalty was imposable when there was no more firm's intent to evade payment of duty on their part and thus, they are not liable for penalty under Section 11A(c) of the Act; that case laws cited by the adjudicating authority are not applicable to this case.

4.3 Despite personal hearing notices sent to the Commissioner, no reply / response received and no officer appeared for personal hearing.

**Findings:**

3. I have carefully gone through the facts of the case, the impugned order and written as well as oral submissions made by the Appellants. I find that Appellants No. 1 & 2 have filed applications for condonation of delay of 27 days



*(Signature)*

In filing appeals on the ground that consulting chartered accountant at the material time was busy with other legal matters and Income Tax Notices, etc. and therefore, they could not file appeals within stipulated time. Considering that delay is within condonable period of 30 days as provided under provision in Section 35(1) of the Act, I condone delay in filing of these appeals.

6. The issue to be decided in the two appeals is whether the Impugned order confirming demand along with interest and imposing penalty on the Appellants is correct, legal and proper or otherwise.

7. I find that Directorate General of Central Excise Intelligence (in short, DGCEI) conducted coordinated search at various places including offices and residence of Shri Bharat Sheth, broker and various incriminating documents were recovered under Panchnama proceedings. On being confronted with the recovered records, Shri Bharat Sheth, broker and Shri Manishbhai H. Patel his Accountant who write the diaries, explained contents of the documents recovered, seized and admitted in their respective statements recorded under Section 14 of the Act that the recovered records like trip books of respective trucks, etc. (refers Para 5.1.4.3 of the Show Cause Notice) were relating to purchases of the excisable goods on behalf of their clients from various re-rolling mills including that of Appellant No.1; that the records recovered contained details like date, description of goods, name of buyers and sellers, rate and total amount, transportation details etc.; that they used short name of re-rolling mills from whom goods were purchased. ; that "Ch" means "M/s. Chandroop Steel Re-rolling Mill Varte;" (refers Para 3.11.3.2(i) of the Show Cause Notice.)

7.1 I find that Appellant No. 2 (Partner of Appellant No. 1) in his statements dated 19.2.2014 and dated 25.2.2014 recorded under Section 14 of the Act, after perusing Panchnama dated 30.3.2010 drawn at the office cum residential premises of Shri Bharat Sheth, broker (refers page 55, question No. 7) as well as statements and Annexure prepared on the basis of documents recovered from the premises of the said broker and transporter also admitted that Appellant No. 1 had sold their excisable goods through said broker without payment of CE duty and without preparing CE Invoices. Appellant No. 2, partner was given full opportunity to go through Panchnamas, statements and Annexures before recording his Statements. I find that Appellant No. 2 deposed in his Statement dated 19.2.2014 (refers Para 4.2.1 of the Show Cause Notice) as under :-



*(Signature)*





Q. No. 10. Please produce Purchase Register and Sale Register of M/S. Chandrasekhar Steel Re-Rolling Mill, Vardaj for year 2008-09 and 2009-10.

A. No. 10. I peruse the Purchase Register of M/S. Chandrasekhar Steel Re-Rolling Mill, Vardaj for year 2008-09 and 2009-10 duly under my signature.

Q. No. 11. In question No. 09, an Annexure A-2 showing all transaction carried out by M/s. Chandrasekhar Steel Re-Rolling Mill, Vardaj, which was prepared on the basis of the invoices no. A-7 and A-11 entered under Paragraphs dated 30-03-2010 from offices-cum-residence of Shri Bharat Sheth, South. Please peruse the same and compare the details contained therein with said stories and your dated signature in token of having verified the correctness thereof.

A. No. 11. I have perused the Annexure A-2 and compared the details contained therein with the serial stories and got my dated signature on it in token of having verified the details thereof. Some of transactions are related with the Annexure A-2 means these transactions are related with the 2 nos purchased from the Shri Bhaskar Singh through Shri Bhambhani Sheth, Broker. Other transactions are not mentioned in our Purchase Register. Further, I state that I do not remember to have made any such transaction with Shri Bhambhani Sheth, Broker, however, Central Excise duty may payable shall be paid by us.

Q. No. 12. Shri. Manish Patel, Assistant and Shri Bharat Sheth in the various statements recorded during investigation, has explained the details of the transactions carried out by him, which have been mentioned in the various records seized from his premises under Paragraphs. They have explained that the plates have dispatched to other party and invoice corresponding to the said quantity was raised in favour of other party.

Please peruse page no. 109 of the serial story marked as A/13 under the paragraphs dated 30.03.10 from the premises of Shri Bharat Sheth. Is reproduced hereunder:-

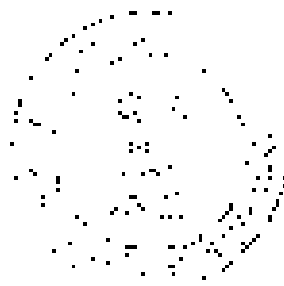
"11.14" 14500 CH (Amar) 102" 10.515

Based on the information given by Shri Manish Patel and Shri Bharat Sheth, M/s. Shree Cement Sales Booking Ltd. Ltd, 35/1 No. 1. Along cleared Party weighing 10.515 MT @ Rs 14,000/- to M/s. Chandrasekhar Steel Re-Rolling Mill, Vardaj and invoice is issued in the name of M/s. Aron Trading, Vardaj (Trader). This transaction was carried out at the rate of Rs. 14,000/- per Metric Ton. Please compare this entry in details and explain.

A. No. 12. I have perused above entry. After perusing the same, I state that this entry is not mentioned in our Purchase Register and I am not aware about such transactions as same being very old.

7.2 I further find that the evidences collected at the premises of Shri Bharat Sheth, Broker were corroborated at transporters ends, who accepted to have transported the excisable goods from the premises of Appellant No. 1. The details of corroboration at transporters' end have been discussed at Para 5.1.4.2 and Para 5.1.4.3 in the impugned Show Cause Notice as under :-

*(Signature)*



showing the description of goods, names of consignees without actual supply of goods mentioned therein. In such cases, when the details of transactions are compared with the corresponding sales invoices issued by the respective ship-breaking units, it is observed that the details of both the said set of transactions and details available in the seized invoices and corresponding sales invoices issued by the respective ship-breaking units, are found alike with some other, except the name of the consignee. Description of goods in certain cases further on the basis of details available in the sales invoices issued by the ship-breaking units, the vehicle numbers have been ascertained through which the goods were shown to have transported. DGOE has extended further investigation with such vehicle owners to ascertain the fact that as to whether such vehicles have actually transported the goods mentioned in the phony sales invoices issued by the respective ship-breaking units or otherwise. Simultaneously, DGOE has extended the investigation with such vehicle owners to ascertain the fact that as to whether such vehicles have actually transported the goods in legitimate milling mill or otherwise.

5.1.4.2 Therefore, to corroborate as to whether the fact that the said truck was used for the transportation of scrap to Indulim furnace unit as per details mentioned in the sales invoice issued by the ship-breaking unit or was used for the transportation of plates to rolling mill, as per details mentioned in the seized records of Shri Bharat Sheth, Statement dated 25.08.12 of Shri Anirulbhai Bahadurraoh Rane owner of vehicles no. GJ 3T 0849, GJ 4U 7077, GJ 4X 6969, GJ 4X 1500 was prepared and during the process accordingly, he has submitted the trip books in respect of the trucks no. GJ 4U 2690, GJ 4X 5591, GJ 3Y 8479, GJ 5V 5574, GJ 4X 2751, GJ 4X 5591 and GJ 4X 6969. The details available in the trip books for transportation of goods by the respective trucks were compared with the truck numbers mentioned in the respective sales invoices issued by the concerned ship-breaking units with reference to the transactions shown in the records of Shri Bharat Sheth. The comparison of such several transactions reveals that the particular truck was used for the transportation of scrap to the mill mentioned in such invoices issued by the ship-breaking units, however the trucks were used for the transportation of plates to the destination mentioned in the records of Shri Bharat Sheth. The details of the same have already been discussed in detail in the para 5.1.4.1 of this report. This conclusively proved beyond doubt about the transactions available in the records of Shri Bharat Sheth.

5.1.4.3. In view of above, the details in regard to transactions carried out by Shri Bharat Sheth, as exhibited by him in the various seized records are fully corroborated with the details of trip books of the respective trucks. Accordingly, it is proved that the plates were actually corresponding quantity of plates cleared to these rolling mills were used in favour of Indulim furnace unit/Deer Rolling Mills without supply of goods mentioned therein. This proved the authenticity of the various transactions relating to supply of goods/supply of invoices only, carried out by Shri Bharat Sheth during the course of his regular business and mentioned in the various records from Shri Bharat Sheth.

7.2 I also find that documentary evidences and Statements of Partner and Accountant of Appellant No. 1, broker, transporters, angadias etc. have been discussed in elaborate manner at Para 26 to Para 56 of the Impugned order and these substantial evidences fully corroborated, have not been contradicted by the Appellants at any stage and therefore, as per settled legal position, sanctity/validity of the Statement cannot be undermined at this stage.

7.4 After analyzing the evidences available in form of (i) incriminating documents recovered from the premises of Shri Bharat Sheth, broker of the excisable goods, (ii) documents/statements of transporters and angadias and depicting modus operandi adopted for removal of goods clandestinely from the

factory premises of Appellant No.1 (M) Statements dated 19.2.2014 and dated 25.2.2014 or Appellant No. 2 who admitted to have removed finished goods. There is no doubt that Appellant No.1 had indulged in clandestine removal of their finished goods. The lower adjudicating authority, at Para 51 to 67, has elaborately countered all the contentions raised by the Appellants while confirming demand of Central Excise duty and in appeal these evidences and reasoning could not be contradicted.

7.5 Appellant No. 1 has argued that demand of duty confirmed on the basis of diaries recovered from the premises of third party like broker Shri Bharat Sheth, without any corroborative evidences, which is not correct and legally unsustainable. I find that the diaries maintained by Shri Bharat Sheth have recorded licit as well as illicit transactions of Appellant No. 1 and only those entries for which corresponding sale Invoices were not issued by Appellant No. 1 have been taken into account for the purpose of demanding duty. Shri Bharat Sheth and his Accountant who wrote the diaries have admitted to have purchased goods reflected in the said Diaries from Appellant No. 1, on behalf of their buyers. I also find that Appellant No. 2, in his Statements has admitted the correctness of Annexures prepared on the basis of said Diaries/ private records and the transactions reflected in the said private records were further corroborated by the statements of the transporters and angadias, who have accepted to have transported these goods from the premises of Appellant No. 1 and delivered to the respective buyers and also dealt with Cash. I further find that all links involved in the case, namely, Appellant No. 2 (Partner of Appellant No. 1), Shri Bharat Sheth, broker as well as transporters and angadias have corroborated the evidences gathered during investigation and therefore, demand cannot be said to be without corroborative evidences or is based only on third party documents. In the instant case, the evidences of clandestine removal have been gathered by the investigating officers from many places and corroborate by many statements recorded under Section 14 of the Act and therefore, it cannot be called without any corroborative and supporting evidences. I rely upon the Order of the Hon'ble CESTAT in the case of Om Prakash Agarwal reported as 2017 (346) ELT 125 (Tri-Del), wherein it has been held that :-

*"5. I note that in both the proceedings almost identical set of facts were involved. The allegation was that based on evidences collected from the suppliers' side, un-received receipt and further manufacture of dutiable items by the appellant was sought to be established. Admittedly, the case was not only based on the material evidence collected from the suppliers and was also corroborated by the available records of the number's end. The receipt and use of the such manufactured raw materials for further manufacture (as apparent) were admitted by the appellants and the duty short paid has also been discharged during the course of investigation itself. The appellants' great emphasis on non-availability of any further corroborations by way of details of transport, money receipt, etc. in the*

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overall case, the evidence collected from the supplier's side is circumstantial and cannot be deemed to be conclusive. The evidence against appellants have been corroborated and substantiated for the commission of the offence by the persons who were in-charge of the export's units. Since such evidence was brought before the parties of the appellants and he was given the opportunity to present evidence of rebuttal nature. However, he did not raise the burden to show such evidence were valid in such situation. It is strange that the appellant has taken a plea that the department has not established the details of buyers and purchasers of the finished goods in such buyers. It is seen that the records maintained by suppliers, which were affirmed by the persons in charge cannot be treated as valid to say the case of the appellant that the suppliers maintained such records which directly implicate the appellants. In fact, the supply of evidence and materials has been corroborated by the parties of the appellant's firm. In such situation, it is not viable for the appellant to raise in the appeal stage, after the fulfilment of cross-examination, etc. Admittedly, none of the papers received by the statements given have been extracted or interrogated for their contents. In the appeal before the Tribunal the appellant is making a belated averment that the statements by the persons of the appellant firm is not voluntary. Papers have been filed upon by the appellants are not of any support in the present case. In the cases involving unaccounted transactions, the evidence of such cases are to be scrutinized for conclusive as noted already. The third party's records of the supplier's side as affirmed by the person in-charge and further corroborated by the appellant cannot be discarded only on the ground of failure to identify the transportation and receipt of goods has not been proved. In a clandestine transaction and otherwise, such stage of operation cannot be substantiated with complete and careful consideration of the grounds of appeal 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."

[Emphasis supplied]

7.6 Appellant No. 1 has contended that the Department has not discharged burden of proof for alleged illicit transactions and that evidences regarding transportation and the buyers are non-existent. I have already discussed in Paras supra that the Department has adduced sufficient evidences in the form of incriminating documents recovered from the premises of Shri Bharat Sheti, Broker which contained details of goods purchased/sold by him on behalf of their clients from Appellant No. 1 without Central Excise Invoices and without payment of Central Excise duty. I find that Appellant No. 2 in his Statements affirmed the correctness of Annexures prepared on the basis of these said Diaries/ private records recovered from the premises of brokers and these evidences were further corroborated in the form of statements of transporters, who admitted that they had transported the impugned goods from the premises of Appellant No.1. I also find that none of the Confessional Statements has been retracted so far. Considering substantial evidences in the form of documentary and oral evidences on record, I am of the considered view that the Department has discharged its burden of proof establishing clandestine removal of goods by Appellant No.1. I find that the lower adjudicating authority has disclosed evidences in the Show Cause Notice, by way of corroboration of statements of various agencies about cash transactions that took place along with clandestine



clearances of the excisable goods by Appellant No.1. In such cases of clandestine removal, the Department is not required to prove the evasion 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 1996 (186) 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 required to have discharged their burden if they place so much of evidence which, prima facie, shows that there was a clandestine removal if such evidence is produced by the Department. Then the onus shifts on to the Appellants to prove that there was no clandestine removal."*

7.7 The Hon'ble CESTAT in the case of Ramachandra Roxin Pvt Ltd, reported as 2011 (295) E.L.T. 136 (Tri. Bang.) has held as under:-

*"7.2 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 in a mathematical precision. After all, a person indulging in clandestine activity takes sufficient precaution to hide away 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 entire facts and circumstances of the case have to be looked into and a decision has to be arrived at on the jurisdiction of 'preponderance of probability' and not on the jurisdiction of 'beyond reasonable doubt'."*

7.8 The Hon'ble Supreme Court as reported in 2014(302) FLT 461 (SC) has upheld the above order of the CESTAT.

7.9 I also rely on the order passed by the Hon'ble CESTAT, Ahmedabad in the case of Apurva Aluminium Corporation reported as 1996 (261) E.L.T. 515(Tri. Ahmd.), wherein at Para 5.1 of the order, the Tribunal held that,

*"Once upon the onus of proving that they have accounted for all the goods available shifts to the appellants and they have failed to discharge this burden. They want 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 all the details and it would not be possible for any investigating officer to unearth all the evidence required and prove with mathematical precision, the evasion or the other illegal activities."*

7.10 I find that the Statements of Appellant No. 2 (Partner of Appellant No. 1) affirming the correctness of Annexures prepared on the basis of records recovered from the premises of Shri Bharat Sheth showing details of goods dealt with by Appellant No.1, are inculpatory and not retracted and hence, have to be held as admissible as held in the case of M/s. Hi Tech Abrasives Ltd reported as 2017 (346) FLT 406 (Tri.-Del.) as under:

*"10. On careful consideration of the facts and circumstances of individual case, I find that the statements of Director is the basis for the demand. The statement is inculpatory and is specific. The Director clearly admitted that the documents/circulars received by the officers contained details of procurement of raw materials as well as clearance of finished goods with and*

without payment of duty. The positive evidence is strengthened by the observation that under entries in the private accounts are entered by the bookseller issued by the department which were entered in the 2014-15 by clearly admitted the truth of the charges as well as character of statements of amounts entered by the entries in the private accounts which were not entered by the taxpayer. Such statements are admissible as evidence as has been held in the Apex Court in the case of Systems & Components Pvt. Ltd (supra). The contents of confidential nature is required to be proved by sufficient positive evidence. However, the facts presented in each individual case are required to be considered and examined independently. The department in this case has failed even to disprove the statement of the Director which is also supported by the original entries in the private records. There is an averment that the statements have been made under duress. The manner in which the evidence has been collected for each commodity during the period of adjudication

15. In view of the foregoing, I find that the Commissioner (Appeals) was correct in taking the view that there is not enough evidence of circumstantial evidence of goods. Even though the statement of Sh. Jaganjit Singh is said to be the author of the private records concerned, it has not been established, it stands submitted by the Tribunal, however, about the truth of the contents of the private accounts. Consequently, I find no reason to dislodge the piece of evidence.

16. The evidence of circumstantial nature has been brought on record only as a result of investigation conducted by the department. The evidences furnished by the department are not certainly authentic and could have gone undetected but for the investigation. Therefore, the plea of statute of limitation of facts from the department and certainly the relevant period of limitation is inoperative in this case and hence the demand cannot be held to be time-barred.

[Emphasis supplied]

7.11 I also rely on the Order passed by the Hon'ble CESTAT in the case of Mrs. Karol Engg. Works reported as 2004 (160) T.L.T. 373 (M. Del.) wherein it has been held that the Statement is a substantial piece of evidence, which can be used against the maker. The Hon'ble CESTAT in the case of M/s. V R Sponge Pl Ltd reported as 2015 (328) ELT 453 (M-Del) has also held that when preponderance of probability was against the Appellant, pleadings of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase 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 Pvt Ltd- reported as 2010(255) ELT68(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, the Appellant's reliance on various case laws are not applicable in light of the positive evidences available in this case as discussed above and in the impugned order.

8. I have also examined Order No. A/11033-11034/2015 dated 17.07.2015 of the Hon'ble CESTAT in the case M/s. Beijing Castings Pvt. Ltd relied upon by the Appellant No. 1, wherein it has been held that :-





*"5. In view of above proposition of law, a direction issued from the lower adjudicating authority cannot be made the basis for allowing CESTAT credit in the Appellant in the absence of cross-examination of the third party witness given. Further, there is no evidence of alternative purchase of raw material by the Appellant for manufacture of goods cleared on payment of duty during the relevant period. ...."*

[Emphasis supplied]

8.1 On going through the grounds of appeals, as also the written submissions made before the lower adjudicating authority, as discussed at Para 20 of the impugned order, I find that no request for cross examination of any witness has been made by Appellant No. 1 and therefore, the order of the Hon'ble CESTAT in the case of *M/s. Bajrang Castings Pvt. Ltd and others supra* is not applicable in the instant case.

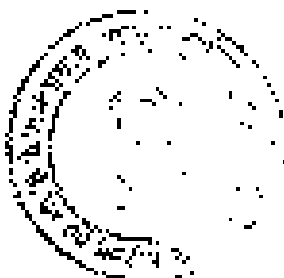
9. In view of above, the contentions raised by the Appellants are of no help to them since the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that Appellant No.1 was engaged in clandestine removal of the finished goods without preparing Central Excise invoices and without payment of Central Excise duty. I, therefore, hold that confirmation of demand of Central Excise duty of Rs. 19,26,973/- by the lower adjudicating authority is correct, legal and proper.

9.1 Since demand is confirmed, it is natural consequence that the confirmed demand on clandestine clearances of goods is required to be paid along with interest at applicable rate under Section 11AA of the Act, 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 paras supra and therefore, the impugned order has correctly imposed equal and mandatory penalty of Rs. 15,66,243/- on Appellant No. 1 under Section 11AC(1) of the Act. The impugned order has correctly given option of reduced penalty of 25% to Appellant No.1 as prescribed under Section 11AC(1) of the Act. Hence, I concur with his decision on penalty on Appellant No.1.

10. Regarding confirmation of demand of wrongly taken and utilized Cenvat credit of Rs. 43,065/- under Rule 14 of the CCR read with Section 11(A) of the Act along with interest and equal penalty thereupon, I find that at Para 44 (iv) and Para 52 of the impugned order the lower adjudicating authority has held as under :

*(Signature)* -----



Rate prevailing at the relevant time. The Central Excise duty payable thereon is calculated as per Annexure-CHANNISA-A(2). Details of which are under:-

Sr. No.	Finished Goods	Quantity (In MT)	Value (In Rs.)	C.E. duty (including Edu. Cess & S & SE Ed. Cess) payable (In Rs.)
1	M. S. Rolled Bars	251,980	Rs. 35,84,262/-	Rs. 15,41,025/-
2	M. S. Sheet	1,806	Rs. 2,64,570/-	Rs. 22,280/-
	TOTAL	253,786	Rs. 38,48,832/-	Rs. 15,63,305/-

(iv) Further, M/s. Chandradeep has received many timely invoices from various ship-breaking units without receipt of the forms described in those invoices, as per details mentioned in Annexure-CHANNISA-A(2). M/s. Chandradeep have availed Central Credit of Rs. 45,000/- (inclusive of Edu. Cess and S&SE Ed. Cess) as indicated in the said Annexure-CHANNISA-A(2) and utilized the same towards payment of Central Excise duty on the finished goods.

(v) It is to mention that records seized from Sri Bharat Sheet contained the information/transactions in respect of several ship-breaking units, Rolling Mills, Induction Furnace units, traders etc. Out of all the details available in the said records records/work sheets are relevant to M/s. Chandradeep are annexed at 36.

32. Further, Sri Bharat Manasbhai Sheth is one of the major brokers of Kharadike through whom M/s. Chandradeep had purchased plates from various ship-breaking units of Alap Shah Nagar and during the period from January 2009 to 2009-10. Investigation conducted revealed that majority of Ship-breaking plates were received (illegally) by M/s. Chandradeep on cash basis from different ship breaking units through Sri Bharat Sheth. Sri Bharat Sheth has received cash amount towards clandestine supply of plates to M/s. Chandradeep. Sri Bharat Sheth is the person who has given cash amount to the respective ship-breaking units, received from M/s. Chandradeep either directly or through Angadias. Sri Bharat Sheth is the person who has given cash amount to the respective induction furnace units, received from M/s. Chandradeep either directly or through Angadias. Sri Bharat Sheth has also received backlogs in cash from various rolling mill units including M/s. Chandradeep for such clandestine supply of plates. Investigation further revealed that Sri Bharat Sheth has also managed sales invoices for induction furnace units/traders and quantity corresponding to the respective invoices raised in favour of such units was entered to the various rolling mill units including M/s. Chandradeep and thereby he has facilitated such inductions. Further considerations to suppliers of fraudulent Central credit. Further, Sri Bharat Sheth has simultaneously facilitated such rolling mill units including M/s. Chandradeep to receive plates clandestinely, to manufacture finished goods out of such clandestinely received plates and in turn to clear the finished goods clandestinely within payment of Central Excise duty. Sri Bharat Sheth has also given cash payment to such induction furnace units/traders against the cheques given by them for full invoice value to the respective induction furnace units/traders, no invoices any were provided without physical supply of goods mentioned in the respective sales invoices raised by different ship-breaking units. Investigation further revealed that the such cash transactions were mainly done through Angadias i.e. receipt of cash amount from rolling mills against clandestine supply of plates etc and making cash payment either to respective ship-breaking units or to induction furnace units/traders etc. Sri Bharat Sheth has also maintained the accounts for the said purposes indicating all such transactions. He has also submitted all such transactions mentioned in the seized records. Thus, he has entertained himself in removing, selling and in all such matters dealt with excisable goods on which appropriate amount of Central Excise duty has not been paid. Thus, he had reasons to believe that such goods so removed are liable to confiscation under the provisions of Central Excise law and yet he dealt with such goods contravening the provisions of the Central Excise Act and the Rules made thereunder. Therefore, appears that Sri Bharat Sheth, broker is also liable to penal action under of Rule (k) of Central Excise Rules, 2002. It further appears that Sri Bharat Sheth is also liable to penal action under Sub-Rule-2 of Rule 26 of Central Excise Rules, 2002, as he was found to be involved in cheating in making such invoices.

(Signature)

