



संयुक्त निर्देशिका क्र. १५४/२०१८-१९ दि. १३/०४/२०१८
 Joint Circular No. 154/2018-19 Dated 13/04/2018



श्रीलंका के. सी. ई. सी. १९९९/१९९९
 Sri Lanka C. S. I. C. 1999/1999

दिनांक १३/०४/२०१८
 Dated 13/04/2018

संयुक्त निर्देशिका क्र. १५४/२०१८-१९ दि. १३/०४/२०१८
 Joint Circular No. 154/2018-19 Dated 13/04/2018

संश्लेषण तालिका क्र. १५४/२०१८-१९

क्र.	संश्लेषण विवरण	प्रारंभिक तिथि	अंतिम तिथि
१५४	संश्लेषण क्र. १५४/२०१८-१९ दि. १३/०४/२०१८	१३/०४/२०१८	३०/०६/२०१८

आपलेशन नम्बर (Appel No.)

BHY-EXCIS 000-AUP-013-10-013-2018-19

आपलेशन दिनांक: ०९/०४/२०१८
 Date of Appeal: 09/04/2018

आपलेशन के तिथि: १३/०४/२०१८
 Date of Appeal: 13/04/2018

सूचना संख्या: १५४/२०१८-१९ दि. १३/०४/२०१८
 Issued by: Shri Kumar Sanjiv, Commissioner, Excise and Customs, Dharmapuri

१. यह आदेश, जो कि एक आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है, के अंतर्गत आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

२. आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

३. आदेशिका के अंतर्गत आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।
 1. Ms. Kiran Rajat Dising, Plot No. 564 G.H.C. - II, Sibat, Dist: Dharmapuri,
 2. Shri Vipin Jang, Auck. Division of Ms. Kiran Rajat Dising, Dharmapuri
 3. Shri Himanshu Lal Nandlal Jagani, 31, Vihar Complex, Fourth Floor, Dharmapuri

४. आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

५. आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

६. आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

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१२. आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

१३. आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

१४. आदेश संख्या १५४/२०१८-१९ दि. १३/०४/२०१८ के अंतर्गत जारी किया गया है।

11. The Board shall have the authority to... (text is extremely faint and largely illegible)

12. The Board shall have the authority to... (text is extremely faint and largely illegible)

- 1) ...
- 2) ...
- 3) ...
- 4) ...
- 5) ...

13. The Board shall have the authority to... (text is extremely faint and largely illegible)

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23. The Board shall have the authority to... (text is extremely faint and largely illegible)

II ORDER IN APPEAL:

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1 to Appellant No.3") as detailed in the Table against Order-in-Original No. 64/Facto/Demand/1A/17 dated 30.04.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner of Central Excise, Surendranagar Division (hereinafter referred to as "the lower adjudicating authority"):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/244/BVR/2017	Appellant No.1	M/s Kiran Ispat Udyog, Plot No. 504, G.I.D.C. -I, Sibar, Bhavnagar.
2	V2/245/BVR/2017	Appellant No.2	Shri Vinay Jain, Authorized person of M/s Kiran Ispat Udyog, Plot No. 504, G.I.D.C.-II, Sibar, Bhavnagar.
3	V2/340/BVR/2017	Appellant No.3	Shri Himanshu Nandlal Jaganji, 38, Vihar Complex, Fourth Floor, Near Sahakar Hall, Vaghazwadi Road, Bhavnagar.

2. The officers of Bhavnagar Commissionerate on intelligence that some re-rolling units of Sibar, Varni and Bhavnagar were engaged in large scale evasion of Central Excise Duty by way of clandestine removal of Re-rolled products viz. M. S. Round/TMT Bars etc. with active support of brokers, conducted coordinated search operation at the premises of S/Shri Himanshu Nandlal Jaganji and Yogesh B. Sanghvi, both brokers of Round/TMT Bars at Bhavnagar and incriminating documents were recovered from them during search. Thereafter, another round of search operation was conducted at the office premises of Appellant No. 2 and at business premises of Appellant No. 1 and various incriminating documents were recovered.

2.1 Show Cause Notice No. V/15-22/Dem/HQ/2015-17 dated 05.08.2016 proposing demand of recovery of Central Excise duty of Rs.7,97,187/- under the proviso to Section 11A(c) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") along with interest under Section 11AA of the Act and also proposing imposition of penalty under Section 11AC of the Act read with Rule 24 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules") upon Appellant No.1 and normal penalty under Rule 26(1) of the Rules (var

Appellant No. 2. The Show Cause Notice was adjudicated by the lower adjudicating authority vide the Impugned order, in which (i) Central Excise duty of Rs. 7,97,187/- was confirmed under Section 11A(4) of the Act along with interest under Section 11AA of the Act and penalty of Rs. 7,97,187/- was imposed under Section 11AC of the Act read with Rule 25 of the Rules upon appellant No. 1 with option of reduced penalty as envisaged under provisions of Section 11AC(1)(b) of the Act, (ii) Penalty of Rs. 7,97,187/- under Rule 26(1) of the Rules upon Appellant No. 2 and (iii) Penalty of Rs. 50,000/- and Rs. 50,000/- has been imposed upon the Appellant No. 2. Broker and Shri Yogesh B. Sanghvi, Broker respectively.

3. Being aggrieved with the impugned order, the Appellant No. 1 has preferred the appeals on various grounds as below :-

Appellant No. 1 :-

(i) The allegation of illicit removal of excisable goods on the basis of entries found in the private records / note books etc. seized under Panchnama dated 12.09.2012 at the premises of Appellant No. 3 under Panchnama dated 06.09.2012; from Shri Yogesh B. Sanghvi under Panchnama dated 06.10.2012 and from Shri Ashish Trivedi under Panchnama dated 12.09.2012; that these seized records had not been proved as 'authenticated documents' to sustain the charge of so called illicit removal as no such direct material evidences have been placed on records viz. Central Excise Records maintained by the Appellant No. 1, weightment slips had been taken on record to sustain the entry of weight shown in the said private note book as well as no material evidences had been placed on record regarding means of transport

(Signature)

(ii) The relied upon documents had been provided in the form of "CD" and not in hard form as required in order with the principles of natural justice read with provisions of Section 33 of the Act; that the private records/ note books were not available for contesting the case and they rely on the decision in case of M/s. Shyam Steel Corporation reported as 2016 (449) ELT 410; that when the relied upon documents supplied in form of "CD" not found in accordance with the condition laid down under Section 36.1 of the Act read with Section 68A of the Indian Evidence Act, such documents cannot be accepted as 'evidence' to frame a charge against such person of party; that no such evidence has been placed on record that the relied upon documents had been supplied in CD form in accordance with the provisions of Section 36 of the Act and hence the Impugned order passed by way of Show Cause Notice is not proper and legal to demand and confirm the Central Excise duty.

(iii) The adjudicating authority failed to establish that they had clandestinely procured the raw materials and manufactured the excisable goods from such illicit procurement of raw material and sold the said excisable goods directly; that in absence of clandestine procurement of raw material, manufacture of excisable goods from such raw material, the charge of clandestine removal of the excisable goods cannot be justified in the eyes of law.

(iv) The case had been made out only on basis of assumption and presumption grounds as the adjudicating authority failed to establish that the coding name mentioned in the said seized private diaries/records was pertaining to Appellant No. 1 and no such question has been asked by the Central Excise officer establishing that the coding name "Kinar" was name of Appellant No. 1 inasmuch as their name start with the wording "Mashis"; that without such verification of the genuineness of the name of the consoling unit mentioned in the so called seized diaries, it is not justifiable that the so called coding name as deciphered by the broker is the name of Appellant No. 1; that quantity of illicit removal had been worked out only on the basis of entries found in the seized private diaries but not established the quantity on the basis of weighment slips etc.

(v) That transactors have stated in their statement that all such disputed transactions had been carried out by him through his above truck so far as the charge of illicit removal was framed against the Appellant No. 1; he also stated that he received payments of freight for such transportation in cash, sometimes from the Appellant No. 2 and sometimes from the purchaser but this fact had not been corroborated by the independence witnesses viz. specific recording a statement of the said broker as well purchaser; that no such investigation had been carried out at the end of the buyer/purchaser; that the said truck owner had not stated that such quantities mentioned against such entries found in the said seized private records from Appellant No. 3 and Shri Rajesh B. Sanyal, had been loaded from the factory premises of Appellant No. 1 and therefore, the statement of the owner of trucks cannot be taken as corroborative evidences to establish the charge of illicit removal of the excisable goods.

(vi) The entries/notes on which basis Annexure-E was prepared, were not the authenticated one and the same were not got prepared by Appellant No. 1; that the comparison of such entries/ notes with the sales summary/ register of Appellant No. 1 is not sufficient without any corroborative evidences viz. daily stock account maintained by them wherein such particular of removal of excisable goods are being shown; that no such records pertaining to receipt and consumption of raw material are taken on record; that the goods removed by them on payment of Central Excise duty and confession statement of partner is

not alone the evidence to prove the charge.

(vii) The so-called financial transactions taken place in so called illicit removal has not been proved by providing corroborative evidences on record in such as money flow back has not been placed on record to charge the illicit removal of Central Excise goods without payment of Central Excise duty, that the so-called transactions corroborated by the adjudicating authority on the basis of the private note books/ records seized from the broker cannot be said as corroborative evidences as the said inquiry was not extended to the end of buyer/purchaser and no records were placed on record regarding payment of freight charges.

(viii) That recovery of some documents is not the criteria to establish the charge of clandestine removal unless it is proved with corroborative evidences viz. illicit receipt of raw material and manufacture of excisable goods from such illicit receipt and its illicit removal; that the department failed to establish the said transactions with evidences viz. money flow back; that in absence of statement/confession of customers/buyers with reference to so called illicit removal of excisable goods, such transaction value cannot be ascertained; that one Central Excise duty had been worked out on the basis of the sale price shown in the said seized private note books & records of the fair party and therefore, duty demanded on the value shown in the said seized private records is not proper/genuine.

(ix) The case-laws cited by the adjudicating authority are not applicable; the adjudicating authority failed to give due respect to the case laws cited by Appellant No. 1 and thus failed to observe the judicial discipline in as much as he has not proved the clandestine receipt and consumption of raw material, not extended the inquiry at the end of buyers to sustain charge of their removal etc.; that they relied on decision of M/s. Omi Aluminium Pvt. Ltd. reported as 2004 (311) EIT 144 (Del. AHC), M/s. Accon Enterprises Ltd reported as 2014 (324) EIT 461 (Mad.) and the Hon'ble CESTAT Ahmedabad Order No. A/11033-1/2014/2015 dated 17.07.2015 in case of M/s. Bajrang Lashings Pvt. Ltd. which were applicable in the present case; that the adjudicating authority has wrongly and without authority of law confirmed the duty which they are not required to pay and that they are not liable to pay any penalty as well.

(x) The professional statement dated 25.03.2016 of Shri Vihar Jain, Authorized Person/Appellant No. 2 can not be considered alone as evidence to prove the charge against Appellant No. 1; that he simply perused the statements and Panchnama and work sheet pertaining to calculation of Central Excise duty

on the basis of entries found in the seized private rate books from the brokers; that perusing documents are not direct material evidences unless such entries are corroborated with the documents pertaining to the illicit procurement of raw material, illicit manufacture of the goods; that since they had not cleared excisable goods without payment of Central Excise duty, they are not liable to penalty.

Appellant No. 2 :-

Appellant 2, Authorized Person of the Appellant No. 1 reiterated the same grounds as have been raised by the Appellant No. 1 in the Appeal Memo.

Appellant No. 3:

(i) Appellant No. 3 stated that the Impugned order is non speaking and non reasoned one inasmuch as the lower adjudicating authority has not dealt with the pleas made by them in their written submission as well judgments referred by them were completely ignored; that the Impugned order is issued in violation of principle of natural justice as during personal hearing they requested to supply relied upon documents to defend their case; that the Appellant No. 3 is not liable to penalty under Rule 26 of the Rules as he had not knowingly and intentionally concerned with the clearance of the goods or engaged him in any way; that he discharged his duties by introducing the purchaser and therefore, the imposition of penalty under Rule 26(1) of the Rules does not arise inasmuch as he being a broker was called in by the purchaser at the M. S. Bars for purchase of the same; that since being broker had introduced and finalized the deal, it cannot be said that he being a broker he had played any role which would render the M. S. Bars liable for confiscation under the provisions of Rule 7(1) of the Rules in order to attract penal provisions of Rule 26(1) of the Rules; that he had not in any way conspired or colluded with the rolling mill to facilitate the evasion of excise duty by them and he never asked the rolling mill to remove the goods clandestinely.

(ii) That he had only brokered the sale and had nothing to do with the sale of the excisable goods; that he had not asked the seller to sale his goods illicitly but only introduced the purchasers to the seller i.e. rolling mill, represented by Shri Ashish Trivedi; that brokers have dealt with the goods just as link between buyer and seller of the good; that they were not required to get themselves registered with the Central Excise authorities and they have not violated any rules or regulations; that even if it is admitted that he had indulged in clandestine removal of goods and whatever written in documents are details of such illicit transactions, then one has to have the evidence from sellers

regarding such sale/transport of such goods; that this case is not covered under sub-rule (1) of Rule 26 as he has not dealt with excisable goods in any manner whatsoever and he only introduced the purchaser; that for a penalty on any person under Rule 26(1), it is prime condition that either he acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief; that he rely on the decision in the case of Godrej Boyce & Mfg. Co. reported as 2002 (145) EIT 161 followed in *A. M. Gokulraj* - 2003 (56) EIT 573 (CECAI Mumbai) and decision of *Saro Nath Singh* - 2004 (251) EIT 451 (Trib. Del.); that any person to be penalized under the provisions of rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act/Rules; that he is not liable to personal penalty of Rs. 50,000/- as imposed under Rule 26(1) of the Rules.

4. Personal Hearing in the matter was attended by Shri N. K. Manu, Consultant on behalf of Appellant No. 1 and Appellant No. 2 and reiterated the grounds of appeals and submitted that the case laws of Hon'ble CECAI's Order No. A/1/013-1103-W/2015 dated 17.07.2015 in the case of *M/s. Bajrang Castings Pvt. Ltd. and Avin Aluminium Pvt. Ltd.* reported as 2014(31)EIT354(Tri-Abd) have held that third party evidences can't be relied upon if not corroborated in the case of the appellant; that there is no money flow back established by the department in this case; that demand can't be upheld in absence of evidence to prove any evasion of duty.

4.1 Personal Hearing in the matter was attended by Shri Madhav Madolewala appeared on behalf of Appellant No. 3 and reiterated grounds of appeals and submitted that the impugned order should be set aside and no penalty should be imposed on Shri Himanshu Nandlal Jagtap i.e. Appellant No. 3, because there is no corroborative evidences; that principles of natural justice have not been followed by the Department, inasmuch as all RUDs have not been supplied to them.

Findings:-

5. I have carefully gone through the facts of the case, impugned order and written as well as oral submissions made by the Appellants. The issue to be decided is whether the impugned order, in the facts of this case, confirming demand and imposing penalty is correct, legal and proper or otherwise.

6. I find that the officers of Central Excise, Bhavnagar conducted coordinated search operations at various places including job brokers and recovered incriminating documents like diaries, notebooks, files, loose papers etc. It is on record that statements of Shri Himanshu Mandlal Jajani and Shri Yogesh R. Sanghvi, both brokers were recorded by confronting them with recovered records and the entries recorded in the notebook/diaries resumed under Panchnama proceedings revealed manufacture and clandestine clearances of M. S. Round/TMT Bars to buyers against cash transaction without CE Invoices and without payment of CE duty. Appellant No. 1 has in a detailed manner explained the codes used and the transactions recorded in the said notebooks/diaries.

6.1. In the grounds of appeal, it is submitted that the adjudicating authority while passing the impugned order has ignored the submissions made by them. On perusal of the impugned order, it is noticed that the adjudicating authority has categorically mentioned the defense submissions at various sub-paragraphs of the impugned order, and had also discussed the same giving his findings. Thus, this argument put forth by the appellants is devoid of merits.

6.2. I find that demand of Rs. 7,77,187/- comprises of three Annexures viz. Annexure - A involving duty of Rs. 6,18,581/- (based on records resumed from the factory premises of Appellant No. 1 and other places), Annexure - H.I involving duty of Rs. 1,14,357/- (based on records resumed from the Premises of Appellant No. 3, Broker) and Annexure - YS involving duty of Rs. 72,277/- (based on records resumed from the Premises of Shri Yogesh R. Sanghvi, Broker). I find that before recording statement of Appellant No. 3, Authorized Person of Appellant No. 1, all documentary evidences recovered from the premises of appellant no.1, Appellant No. 3 and Shri Yogesh R. Sanghvi (Broker) were placed before him. Appellant No. 2 in his confirmatory statement dated 29.01.2016 recorded under Section 14 of the Act had also gone through all Panchnamas drawn at the premises and all the statements tendered by Appellant No. 1 and Shri Yogesh R. Sanghvi, Broker, Shri Ashish B. Tibedi, Sales Manager of Appellant No. 1, Shri Jatin A. Rathwani, Proprietor of M/s. Pm Enterprise dated 11.03.2015, Loading supervisor of Appellant No. 1, transporters etc. Appellant No. 2 was also given full opportunity to peruse incriminating documents, statements and duty calculation worksheet before giving testimony about the truth and correctness thereof. He was duly shown duty calculation Annexures H.I, YS and X prepared on the basis of investigation showing transactions carried out through Appellant No.3 and Shri Yogesh R. Sanghvi, both brokers of

Appellant No.1. I find that the documentary evidences and statements of the brokers, sales manager, transporters have been discussed and reproduced in a very elaborate manner in the impugned order and many transactions recorded in the seized private records were found tallying with the statutory records/transactions of Appellant No.1 which proves admissibility of transactions and details contained included upon documents and relevance of these for duty liability of Appellant No. 1.

9.1 Before proceedings, I would like to reproduce some relevant and important paragraphs of the impugned order, which are important to decide these Appeals as under :-

(a) Para 3.3.6: Shri Ashish B. Trivedi, Sales Manager of the Appellant No. 1 in his statement dated 03.03.2016 admitted that

"First in impugned order it is stated that goods have been purchased from M/s. Kinnu Export Trading in which some are cleared by M/s. Kinnu Export Trading and Central House Imports and some are without clearance of Central House Imports and without payment of duty but it is stated that all these goods for which Central House Imports had not been issued and removed from the Customs No. 7 entered payment of duty and without issuance of invoices that the payment of this type of sale of goods had been made by the Customs No. 7 in cash."

(b) Para no. 3.3.7 : Shri Jai. Jai. Ashraf Nathvani, Proprietor of M/s. Om Enterprise, Bhavnagar (Buyer) in his statement dated 11.03.2016, inter alia, admitted that

"First he stated that all the entries in respect of odd lot goods have been purchased from M/s. Kinnu Export Trading, in which some were purchased from M/s. Kinnu Export Trading under Central House Imports and some are without issue of Central House Imports & without payment of duty, that he talked all the entries of the goods purchased from M/s. Kinnu Export Trading with the duty regime of M/s. Kinnu Export Trading & the bills were and stated that the goods mentioned in this document for which no sale bill had been issued by M/s. Kinnu Export Trading had been purchased without payment of duty and without issue of Central House Imports, that the payment of this type of purchase of goods without issue of invoices had been made to M/s. Kinnu Export Trading, in Cash."

(c) Para No. 3.3.8 (Statement dated 29.03.2016 of Shri. Vikr. Sethi (Appellant No. 2) was exhaustive wherein he, inter alia, admitted as below :-

"Q. No. 6. As you stated in reply to question no. 7 above that besides these five entries, none of the entries have been talked with your Sales Managers. Had you talked the goods mentioned in rest of the entries without issuance of Central House Imports and without payment of duty? Is it true? Please also state from which firm the said goods have been purchased."

Answer: Yes. The goods mentioned in remaining entries have been received from M/s. Kinnu Export Trading, Bihar."

"Q. No. 7. Please prepare a sheet "Annexure (F)" prepared on the basis of documents prepared on the basis of documents of Sr. No. 13 and 14

seized under Panglima dated 12.05.2012 from office premises of Sh. Hemanth M. Jagani, Owner of M/S. Har and after your comments I say

Answer: please the sheet "Ampun-41" prepared on the basis of documents No. 12 & 14 seized under Panglima dated 12.05.2012 of office premises of Sh. Hemanth M. Jagani, Owner of M/S. Har I cross check all the entries mentioned in this sheet with Document No. 12 & 14, and found tally and correct. In taken of same, I put my dated signature on this sheet."

Q. No. 13: Please review Annexure 'Y' prepared on the basis of documents mentioned at Sr. No. 5(a) to 5(d) (as not being seized under Panglima dated 06.10.2012 from residential premises of Shri Yogesh Sanghavi situated at Sitor and found the same with the original documents

Answer: please Annexure 'Y' prepared on the basis of documents mentioned at Sr. No. 5(a) to 5(d) in two columns (Page No. 7-104 to 7-102) seized under Panglima dated 06.10.2012 from residential premises of Shri Yogesh Sanghavi situated at Sitor. On looking the same with the original documents, I found they tally. In taken of perusing and verifying the same, I put my dated signature on Annexure 'Y'."

Q. No. 24: On the basis of the diary submitted by Shri Dewarka Prasad, Loading Supervisor of M/s Kiran Ispat Udyog, Sitor and M/s Jain Steels, Sitor under his statement dated 17.03.2013 and Sales Registers for the F. Y. 2012-13 of M/s Kiran Ispat Udyog, Sitor and M/s Jain Steels, Sitor, a sheet has been prepared. Please peruse the sheet and state why there is a difference between the quantity of goods loaded and actual sales (combined sale of both the units) as per the sales register of M/s Kiran Ispat Udyog, Sitor and M/s Jain Steels, Sitor.

Answer: Since, the matter is very old, I could not re-collect the same. The reasons of difference of the goods loaded might be that besides the loading of our firms M/s Kiran Ispat Udyog, Sitor and M/s Jain Steels, Sitor, Shri Dewarka Prasad was also loading the goods at any another units.

(d) Para 29 : on third party evidences :

"29. The Notice No. 1 and 2 further argued that the above cases neither has been raised nor on third parties' evidences. I find that third parties are nothing but the brokers involved in sale and purchase of goods in question. The brokers were involved in both first as well as second round of raid by the Notice No. 1. The anti-corruption branch has carried out systematic investigation. The documents seized from Notice No. 1, 3 and 4 have scrutinized thoroughly and after verification of records of above documents with the statutory records maintained by the Notice No. 1, the entries which match and invoices were issued, the same were not taken into account while determining the total tax to collect. The entries which mentioned in the seized documents do not match with the statutory records as per provisions provided in goods without tax and without payment of Central Excise duty. These facts were assessed by the Notice No. 1, 3 and 4 in their professional statement. These documentary evidences supported by professional statements issued by Central Excise officers are sufficient to prove the case of illicit removal of goods by the Notice No. 1 with the active help of Notice No. 3 and 4. I find that though they are third party evidences, but it has been admitted by the concerned persons and corroborated by other evidences. Therefore, the inconsistency existing in all the evidences

together. It is further clear that evidence has been placed on various parties (now impleaded in it) therefore, the evidence through third party can be admitted as circumstantial. In the disputed case, third party witnesses (in several instances) have been fully interviewed by the concerned persons and transactions depicted therein are matched with the bills of the Appellant No. 1 as well as of other third parties. Thus, though witness statements are the nature of third party witnesses, it cannot be brushed aside only on the very ground. Further, when the third party witnesses are corroborated and admitted, the same has some legal sanctity and can be represented accordingly as per Indian Evidence Act, 1972. In the cases of evidence and taking in the said international trade operations, it can be assumed that such third party evidences are sufficient enough. Thus this is not the case formed based on third party witnesses and corroborating documents were also found at factory premises as well as office premises of the Appellant No. 1. Thus, the arguments advanced by the Appellant No. 1 and 2 are not tenable and hold to be of no avail.

6.4 I find that on being confronted with the incriminating documents seized during the searches, both the brokers in their respective statements, Sales Manager of Appellant No. 1 Shri Ashish Bharatnari Trivedi during the investigation have admitted that Appellant No. 1 has cleared goods without I.L. invoices and without payment of Central Excise duty and they knew because they acted as brokers in such transactions and entries were available in their private records. Shri Ashish B. Trivedi also in his capacity as Sales Manager of Appellant No. 1 has admitted transactions without invoice. Shri Jatin A. Mathwar, Proprietor of M/s. Om Enterprise in his statement recorded under Section 14 of the Act on 17.03.2016 has also admitted to have purchased non duty paid goods without cover of Invoices from Appellant No. 1.

6.5 It is seen that these are substantial evidences duly corroborated which have not been retracted at any stage and therefore, as per the settled legal position sanctity of the same cannot be undermined by arguments only. I also find that authenticity of records seized from the premises of Appellant No. 1, Appellant No. 3 (broker), and Shri Yogesh B. Sanghvi, Broker have been duly corroborated and tallied with records seized from other premises before quantifying Central Excise duty liable to be paid by Appellant No. 1. Para 3.1.5.4, Para 3.2.9 and Para 3.3.6 of the impugned order are conspicuous example of such correlation of evidences.

6.6 As seen from Para 3.3.7 of the impugned order, I find that Proprietor of M/s. Om Enterprise admitted to have procured/purchased the goods from Appellant No. 1 without bills and therefore, there is corroboration from the buyers of the goods also which has to be considered to be substantial piece of corroboration.

6.7 Appellants No. 1 has argued that demand of duty cannot be confirmed on the basis of damages and records recovered from the third party i.e. brokers Shri

Himanshu N. Jagan¹; Appellant No. 3) and Shri Yogesh B. Sanghvi, and hence, demand made on the basis of third party documents is not sustainable. In this regard, I find that the diaries maintained by the brokers recorded in², as well as sheet transactions of Appellant No. 1. I also find that many transactions recorded in private records tallied with invoices were actually issued by Appellant No. 1. Thus, truthfulness of diaries/notebooks and other private records recovered from the brokers during search is clearly established, also because both brokers have admitted to have dealt with the goods belonging to the Appellant No. 1 without invoices and also sold such goods without invoices. Notwithstanding above, I also find that demand has been computed on the basis of three Annexures, two based on the searches carried out at the premises of brokers and one at the premises of Appellant No. 1. I also find that all lines involve in the case, i.e. Brokers, Appellant No. 1, Sales Manager of Appellant No. 1, buyer, transporters etc. have corroborated evidences gathered during searches and therefore, demand cannot be said to be based upon third party evidences only. The case in fact, is not based only on third party documents but duly corroborated by rest of other evidences also. I find that multiplicity of party would itself negate the concept of the third party. In the instant case, the evidences of clandestine removal have been gathered by the investigating officers successfully from many places and therefore, it cannot be called third party evidences or corroborative and supporting evidences against Appellant No. 1.

6.5 Further, Appellant No. 2 and Authorized Person of Appellant No. 1 has in his statement dated 29.03.2016 (recorded during final part of the investigation), on being confronted with vital documentary and oral evidences along with duty calculation Annexures A, H) and Y5, admitted that they cleared excisable goods without payment of duty and no CE Invoices raised for such transactions. This statement of Appellant No. 2 dated 29.03.2016 has not been retracted till date and hence, have sufficient evidentiary value, which cannot be belittled. The combined appreciation of all such corroborative evidences reflect that CE duty evasion has indeed taken place and Appellant No. 1 has indulged in it. I, therefore, find that all these are required to be considered vital and hard evidences and are sufficient to prove the case against appellants. In this regard, I also rely upon the decision of principal bench of the Hon'ble CESTAT in the case of Om Prakash Agarwal reported as 2017 (346) ELC 525 (T-1-Del) wherein it has been held as under :-

"5. I note that in both the proceedings aforesaid identical set of facts were involved. The allegation was that based on evidence collected from the appellants, the unaccounted receipt and further surmounting of quantity

items by the appellant was sought to be established. Admittedly, the case is not supported by the material evidence collected from the supplier's end and also as corroborated by the responsible persons of the respondent end. The receipt and use of the said unprocessed raw materials for further manufacture has apparently been admitted by the appellant and the duty taxes paid has also been disclosed during the course of investigation itself. The apparent great emphasis on non-availability of the further corroborative in way of details of transport, money receipt, etc. in the present case, the evidence collected from the supplier's end is categorical and cannot be disputed. The private records of the suppliers have been corroborated and endorsed for the convenience of their account by the parties who were in-charge of the supplies. Thus, each certificate was brought before the presence of the appellant's end, he categorically admitted unprocessed character of materials drawn. He never in any way gave the figure to show such unprocessed raw material in such situation. It is strange that the appellant has taken a plea that the department has not established the details of ledger and transport of the finished goods to such extent. It is clear that the records maintained by the supplier, which were affirmed by the private in-charge, cannot be disputed since it is not the plea of the appellant that the supplier maintained such records only to misleadly mislead the appellant. He had the supply of unprocessed raw materials has been corroborated by the parties of the appellant's firm. In such situation, it is not tenable for the appellant to raise in the appeal, except the plea by requirement of corroborations, etc. Admittedly, none of the private records or the statements given have been endorsed or later endorsed for their authenticity. In the appeal before the Tribunal, the appellant is making a factual assertion that the evidence by the parties of the appellant is not voluntary. This may raise in the mind upon by the appellant and rest of any support in the present case. In the cases involving unprocessed manufactures, the evidence of each end can be represented for completion. As noted already, the final party's records of the supplier's side are affirmed by the private in-charge and further corroborated by the appellant cannot be disputed only on the ground of further evidence. The material nature and receipt of money has not been proved. In a conclusive manner, the appellant's case of exemption cannot be established with evidence. On 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]

5.9 During personal hearing, the consultant was referred to the case of Bharat Shah and Others decided by the Hon'ble CESTAT vide Final Order No. A/13877-13931/2007 whereby 55 cases were remanded back to the original adjudicating authority. I find that the facts and circumstances involved in those cases are different, inasmuch as in those cases invoices were issued in the name of Input manufacturers, whereas inputs were actually diverted to retailers, who allegedly wrongfully utilized Cereals credit which is not the issue in the present appeals.

6.10 Appellant No. 1 has also cited Final Order No. A/11333 11334/2015 dated 17.07.2015 of the Hon'ble CESTAT in the case M/s. Bajrang Castings Pvt. Ltd. and Others in support of their contentions. I find that the order of Hon'ble CESTAT held as under :-

"5. In view of above proposition of law, minor requests from the broker and few statements alone cannot be made the basis for denying CENVAT credit to 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]

6.10. On going through the grounds of appeals, as also the written submissions made before the lower adjudicating authority, as discussed at Para 10 to 13 of the impugned order, I find that no request for cross-examining any of the witnesses has been made by the appellants in the present case and therefore, the order of the Hon'ble CESTAT in the case of M/s. Rajrang Castings Pvt. Ltd and others supra is not applicable to the instant case.

6.11. It is settled law that in cases of clandestine removal, department is not required to prove the case with mathematical precision. My said view is duly supported by judgments of the Hon'ble Supreme Court in the cases 1983 (14) E.T. 1431 (SC) & 2009 (235) ELT 597 (SC).

6.11.1 The statements, if not retracted, are legal and valid in the eyes of law and have to be considered as corroborative evidences as held in the cases of (i) Harsh J. Suthawani [1996 (83) ELT 258 (SC)] (ii) Hakesh Kumar Garg [2016 (331) ELT 321 HC-Delhi]. I find that Statement of Director/ authorized persons of assessee admitting clearances of goods without payment of Central Excise duty and without issuing invoices inculpatory and specific and not retracted is admissible as held in the case of M/s. HI Tech Abrasives Ltd. reported as 2017 (346) E.T. 686 (Tri.-Del.)

"14. On careful consideration of the facts and circumstances as aforesaid above, I find that the statement of Director is the basis for the demand. The statement is inculpatory 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 charts as well as clandestine clearances 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 activities of clandestine nature is required to be proved by sufficient positive evidence. However, the facts presented in each individual case are required to be scrutinized

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 use.

7. In view of above facts, I find that the contentions raised by the appellants are of no help to them and the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that the Appellants were engaged in clandestine removal of the goods. I, therefore, find that the confirmation of demand of Central Excise duty of Rs. 7,97,187/- by the lower adjudicating authority is correct, legal and proper.

7.1 It is natural consequence that the confirmed demand is required to be paid along with interest at applicable rate under Section 11AA of the Act. I, therefore, uphold the impugned order to this extent.

8. I find that this is a case of clandestine clearance of the goods and hence, the impugned order has correctly imposed penalty equal to duty of Rs. 7,97,187/- under Section 11AC(1) of the Act on Appellant No. 1.

8.1 Appellant No. 2 i.e. Authorized Person of Appellant No. 1 has contended that the lower adjudicating authority has failed to establish as to how he has abated the so-called evasion of Central Excise duty and thus wrongly imposed penalty on him under Rule 26(1) of the Rules. I find that the facts of this case very clearly establish that he was key person of Appellant No. 1 and was responsible for clandestine removal of the goods manufactured by Appellant No. 1. He, as authorized person, was looking after day to day affairs of Appellant No. 1 and had concerned himself in various irregular activities related to excisable goods including manufacture, storage, removal, transportation, selling etc. of such goods, which he knew and had reason to believe that they were liable to confiscation under the Central Excise Act, 1944 and the rules made thereunder. Looking to the involvement of Appellant No. 2 in the case and gravity thereof, I find that imposition of penalty of Rs. 7,97,187/- upon him under Rule 26(1) of the Rules is proper and justified.

8.2 As far as penalty upon the broker i.e. on Appellant No. 3 is concerned, it is contended that his role was limited as mailman or link person and not concerned with goods and therefore, penalty is not imposable upon him. I find that he was the key person and had been dealing with the goods on behalf of Appellant No. 1 without cover of C.E. invoices and supplied the same without

cover of invoices. Incriminating documents establishing the clandestine clearances of the goods were also found from premises of the Appellant No. 3 during the search proceedings on 12.09.2017. The details of clandestine transactions recorded in his diary/notebooks contained details of the goods, truck no., cash payments, etc. Thus, his role is elaborately discussed in the impugned order and in fact inquiry has been originated based on documents recovered from his premises and therefore, he cannot now plead that his role was limited as a link person between buyers and seller. It is found that his role was very very crucial in the whole episode of clandestine removal of goods. Therefore, I find that penalty of Rs. 50,300/- under Rule 25(1) of the Rules has been correctly imposed upon him by the lower adjudicating authority and hence, there is no need to interfere with the impugned order.

9. In view of above, I uphold the impugned order and reject all appeals filed by the appellants.

9.1 अपीलकर्ताओं द्वारा दई गई वकीलों का निष्पक्ष उद्देश्य संकेत में विवक्षित है।

9.1 The appeals filed by the appellants stand dismissed off in above terms.

By R.P.A.D.



(कुमारी सतीश)
आयुक्त (अपील)

To,
1. M/s Kisan Ispat Udyog,
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17

Copy for information and necessary action to:-

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information,
- 2) The Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar
- 3) The Additional Commissioner, GST & Central Excise, Bhavnagar Commissionerate, Bhavnagar
- 4) The Assistant Commissioner, GST & Central Excise Division II, Bhavnagar.
- 5) ~~Copy File.~~
- 6) F.No. V2/245/BVR/2017
- 7) F.No. V2/545/BVR/2017

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