[illegible]
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
[illegible]
2nd Floor, GST Bhavan,
[illegible] Race Course Ring Road,
Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: [illegible]

[illegible]

क	[illegible] / Appeal / File No.	[illegible] / O.I.O. No.	[illegible] / Date
	V2/201 & 209/BVR/2017	45/AC/Rural/BVR/JDR/2016-17	22.02.2017

ख [illegible] / Order-In-Appeal No.:

BHV-EXCUS-000-APP-019-TO-020-2018-19

आदेश का दिनांक / Date of Order:	10.04.2018	जारी करने की तारीख / Date of issue:	11.04.2018

Passed by Shri P. A. Varma, Commissioner, CGST & Central Excise, Kutch(Gandhidham)

[illegible]

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated [illegible] read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri P. A. Varma, Commissioner, CGST & Central Excise, Kutch (Gandhidham) has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग [illegible]
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham / Bhavnagar :

घ [illegible] / Name & Address of the Appellants & Respondent :-

1. M/s Kishorbhai A. Patel Prop. Of Shree Krishna Enterprises, 304, Shoppers Point, Crescent Chowk, Waghawadi Road Bhavnagar
2. Shri Vinod Bhai Amrutbhai Patel, Plot No. 102, Pavan Mega City, Opposite Victoria Park, Bhavnagar- 364 002

[illegible]
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) [illegible]
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) [illegible]
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) [illegible]
To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) [illegible]

[illegible] to the Appellate Tribunal shall be [illegible] in [illegible] Central Excise (Appeal) Rules, 2001 [illegible] shall be [illegible] Rs. 1,000/- Rs.5,000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of [illegible] of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) [illegible]

The appeal under sub section (1) of Section 86 of the Finance Act, 1994 to the Appellate Tribunal shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. 50 Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(ii) [illegible]

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(iii) [illegible]

[illegible]

(i) [illegible]

(ii) [illegible]

(iii) [illegible]

[illegible]

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include:

(i) amount determined under Section 11 D;

(ii) amount of erroneous Cenvat Credit taken;

(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) भारत सरकार को पुनरीक्षण आवेदन :

Revision application to Government of India :

(i) केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भंडागार या अन्य कारखाने में या फिर किसी एक भंडागार से दूसरे भंडागार में माल ले जाते हुए मार्ग में, या किसी भंडागार या भंडार में चाहे वह किसी कारखाने में या किसी भंडागार में हो माल की प्रक्रिया के दौरान हुई हो।

In case of any loss of goods, where the loss occur in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse.

(iii) भारत के बाहर किसी राष्ट्र या प्रदेश को निर्यात किये गये माल पर या माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के रिबेट के मामले में जो भारत के बाहर किसी राष्ट्र या प्रदेश को निर्यात की गई है।

In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iv) यदि शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है।

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(v) अंतिम उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं.2) 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए है।

Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(vi) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए।

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vii) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए।

जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो रुपये 1000/- का फीस भुगतान किया जाए।

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल ओ.आई.ओ. के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिए। इस तथ्य के होते हुए भी की लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है। In case, if the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975 के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है।

Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं।

For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in.

::ORDERs -IN-APPEAL::

The subject appeals have been preferred by Shri Kishor Amarshibhai Patel, Proprietor of M/s. Shree Krishna Enterprises Bhavnagar, Plot No.102, Excon Mega City, Opposite Victoria Park, Bhavnagar – 364 002 and by Shri Vinod Amarshibhai Patel, Plot No.102, Excon Mega City, Opposite Victoria Park, Bhavnagar – 364 002 (hereinafter referred to as "the appellant No.1&2 respectively") against the Order-In-Original No.45/AC/RURAL/BVR/2016-17 dated 22.02.2017 (hereinafter referred to as "the impugned order") passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar (hereinafter referred to as "the Adjudicating authority"). They are the two co-noticees in the case booked by Directorate General of Central Excise Intelligence (hereinafter referred as DGCEI for brevity) against M/s. Mahadev Ship Breakers Pvt Ltd, Plot No. 134, Ship Breaking Yard, Sosiya, Dist. Bhavnagar (hereinafter referred as "the unit"). The unit is engaged in the process of obtaining goods and materials by breaking ships, boats and other floating structures amounting 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 "the CETA") and are registered with the Central Excise Department and are availing Cenvat credit under the provisions of Cenvat Credit Rules, 2004 (hereinafter referred to as "the CCR,2004").

2. The officers of DGCEI gathered an intelligence which indicated that some of the ship breaking units of Alang / Sosiya are engaged in large scale evasion of Central Excise duty by way of clandestine removal of plates to the Rolling Mills, diversion of goods, undervaluation of goods etc. and that most of the aforesaid type of illicit activities are carried out by the Ship Breakers with the support of some brokers. These brokers obtain orders from different Rolling Mill units and Furnace units and many times, dispatch the material through some Transporters without any Central Excise invoices and without payment of duty. Similarly, these brokers procure orders from Furnace Units and Registered Dealers etc. for supply of fake Cenvat invoices without any physical supply of goods. These brokers take up responsibility of payments from such recipient units by way of various bank instruments and after making such official payments to the ship breakers, they payback equivalent cash amounts to such recipient units after deduction of commission. Several brokers also obtain orders for plates and scraps from Rolling Mills and dealers without invoices against cash payments. It was also gathered that the Ship Breakers and brokers are ensuring safe transfer of unaccounted cash amounts through various angadias, shroffs etc. situated in and around Bhavnagar. The DGCEI conducted a thorough study and discreet verification of the intelligence.

2.1. Accordingly, it was gathered that some of the brokers are the main executors and facilitators of the aforesaid illicit transactions, who act as illegal conduits between the aforesaid chain of Ship Breakers, Rolling Mills, Furnace units, Registered Dealers, Traders, Transporters, Angadias, Shroffs etc. to ensure proper execution of the fraud and thereby aid, abet and facilitate the aforesaid assesses for large scale evasion of excise duty. Considering the above facts, the DGCEI conducted a coordinated search operation at the premises of some of the major brokers at Bhavnagar. Several incriminating documents substantiating the above intelligence were recovered during the search operation. Thereafter, another round of search operation was conducted which proved that several transporters whose documents were available on the record of recipient furnace units were fake. Searches were also conducted at the premises of various Ship Breaking Units and some Rolling Mills. The transporters whose names appeared in specific cases were also covered. Preliminary scrutiny of the documents resumed from the various premises as a result of the aforesaid search operations, fully validated the intelligence and therefore, the DGCEI initiated a thorough investigation into various aspects involving evasion of Excise duty as well fraudulent availment of Cenvat credit etc. The intelligence indicated that the appellant no 1&2, major Brokers of iron & steel at Bhavnagar were also involved in large scale illicit activities of aiding, abetting and facilitating the Ship Breaking Units, Furnace Units and Rolling Mills in clandestine removal of dutiable goods and fraudulently passing of Cenvat credit without physical supply of goods etc. Therefore, a search operation was also conducted at the residence cum office premises of both the appellants in which certain incriminating documents were recovered, which led to conclusion that Central excise duty was evaded.

3. The above observations led to issuance of the Show Cause Notice No.DGCEI/AZU/36-87/2013-14 dated 21.05.2013 (in brief SCN) & corrigendum to SCN F.No.V/15-17/ADJ/DGCEI/HQ/2013-14 dated 29.10.2015 proposing recovery of C.Ex. duty amounting to Rs. 41,10,890/- under the proviso to Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') along with interest under the provisions of Section 11AB(now Section 11AA) of the Act and imposing penalty under the provisions of Section 11AC of the Act upon the unit. And also proposing personal penalties of Rs.14,893/- each on the Appellants No. 1& 2 under sub-rule (1) & (2) of the Rule 26 of the Central Excise Rules, 2002 (hereinafter referred to as 'the CER'). The said SCN was adjudicated by the adjudicating authority vide the impugned order, in which duty was confirmed along with interest and penalties including personal penalties as proposed in the SCN.

4. Being aggrieved with the impugned order, the appellants No.1&2 have preferred the present appeals mainly on the following grounds:

1. The impugned order is non-speaking and non-reasoned.

1.1 The appellants, at the outset, submit that the Assistant Commissioner vide impugned order, has not at all dealt with the pleas made in written reply by the appellants before him. Not only has this, the judgments referred to and relied upon been completely ignored by the Assistant Commissioner while passing the impugned order which is non-speaking and non-reasoned one.

1.2.The Assistant Commissioner has not recorded any finding on the arguments raised before him during personal hearing and have cursorily and mechanically dealt with the pleas of the appellants.

1.3.The appellants, at the outset, adopt and reiterate to avoid repetition, the entire pleas made by them in their reply to SCN filed before the Adjudicating authority for the purpose of adjudication as if the same are specifically canvassed herein.

1.4. The appellants, in view of the above, submit that the impugned order is liable to be quashed and set aside as being illegal, invalid, void and bad in law.

2. The appellants are not liable for penalty under Section 26 of the Rules.

The appellants submit that penalty imposed on him under Rule 26(1) of the Rules, which is reproduced below:

2.1.Rule 26. Penalty for certain offences. (1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.

2.2.On reading of above, it is apparent that the case of the appellants are not covered under sub-rule (1) of Rule 26 as the appellants have not dealt with excisable goods in any manner whatsoever. They have only introduced the purchaser. The sine qua non for a penalty on any person under the above rule is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under Central Excise Act or Rules or he 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. Acquisition of possession of goods is, indisputably, a physical act, and so is each of the various ways of dealing with goods, specifically mentioned in the rule. The expression 'any other manner' should be understood in accordance with the

principle of 'physical' goods and would, then, mean any other mode of physically dealing with the goods. This position has been recognized in Godrej Boyce & Mfg. Co. [2002 (148) E.L.T. 161 (T) = 2002 (103) ECR 770 (Tri.)] which has been followed in A.M. Kulkarni [2003 (56) RLT 673 (CEGAT-Mum.)]. The decision in Ram Nath Singh [2003 (151) E.L.T. 451 (Tri.-Del.)] is also to the same effect. Any person to be penalized under the above 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. He should have done the act with mens rea. However, in the instant case, the appellant has not acted with mens rea. Therefore, the appellant is not liable to a penalty which is imposed under the impugned order.

5. The personal hearing in the matter was held on 27.02.2018. Shri Madhav Kumar Vadodaria, Advocate appeared on behalf of the appellants. He reiterated the grounds of appeal and also filed written submission along with case laws inter alia submitting as under :

i) On behalf of our client we submit that our client made a request on 28.12.2016 for supply of Relied Upon Documents. The adjudicating authority has not supplied the relied upon documents along with the SCN. It was not proper and legal. There were huge numbers of documents had been relied upon which were mainly in the form of recorded statements. The adjudicating authority has contravened the principles of Natural Justice thereby rendering the impugned Order as untenable

(ii) Their client has not received any soft copies of relied upon documents along with SCN though he had requested for. Our client in these circumstances could not make effective defence reply. If the relied upon documents were physically available for refuting the contentions as contended in the respective statements of the respective persons which had been relied upon in the SCN, he would have defended the case strongly as the SCN had been issued only on assumption presumption grounds without direct material corroborative evidences.

(iii) Without prejudice to the above submission, we submit that Para 6.6.2 & 6.6.3 of the show cause notice states that Shri Vinod Patel, elder brother of our client has written and maintained private records. Whereas in concluding Para viz. 10.5 of the show cause notice, it is stated that our client & Shri Vinod Patel brokers dealt with such goods. It is clearly evident from above that department is not sure whether our client was duly involved in the so called clandestine transaction or only Shri Vinod Patel & our client were involved. Ideally in the adjudication proceedings such aberrations 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. However, to our utter surprise & shock the adjudicating authority did not even discuss this aspect.

(iv) Merely a fact that two brothers living in a same house with their parents would mean that they are conducting their business together. Shri Vinod Patel and our client have clearly mentioned and revealed their business activity and that they do not [illegible] jointly. Neither Show Cause Notice nor the impugned order controvert this fact and therefore in order to impose penalty under Rule 26 of the Central Excise Rules, 2002 (Hereinafter referred to as "the Rules") it has to be clearly spell out that they had played different roles independent of each other. In absence of any such findings, at least even it is assumed for the sake of arguments that the goods of value of Rs. 1,39,570/- were removed clandestinely, our client cannot be penalized.

(v) We further submit that the only so called evidence for alleged clandestine removal is seized diaries. The adjudicating authority has failed to appreciate the facts on record. The investigation carried out by DGCEI has not controverted the deposition/explanation given by our client as regards the entries in the diaries. Adjudicating authority has ignored the submission of the appellant that many entries were estimates/survey of the goods lying at various plots of Ship Breaking Yard, Alang/Sosiya. It is not denied that the Adjudicating authority has power to not to accept the submission but that can be done through well reasoned and speaking order. It is surprising that the adjudicating authority has considered merely tallying of some dates in diaries with those in storage devices as corroboration! How can matching some entries in records seized from the same person can be considered as corroboration? Moreover, the adjudicating authority has failed to appreciate the submission of our client without any reason recorded in the impugned order as regards the matching of the entries in ship breaker's records. It had been categorically stated that our submission before the adjudicating authority that entry made in diary No. A/3 recovered from the residence of our client is nothing but details of deal locally known as Sauda and some excisable goods might have been cleared by the ship breaker under proper invoices.

(vi) It should be appreciated that the removal of goods from a factory involves physical movement involving vehicles and other entities. Neither any investigation was carried out with these entities nor with any entities to whom such so called clandestinely were removed goods sold. However the adjudicating authority at Para 3.5.2 of the impugned order noted that "In the cases of evasion and looking to the well orchestrated modus operandi it can be assumed that such third party evidence is sufficient enough". It is not understood from where this principle has taken from? Which provision of the Central Excise Act provides to make such presumption?

(viii) We further submit that penalty proposed on us is also under Rule 26(1) of the Rules which is reproduced thus:

Rule 26. Penalty for certain offences.- (1) Any person who acquires possession of or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under Act or these rules, shall be liable to penalty not exceeding the duty on such goods or two thousand rupees, whichever is greater.

On reading of above, it is apparent that the case of our client is not covered under sub-rule (1) of Rule 26, as he has not dealt with excisable goods in any manner whatsoever. He has only made an inquiry and made an estimate of the goods.

(viii) The sine qua non for a penalty on any person under the above rule is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Central Excise Act or Rules or he has been in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or in any other manner deals with any excisable goods with such knowledge or belief. Acquisition of possession of goods is a, ruinputable, a physical act, and so is each of the various way of dealing with goods, analytically mentioned in the rule. The expression "any other manner" should be understood in accordance with the principle of ejusdem generis and would, then, mean any other mode of analytically dealing with the goods. This position has been recognized in Chiraj Doors & Mfg. Co. [2002 (149) E.L.T. 101 (Tri.) = 2002 (92) ECR 443 (Tri.)] which has been followed in A.M. Kulkarni [2005 (66) RLT 573 (CESTAT-Mum.)]. The decision in Ram Nath Singh [2003 (157) E.L.T. 451 (Tri.- Del.)] is also to the same effect. Any person to be penalized under the above 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. He should have done the act with mens rea.

8. I observe that in the case of Appeal No.V/208/BVR/2017 the impugned order is dated 22.02.2017 & received on 28.02.2017 and the appeal has been filed on 28.05.2017 and in the case of Appeal No.V/209/BVR/2017 the impugned order is dated 22.02.2017 & received on 28.02.2017 and the appeal has been filed on 28.05.2017. Hence I find that both these appeals have been filed in time.

8.1. I have gone through the impugned orders, the grounds of appeal filed by both the Appellants and oral & written submission made by the authorised representative at the time of personal hearing in the case. The brief issue to be decided in these appeals is whether Impugned orders imposing the personal penalty of Rs.14999/-

each on the Appellant No.1&2, passed by the lower authority is correct, legal or otherwise.

7. I observe that in the grounds of appeal, the Appellants have submitted that the adjudicating authority did not furnish the relied upon documents on the basis of which penalties have been imposed. The contention raised by the Appellants is baseless as in the case of appellants the relied upon documents is their personal Diary in which they used to record the illegal transactions of the goods cleared without duty and without proper Cenvat documents and the entries made in this diary have been corroborated from the entries made in the Ship Breakers records.

7.1. The Appellants in the grounds of appeal have submitted that merely a fact that two brothers living in a same house with their parents would not mean that they are conducting their business together and that their business is one and the same for imposing penalty under Rule 26 of the Rules it has to be clearly spelt out that they have played different roles independent of each other. I find that the point raised by the Appellants is far from the truth as it has been established beyond doubt that both these appellants were hand in glove in illicit activities of clandestine removal and fraudulently passing of Cenvat Credit without physically supplying the goods in the name of firm M/s Shree Krishna Enterprises, Bhavnagar, which was registered as dealer for the sole purpose of passing on the fraudulent Cenvatable invoices without physically transferring the goods.

7.2. The Appellants at para 8 of their written submission dated 27.02.2018, pointed out that as per Para 6.8.2 & para 6.8.3 of Show Cause Notice it has been alleged that the Appellants are maintaining private records whereas in para 10.5 of the SCN it is alleged that the Appellants are Brokers and deal with goods. As per Appellants version of presentation of the fact the department is not clear in its mind whether the Appellant No.1 was only involved in the so called clandestine transaction or both the Appellants were involved.

7.3. In this regard I find that the contention raised by the Appellants is absurd and baseless. The Show Cause Notice in para 6.8.2 & at para 6.8.3 is very clear regarding the roles played by both the Appellants and the concluding para No.10.5 of SCN proposing imposition of penalty on both the Appellants are perfectly in sync with each other. The preceding para no.6.8.1 of Show Cause Notice reads as under-

> *"The intelligence indicated that Shri Vinod Patel and Shri Kishor Patel [illegible] to facilitate [illegible] illegal transactions. Documentary evidence recovered from their premises [illegible] dated 30.05.2012 [illegible] the intelligence."*

8. I find that it is a matter of record that, before recording the statement of authorised person of the unit, all the evidences in the form of documents recovered from the premises of the appellants, during the investigation, were placed before him. They have also seen Panchnama dated 10.03.2010 and the statements given by them and have been given full opportunity to peruse the same before giving testimony about the truth and correctness thereof. At the time of recording statement of the Appellants they were shown the Panchnama, various statements given by the Angadias etc. also. They were also shown annexure prepared on the basis of investigation conducted in respect of records seized from the appellants showing the details of the transactions carried out through the appellants by the unit. I find that from the documentary evidences viz. seized diary of the appellants and statements of the angadias, it is proved that the unit had removed the goods clandestinely through the appellants and diverted them without payment of duty. These transactions are tallied with the records of the appellants, which are corroborated with the record of Angadias also, who have also admitted regarding transfer of cash amount. These are substantial evidences in the form of documentary and oral evidences on record returned from the appellants in respect of the unit indulged in transaction with the appellants. I find that the investigation has clearly established various evidences as regards to the evasion of Central Excise duty by the unit. Therefore, it is proved beyond doubt that the Diary marked as M2 seized from the Appellants No.1&2 is containing entry at page No.25&26 regarding clearance of slip packing materials weighing 4260 Kgs valued at Rs.1,33,000/- involving Central excise duty amounting to Rs. 14,586/- has been removed clandestinely without issuance of invoice and without payment of appropriate Central Excise duty payable thereon. The records clearly show that the appellants have never filed any retraction of their statement at any point of time. Therefore, all these evidences substantiate the charges against the appellants as valid, admissible and legal in the eyes of law.

9. The Appellants in their written submission have contended that they are nowhere concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner like, deals with, any excisable goods which he knows or has reason to believe are liable to confiscation. The appellants have not dealt with excisable goods in any manner whatsoever. They have only introduced the purchaser.

10. In this regard, I find that the argument of the Appellants that they were nowhere involved in the illicit removal of excisable goods or transacting business in goods which were liable for confiscation is a blatant lie. The appellants are main conduits through whom the unit had cleared excisable goods in respective buyers illicitly on cash basis to their different buyers, who are the persons involved in cash

transactions in respect of amount receivable to the unit either directly or through agencies, the appellants are the individuals who have given cash amount to the respective ship breaking units, received from various buyers of the clandestinely removed goods either directly or through agencies. the appellants have also received brokerage in cash from various parties including the unit for such clandestine clearances, and diversion of the excisable goods as the case may be. During the course of investigation, it is revealed that such transactions were mainly done through agencies i.e. receipt of cash amount from buyers against clandestine removal of excisable goods and making cash payments to the unit.

10.1. I also observe that the appellants have prepared the accounts for the said purpose indicating all such transactions. The Appellants tried to mislead the investigation by telling that these transactions were details of some imaginary business entity or hypothetical figures and not of genuine transactions. The Appellant No.2 did not disclose unique codes (abbreviated names assigned to various parties in their private records though maintained and updated by him. Hence, the appellants have concerned themselves by way of abetment and facilitating the transactions between the buyers and seller, thus in removing, selling and in all such unlawful manners deal with excisable goods on which appropriate amount of Central excise duty was not paid. Thus, they had the reasons to believe that such goods so removed, were liable for confiscation under the provisions of the Act and yet they dealt with such goods contravening the provisions of the Act and the Rules framed there under. I, therefore observe that the appellants are liable to penal action under Rule 26 (1) of the CER.

11. Further, I find that the unit has issued invoices in the names of some persons who only received the invoices without physical delivery of goods to avail Cenvat credit and the unit diverted the goods covered under these invoices to other persons and for the said transactions involving contravention and violation of statutory provisions. And the appellants are the persons who abetted in handling such irregularity as discussed in the SCN and in the impugned order. In view of above, I find that the appellants were responsible for all the contraventions of rules and provisions as made out in the Act and rules framed thereunder, as discussed above. By acting in this manner, the appellants have also rendered themselves liable for penalty under section (2) of Rule 26 of the CER.

12. On comparison, I find that the facts in hand are distinguishable from the relied upon judgment inasmuch as the documents resumed/collected from the appellants as well as statements of the appellants, Annexures which were never retracted. The investigation of DGCEI revealed that the excisable goods were cleared clandestinely and without payment of appropriate Central Excise duty. It is further evident that they

are the persons who did finance related works such as making follow up of payments against supplies made to various buyers, banking etc. appears to be closely monitored and appropriate decisions and actions are taken by them. The sale proceeds in respect of clandestine removal and diversion of excisable goods by the unit was being handled by them. The authorised person of the unit played vital role in evasion of Central Excise duty by the unit by contravening various provisions of the CEA and Rules framed there under and which resulted in clandestine removal through the appellants. The adjudicating authority has given his clear cut findings in his behalf and since I am in agreement with the same, I dont find any reason / requirement to reproduce the same. The appellants have relied upon various judgments which are on the different footings altogether and are not relevant in the facts and circumstances of the present case and hence not applicable.

13. I find that all the documents and evidences collected by the DGCEI beyond doubt prove that the Appellants No.1&2 were the key persons engaged in clandestine removal of ship breaking material and illicit transaction of cash flow through Angadias. Any of the appellants have not retracted their statement. Therefore, the same is legal and valid in the eyes of law and hence the same can be considered as corroborative evidence and no further evidence is required to prove their involvement in this regard. I would like to rely upon the following judgments:-

- NARESH J. SUKHAWANI - 1996 (83) E.L.T. 258 (S.C.)
- RAKESH KUMAR GARG – 2016 (331) E.L.T. 321 HC-DEL

13.1. The ratio of above case laws as well as discussion in earlier paras would be more applicable in the present case particularly under the facts and circumstances of the case. In light of above facts, the plea of the appellants for not imposing penalty under Rule 26 ibid is not legally tenable, and hence, the same are liable to be rejected.

14. In the instant case, from the documentary and oral evidence, it is established beyond doubt that the Appellants No.1&2 are involved in clandestine removal and fraudulent passing of Cenvat Credit without physically supplying the goods in the name of M/s. Shree Krishna Enterprises, Dhrangadhra which has been registered as dealership firm with the sole purpose of passing on fraudulent Cenvat Credit on the basis of Cenvatable Invoices. The appellants were mainly purchasing G.I. Scrap clandestinely from Ship Breakers and selling the same to various customers without payment of duty and without any invoice and subsequently procuring invoices from various ship breakers without physically procuring the goods so as to enable the buyer/purchaser to avail Cenvat credit on the basis of it.

14.1. On going through the various statements discussed in the SCN and the impugned order, I observe that the statements of appellant No. 1&2 and of other accomplices are inculpable and even valid today. Further, they have explained how they abetted the unit in evasion of Central Excise duty. These statements give modus operandi in detail. I find that the appellants were fully aware of the fact that what they were doing is absolutely illegal under the Act and CER and the goods they are dealing with are liable to confiscation. They were fully aware that Central Excise duty on these excisable goods have not been paid, and therefore, the same are liable to confiscation. By acting in this manner, the appellant No. 1&2 have rendered themselves liable for penalty under Rule 26(1) ibid.

15. Rule 26 of the CER prescribes that "Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or two thousands rupees, whichever is greater". It is seen that penalty under this rule is imposable as soon as excisable goods in respect of which offence is committed, and the person who has dealt such excisable goods, knew that the same are liable to confiscation. The 'liable to confiscation' is the only requirement of Rule 26 when the offender has the knowledge. My view is also supported by the decision in the case of Sanjay Vinalbhai Desai [2014 (306) E.L.T. A131 (S.C.)] wherein the Hon'ble Supreme Court has held as under:

> *"The Gujarat High Court in its impugned order had held that appellant had knowledge of every stage of removing, keeping, dealing and transporting the excisable goods. So, even if the show cause notice did not propose confiscation of goods, penalty would be leviable as per Rule 26 of Central Excise Rules, 2002. Also, just because discretion by authority is used, same cannot be called non-speaking order under Section 35A of Central Excise Act, 1944."*

15.1. Similar view is expressed in the judgment in the case of Radhika Prints Pvt. Ltd. [2013 (294) E.L.T. 155 (Tri. - Ahmd.)] at para 3 holding as under:

> *"The show cause notice makes it clear that the goods were offending in nature and therefore liable to confiscation and adjudicating authority has recorded a finding that goods are offending in nature. There is only a technical omission in the sense that he has not specifically mentioned that these goods are liable to confiscation. In view of the specific allegation in the show cause notice which indicates the nature of offence as far as goods are concerned and the consequence 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."*

16. In the facts and circumstances of the case, I have to take cognizance of the fact that the statements have also not been retracted by any of the appellants which

give credence to the truthfulness of the evidence on record. Hence, the contentions of the appellants that the impugned order of the adjudicating authority is based on assumption and presumption and the adjudicating authority has erred in imposing penalty under Rule 26 of CER is not acceptable. In the SCN as well as the adjudicating authority has discussed at length regarding evidences and acts of the appellant No.1&2 and accordingly imposed penalties as detailed in the impugned order.

17. The plea of the appellants that they were having business independent of each other and were acting as middle man and not as a broker, does not hold ground in view of aforesaid discussion and findings and admittance of breach of law by the concerned. The Appellants did not cooperate during investigation of the case and tried to mislead the investigation shows the shameless of their vicious mind in violating various provisions of the Act and rules framed thereunder. I therefore looking to the facts, circumstances, as detailed in impugned order. I hold that the Appellants No.1&2 are liable to pay penalty of Rs.14,999/- each under Rule 26(1) & 26 (2) of the CER.

18. In view of above discussion and findings, I reject the appeal filed by the Appellants No.1&2 and uphold the impugned order to the above extent.

(Pramod A Vasave)
Commissioner (Appeals)
Commissioner
GST & Central Excise, Kutch

To

1) Appellant No.1
Shri Kishor Amarshibhai Patel,
Prop. M/s. Shree Krishna Enterprises,
Plot No.102, Escon Mega City
Opposite Victoria Park, Bhavnagar 364 002

2) Appellant No.2.
Shri Vinod Amarshibhai Patel, Plot No.102,
Escon Mega City, Opposite Victoria Park
Bhavnagar – 364 002

Copy to-
1. The Chief Commissioner GST & C.Ex. Ahmedabad Zone, Ahmedabad.
2. The Commissioner, GST & C.Ex. Bhavnagar.
3. The Dy./Asst. Commissioner, Central Excise, Rural Division, Bhavnagar.
4. The Dy./Asst. Commissioner (Sys.), Central Excise Hq, Bhavnagar with a request to upload the OIA in the Departmental website.
5. The Superintendent, Central Excise A.R. III, Rural, Bhavnagar.
6. Guard File.