





== ORDER IN APPEAL ==

The below mentioned appeals have been filed by the Appellants therein after referred to as 'Appellant No.1 to Appellant No.4 as detailed in the Table against Order in Original No. 19/Locust/Demand/16-17 dated 31.03.2017 hereinafter referred to as 'the impugned order' passed by the Assistant Commissioner of Central Excise, City Division, Bhavnagar (hereinafter referred to as 'the lower adjudicating authority'):-

Sl. No.	Appeal No.	Appellant No.	Name of the Appellant
1	19/270/378/2017	Appellant No.1	M/s. J. Indusika, Plot No. 201, Side B, Ring Road, Bhavnagar
2	19/270/382/2017	Appellant No.2	M/s. J. Indusika, Plot No. 201, Side B, Ring Road, Bhavnagar, Plot No. 201, Side B, Ring Road, Bhavnagar, Plot No. 201, Side B, Ring Road, Bhavnagar
3	19/270/383/2017	Appellant No.3	M/s. Strong Marketing, Plot No. 201, Side B, Ring Road, Bhavnagar, Plot No. 201, Side B, Ring Road, Bhavnagar, Plot No. 201, Side B, Ring Road, Bhavnagar

2. The officers of the Central Excise Bhavnagar Commissionerate on an intelligence that some re-rolling units of Sahar, Vartej and Bhavnagar were engaged in large scale clandestine removal of re-rolled products viz. M. S. Round/TMT Bars etc. with the active help and support of law brokers, who procured orders from different customers/buyers and procured M. S. Round/TMT Bars etc. from different re-rolling units and furnace units and dispatched the material through Transporters without Central Excise invoices and without payment of Central Excise duty, conducted a coordinated search operation at the premises of Sahar Himanshu, Naarda, Jagani and Virsniji Bhadoriya both brokers of Round/CTD Bars at Bhavnagar and recovered various incriminating documents. The scrutiny of the documents recovered from the various premises as a result of the search operations, fully validated the intelligence and thorough investigation into various aspects involving evasion of Central Excise duty was undertaken.

3. After investigation Show Cause Notice No. 4/15-25/Demand-A, Industries 101-11-14 dated 29.07.2016 was issued proposing demand of Central Excise duty of Rs.4,00,015/- under the proviso to Section 11A(1) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") alongwith interest under Section 11A of the Act and imposition of penalty under the provisions of Section 11AC of the Act read with Rule 73 of the Central Excise Rules, 2007 (hereinafter referred to as 'the Rules') upon

Appellant No.1 and also proposing personal penalty under Rule 26(1) of the Rules upon Appellant No.2 and 3. The said Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order, in which (i) Central Excise duty of Rs. 1,00,015/- was confirmed under section 11A(4) along with interest under Section 11AA of the Act and penalty of Rs. 4,00,000/- was imposed under Section 11A7 of the Act read with Rule 25 of the Rules upon Appellant No. 1 with benefit of reduced penalty under Section 11AC11(b) of the Act, (ii) Penalty of 1,00,000/- each under Rule 26(1) of the Rules upon Appellant No. 2 & 3.

4. Being aggrieved with the impugned order, Appellant No.1, 2 and 3 preferred appeals, inter-alia, on various grounds as under:-

Appellant No. 1

(i) The allegation of illicit removal of excisable goods on the basis of entries found in the private records/ note books seized under Panchnama dated 02.09.2012, Panchnama dated 06.11.2012 & Panchnama dated 23.03.2013 at the premises of Appellant No. 2, Shri Yogesh Ji Sanstha and Appellant No. 3; 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 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; that such vehicle number had been shown 'in figure only' and not with registration number as 'GJ-44, 611, 613 etc.;

(ii) The matter upon documents had been provided in the form of "CD" and not in hard form as required to meet with the principle of natural justice read with provisions of Section 35 of the Act; that the private records/ note books were not available for defending the case and they rely on the register in case of Mrs. Nilesh steel Corporation, reported as 2016 (339) ELT 310; that when the relied upon documents supplied in form of "CD" not found in accordance with the conditions laid down under Section 35B of the Act read with Section 65B of the Indian Evidence Act, such documents cannot be accepted as 'evidences' to frame a charge

*Signature*

against such person of party; that no such evidence has been placed on record that the relied upon documents had been supplied to CD team in accordance with the provisions of Section 36 of the Act and hence the impugned order passed beyond Show Cause Notice is not proper and legal to demand and collect the Central Excise duty; that since relied upon documents demanded by making request, the same were not supplied and hence the impugned order has been passed only on third parties' evidence as well as on assumption presumptive ground without disclosing corroborative evidence; that the adjudicating authority failed to take on record through which vehicle the so called goods had been removed clandestinely in absence of statement of driver/owner of vehicles; that in absence of relied upon documents, they could not request to cross examine the witnesses and the said seized diaries were not found in the said CD leaving the impugned order passed without following procedures as laid down under Section 90 of the Act.

(ii) 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 illicitly; 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 presumptive grounds as the adjudicating authority failed to establish that the coding name mentioned in the said seized private diaries was pertaining to the appellant No. 1 and no such question has been asked by the Central Excise officer establishing that the coding name "M. L. WAIN, LAMN" was the name of appellant No. 1; or as much as their name start with the wording "Wain"; that without such verification of the genuineness of the name of the re-rolling unit mentioned in the so called seized diaries, it is not justifiable that the so called coding name as deciphered by the officer 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.

(vi) The entries/note on which basis the Annexure-E was prepared, were not the authenticated one as the same were not yet perused before Appellant No. 1; that the comparison of said entries/note with the sales summary/register of Appellant No. 1 is not sufficient without any corroborative evidences viz. name 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) That Appellant No. 1 has proved that in absence of proving the charge of illicit procurement of raw material and charge of clandestine manufacture of final product on the so called illicit procurement of raw material, the charge of illicit removals of the Central Excise goods was not justifiable; that they had not cleared the excisable goods illicitly and had removed the same on payment of Central Excise duty by accounting for in the statutory records; that the confessional statement of the partner is not alone the evidence to prove a charge and thus the adjudicating authority has wrongly and without authority of law has confirmed the duty.

(viii) The so called financial transactions taken place in so called illicit removal had not been proved by providing corroborative evidences on record in much as the money flow bank of Rs. 33,97,416/- had not been placed on record to charge the illicit removal of Central Excise goods without payment of Central excise duty; that the so called transaction 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.

(ix) That recovery of incriminating 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 illicit transaction of Rs. 33,97,416/- is not a small one which would have

*Sd/-*

reflected in any manner; that the department failed to establish the said transaction 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 the 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 third party and therefore the duty demanded on the value shown in the said seized private records was not genuine as per section 4 of the Act.

(ix) The case laws cited by the adjudicating authority are not directly 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 illicit removal etc.; that they rely on decisions of Om Aluminium Pvt. Ltd. reported as 2014 (341) F.T.R. 334 (Tn. Altd.), Adar Enterprises Ltd reported as 2015 (324) E.L.T. 461 (Mad.) and CESTAT Ahmedabad Order No. A/11033-11034/2015 dated 17.07.2015 in case of M/s. Bajrang Castings Pvt. Ltd. which are applicable to 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 thus they are not liable to pay any penalty as well.

(x) The confessional statement dated 05.08.2015 of Shri Amin Isha. Sarfani, Proprietor of Appellant No. 1 was not alone evidence to prove the charge against appellant No. 1; that he simply perused the statements and Particulars and work sheet pertaining to calculation of Central Excise duty on the basis of entries found in the seized private note books from the brokers; that perusing documents are not direct material; evidences unless such entries have not been corroborated with the documents pertaining to the illicit procurement of raw material, illicit manufacture of the goods; that since they have not cleared excisable goods without payment of Central Excise duty, they are not liable to penalty.

100  
100

Appellant No. 2:

(i) Appellant No. 2 stated that the impugned order is non-speaking and non-reasoned one in as much as the 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 relies upon documents to refer their case, which was not entertained by the adjudicating authority; that Appellant No. 2 is not liable in penalty under Section 26 of the Rules as he has not knowingly and intentionally concerned with the clearance of the goods or engaged in in any way; that he discharged his duties by introducing the purchase and therefore the imposition of penalty under Section 26(1) of the Rules does not arise in as much as he being a broker was called in by the purchaser of the M. S. Isars for purchase of the same; that since being broker was introduced and finalized the deal, it cannot be said that he being a broker had played any role which would render the M. S. Isars liable for confiscation under the provisions of Rule 25(1) of the Rules in order to attract penal provisions of Rule 26(1) of the Rules; that he in any way conspired or colluded the rolling mill, to facilitate the evasion of excise duty by them and he never asked the rolling mill to remove the goods clandestinely.

(iii) 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 sell his goods illicitly but only introduced the purchasers to the seller i.e. rolling mill; that in his statement dated 02.04.2013, he stated that he had neither purchased nor dealt with the alleged goods; that he never contravened the provisions of the Act or the Rules; that he never confessed having purchased M. S. Round (W) Bars from the rolling mill as mentioned in the Annexure-5; 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 has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or 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

Impuser.

7. The cash transaction taken place in the subject case was not directly proved with the so called consignments found in the said seized diaries; that in these seized diaries, names of the buyer have been disclosed but no such investigation had been conducted to the end of the buyer/purchaser that unless statement of such buyer/purchaser is recorded, the charge of illicit removal and cash transaction are not proved; that the entries found in the seized diaries were only the 'Noting' of such deal made through telephone and this 'Noting' found from the said seized diaries was only the mention of purchase and only in respect of the said goods, therefore, such particulars found in the said seized diaries are not the directly material evidences to prove the charge of illicit removal and to frame a charge of penal action under Rule 26.
8. Confessional statement is not the concrete evidence to establish a charge under the Central Excise Law without any corroborative evidences; that the amount or duty calculation was determined only on the basis of such amount shown in the said seized diaries. Without proving on material evidences that the amount shown in the said diaries was genuine transaction value or not; that the deal of sale and purchase of the said goods is being materialized only on the basis of the market prevailing at the material time and therefore, the duty calculation made on the amounts shown in the said seized diaries was not proper and legal.
9. The Promoter in his statement dated 29.07.2015 has stated that the freight charges are being paid by the buyers/purchasers but, no such inquiry has been extended to the end of the said buyers/purchasers. Therefore, the charges of illicit removal, are not proved and ultimately, he is also not liable for a penal action, as per section in the Impugned order; that unless the charge of illicit removal is not proved by corroborative evidences, it is not correct to say that he had abetted in the so called clandestine removal; that the confessional statement made by him is not alone the material to establish such charge, but it should be with material corroborative evidences.
10. The record user documents had been provided "in the Form of CD" and not supplied hard copies of the relied upon documents as required to meet with the principle of natural justice read with the provisions of

Section 33 of the Central Excise Act, 1944, but not supplied the same and he had defended the case only on the basis of the facts and circumstances narrated in the show cause notice; that the private records/note books were not available for defending the case and relief upon the case of *M/s. Shivan Steels Corporation* reported in 2010 (139) E.T. 310; that therefore, it is clearly established that when the relief upon documents supplied in the Form of CD are not found in accordance with the provisions laid down under Section 36B of the Central Excise Act, 1944 read with Section 68H of the Indian Evidence Act, such documents cannot be accepted as 'evidence' as far as a charge against such person or party; that in the present case, no such evidence has been placed on record that the relief upon documents had been supplied in CD Form in accordance with the said Section 36B of the Central Excise Act, 1944; that the critical relief upon the said Annexure-R had also not been provided though it was requested for; that such Annexures to the Panclimas pertaining to the seizure of the private note books etc. have also not been provided in the so-called CD; that no such clause had been made in the relief upon documents that the said seized documents are available for inspection, if required by any of the appellants to whom the show cause notice is issued; that the case laws cited in this regard by the adjudicating authority are not applicable in the present case and therefore, the findings of the adjudicating authority regarding issue of seized note documents in CD are not justifiable.

11. Notwithstanding contained in the foregoing submissions;

(a) It is admitted fact that the charge of clandestine removal of the excisable goods had been framed against Appellant No. 1 on the basis of the entries found in the seized private note books. Now, unless and until it is not proved that Appellant No. 1 had manufactured the said clandestine removal of the excisable goods from the unaccounted raw materials, the charge of clandestine removal is not at all justifiable. In addition to this, the adjudicating authority has failed to take on record the means of transportation. He had stated that the vehicles for transportation were being arranged by the purchaser. But, in the present case, no such inquiry had been extended to the drivers or the truck owners whose such facts had been narrated in the case and to

decision in the case of Gannoy Woyle & Mfg. Co. reported as 2002 (148) HT 761 followed in A. M. Kulkarni - 2000 (56) EIT 373 (CISAI Mumbai) and decision of Ram Nath Singh - 2003 (151) EL 466 (Tri.-Del.); that any person who is penalized under the provisions of rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or intent that the goods are liable to confiscation under the Act / Rules; that he is not liable to penalty as imposed under the impugned order.

(ii) Appellant No. 2 filed application for condonation of delay for late filing of appeal by 26 days; that their consultant being a chartered accountant was busy with migration and consulting work of GST and hence they cannot prepare the appeal in time leading to delay in filing appeal, that there was no intention on their part and if the delay will not condoned, they will suffer irreparable loss/damage; that they rely on the decision of Cal. J. E. Others reported as 1987 (28) EIT 165 (SC), Brij Singh J. Others reported as 1987 (32) F.T 258 (SC), Vedabat reported as 2001 (172) EIT 15 (SC), C.D. Steel (P) Ltd. reported as 2004 (136) LIT 931 (SC, Kolkata).

**Appellant No. 3**

1. The impugned order passed by the Adjudicating Authority is bad in law, unjust, illegal and is not maintainable in the eyes of law as the same is based on surmises on the basis of the say and admission of the concerned officer of Central Excise (Asst. HC, Bhavnagar without taking into consideration the relevant facts and circumstances of the case made and on the basis of the assumption/presumption grounds.
2. The main charge was framed against Appellant No. 1 for clandestine removal of their final products without payment of total Central Excise duty of Rs. 4,00,015/- as determined in Annexure-E attached to the said show cause notice which was pertaining to the warehouse/ calculation of the Central Excise duty on the basis of the entries found in the seized private note books/issue weightment slips; that he had not received the said Annexure-E, the adjudicating authority has failed to supply the copy of the said Annexure-E which was the relevant document as mentioned in the Annexure-F attached to the said show cause notice; that the adjudicating authority has not supplied

- the Annexure-F and relied upon documents as requested by him and therefore, the impugned order is not proper and legal.
3. He ignored the intimation of personal hearing held on 04.01.2017 and produced written submissions on 04.01.2017 wherein it was clearly stated that the subject show cause notice had been issued on assumption/presumption grounds and the charges has been framed only on the basis of the third party's evidences and the adjudicating authority has failed to give proper findings, passed the impugned order without corroborative evidences pertaining to the Central Excise Law.
  4. The adjudicating authority has erred in giving finding that Appellant No. 1 had not issued Central Excise Invoices in respect of the goods sold to the Appellant which was found from verification of such entries/dates mentioned in the said seized diaries while comparing the sales particulars/registers etc. of Appellant No. 1; that to prove illicit removal of the said goods manufactured by Appellant No. 1, such corroborative evidences viz. Audit receipts of raw materials and their manufacturing of the final products from the raw materials were required to be taken on record to sustain such charge of illicit removal, but in the present case, no such corroborative evidences had been placed on record and hence, the impugned order is not proper and legal.
  5. In the present case, the 'Daily Stock Account' maintained by Appellant No. 1 has not been taken on record and without taking such corroborative evidences on record it is not correct to say that Appellant No. 1 had not maintained the said 'Daily Stock Account' in respect of the disputed goods removed without payment of duty; that no such evidences had been taken on record regarding receipt of the raw materials without under cover of Central Excise Invoice etc and thus, it is proven that he was not involved in the manner as specified under Sub Rule (1) of Rule 26 of the Central Excise Rules, 2002.
  6. Appellant No. 1 was the proper person to follow the Central Excise Law; that he has acted only for limited work say purchase and sale of the said goods in the open market and no any person of Appellant No. 1 or the owner of the vehicle had stated that he was in knowledge of so called illicit removals. Therefore, he was not liable for a penalty as

such inquiry had also been extended up to the end of the year. If such goods clandestinely manufactured, such facts of the unaccountable production should have required to be placed on record. But, in the present case, not such records/evidence had been placed on record. In short, no such positive evidences had been placed on record to prove the charge clandestine removal. The entire case has been made on stories maintained by third parties viz; Brokers, The Appellant. As stated in foregoing para, he had submitted that the referred diaries were pertained to orders booked telephonically. In absence of corroborative evidences, demand cannot be sustained.

(b) The allegation made in the show cause notice confirmed only on the basis of curtailed figures/entries made in the loose papers (weighment slips)/ seized third party's private note books without providing details of goods manufactured. The subject demand was raised on imaginary grounds. The adjudicating authority has simply confirmed the demand only on the basis of the say and submissions recorded in the statements of the various persons. But, the facts stated in the statements are valid only when such independent direct corroborative material evidences are produced on record. But, in the present case no such direct corroborative evidences had been placed on record.

12. From the above grounds of appeal, it is clearly established that the present case has been made merely on assumption/presumption grounds and without any corroborative evidences. There are no any direct material evidences that he was involved in the manner as specified under Rule 26(1) of the Central Excise Rules, 2002. It is clearly established that the adjudicating authority has failed to follow the judicial guidelines laid down in the following case laws which were relied upon by him :

*(Signature)*

- a) 2014 (141) ELT 354 (Trib. Chand.) - M/s. On Aluminium Pvt. Ltd.
- b) The Hon'ble CESTAT, Ahmedabad has passed an Order No. A/ 11033-11034/2015 dated 17.07.2015 in the case of an Appeal filed by M/s. Bajrang Casting Pvt. Ltd. Shri. Amit R. Bhasin.
- c) 2012 (145) ELT 128 (Trib. Delhi) - Kamadevi Steels Pvt. Ltd.
- d) 2012 (145) LLT 285 (Trib. Delhi) - M/s. Abrasives Pvt. Ltd.
- e) 2012 (145) ELT 491 (Trib. Ahmedabad) - Rajputana Steel Casting P. Ltd.

6) 2017 (347) FTR 46 (Trib. Al.) - Super Castotes Industries Ltd.

5. Personal hearing in the matter was attended by Shri H. C. Mani, Consultant on behalf of Appellant No. 1 & 3 and reiterated grounds of appeals and submitted two case laws reported as 2014 (211) ELT 354 (ITM Ahmed) in the case of M/s Aluminium Pvt. Ltd. and CIT's Order No. AP/1033-11034/2015 dated 17.07.2015 in the case of M/s. Bajrang Castings Pvt. Ltd. contending that evidences of 3<sup>rd</sup> party can't be considered if not corroborated with evidences with the appellant; that there is no money law back in this case; that in absence of cross examination demand can't be upheld specially in absence of evidence to evade payment of duty.

6.1 Personal hearing in the matter was attended by Shri Madhav Yashodharya on behalf of Appellant No. 2 and reiterated grounds of appeals; also submitted written submissions stating that impugned order should be set aside and no penalty imposed on appellant No. 2 as because there is no corroborative evidences; that principles of natural justice were not followed by the lower adjudicating authority in as much as all relied upon documents have not been supplied to them and even then impugned order passed.

#### Findings:

6. 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 or otherwise.

6.1 I find that Appellant No. 2 filed appeal beyond period of 60 days but within further period of 30 days stating that their consultant was busy with work related to adjudicating proceedings before various authorities; that their consultant being chartered accountant was busy with work related to reply to notices of income tax department, due to demonetization of currency and statutory audit work of nationalized banks as well as migration related to GST. Since the appeal has been filed within further time frame of 30 days prescribed by the Act under which I am empowered to accord the acceptance of appeal, I condone the delay in filing appeal and proceed to decide appeal on merit.

7. I find that the officers of Central Excise, Dhavanager conducted a coordinated search at the places of various brokers and transactors, from where incriminating documents like various diaries, files, loose papers etc. were retrieved. The searches were also conducted at the premises of enrolling units and certain furnace units. During preliminary inquiry of the records retrieved, the intelligence gathered was validated and therefore detailed inquiry was conducted.

7.1 I find that the statements of Appellant No. 2 (A) and the entries recorded in the notebook/diaries retrieved during the course of investigation revealed that the manufacture and clearances of excisable goods viz. M. S. Round/TMT Bars to buyers were made against cash transactions. Appellant No. 2 (A) explains the codes used and the transactions recorded in the said notebooks/diaries. Shri Arun Ingal Marfan, Proprietor of Appellant No. 1 in his statement dated 05.08.2015 has accepted that the goods had been removed without payment of Central Excise duty and without issuance of Central Excise invoices and payment had been received in cash. He also accepts that he had sold finished goods through Appellant No. 2 (A) and Shri Yogesh R. Sanghvi and has no grudge or dispute with them.

8. On going through the impugned order of the lower adjudicating authority, I find that the impugned order has made detailed analysis of the facts and evidences which were collected during investigation in the form of statements/documents. I find that the officers of Central Excise, Dhavanager conducted coordinated search operations at various places including of brokers and recovered incriminating documents like diaries, notebooks, files, loose papers etc. It is on record that statements of Shri Himanshu Nandlal Jozani, Shri Yogesh R. Sanghvi and Shri Vinayak Bhadouria, all brokers were recorded by confronting them with recovered records and the entries recorded in the notebook/diaries retrieved under Panchanama proceedings revealed manufacture and clandestine clearances of M. S. Round/TMT Bars to buyers against cash transaction without Central Excise invoices and without payment of Central Excise duty. Appellant No. 2 (A) has in a detailed manner explained the codes used and the transactions recorded in the said notebooks/diaries.

*(Signature)*

9.1. In the grounds of appeal, it is submitted that the adjudicating authority while passing the impugned order has ignored the submissions made by them. However, it is noticed that the adjudicating authority has categorically mentioned the defense submissions at various sub-para(s) 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.

9.2. It is found that demand of Rs. 4,00,000/- has been made based on records resumed from the factory premises of Appellant No. 1, based on records resumed from the Premises of Appellant No. 2, Broker, based on records resumed from the Premises of Smt. Yogesh K. Sanghel, Broker and proprietor of M/s. Radhe Steel, . find that before recording statement of proprietor of Appellant No.1, all documentary evidences recovered were placed before him. Appellant No. 1 in his statement dated 05.08.2015 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. 2 and Smt. Yogesh K. Sanghel, Broker, Smt. Virendra Bhadaurya, Broker i.e. Appellant No. 3, transporters etc. The proprietor of Appellant No. 1 was also given all opportunity to peruse incriminating documents, statements and duty calculation worksheets before giving testimony about the truth and correctness thereof. He was duly shown duty calculation Annexures prepared on the basis of investigation showing transactions carried out through Appellant No.2, Smt. Yogesh K. Sanghel and Appellant no. 3, all brokers of Appellant No.1. find that the documentary evidences and statements of the brokers, 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 authenticity of transactions and details contained in relied upon documents and relevance of those for duty liability of Appellant No. 1.

9.3. It is found that on being confronted with the incriminating documents seized during the searches, all the three brokers in their respective statements, during the investigation have admitted that Appellant No. 1 had cleared goods without Central Excise 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 Anirudh Ramani, Proprietor of Appellant No. 1 has admitted transactions without invoice.

9.4 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. 2 (broker), Shri Yogesh R. Sanghvi, broker and Appellant No. 3 (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.

9.5 Appellant No. 1 has argued that demand of duty cannot be confirmed on the basis of diaries and records recovered from the third party like brokers Shri Himanshu H. Jagani (Appellant No. 2), Shri Yogesh R. Sanghvi and Appellant No. 3 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 here, as well as other transactions of Appellant No. 1, I also find that entry transactions recorded in private records tallied with the invoices 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 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 Appraiser's basis on the searches carried out at the premises of three brokers and also at the premises of Appellant No. 1. I also find that all links involved in the case, i.e. brokers, Appellant No. 1 and 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 host 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, I cannot be called third party evidences but corroborative and

*[Handwritten signature]*

supporting evidences against Appellant No. 1.

9.6 The Proprietor of Appellant No. 1 gave in his statement dated 04.05.2014 recorded during final part of the investigation, on being confronted with documentary and oral evidences along with duty calculation Annexures A, III, VI and VII, admitted that they cleared excisable goods without payment of duty and no Central Excise invoices were issued for such transactions. This statement of proprietor of Appellant No. 1 dated 04.05.2014 has not been retracted till date and hence, has sufficient evidentiary value. The combined appreciation of all such corroborative evidences reflects that Central Excise duty evasion has indeed taken place and Appellant No. 1 has indulged in it. Therefore, find that all these are required to be considered vital and relevant evidences and are sufficient to prove the case against appellants. In this regard, I also rely upon the decision of the Hon'ble CESTAT in the case of Om Prakash Agarwal reported as 2017 (146) E.L.T.175 (Tri-DeI) wherein it has been held as under:-

*“50. I have gone through the proceedings about material set of facts were involved. The allegation now has been in evidence admitted from the supplier that transportation receipt and further manufacture of excisable goods by the appellant was single so the material identified, the case is not only based on the material evidence collected from the supplier's and not also as corroborated by the responsible person of the supplier's and. The receipt and use of the such materials were essential for further manufacture and apparently have admitted by the appellant and the duty which paid has also been discharged during the course of investigation itself. The appellant great emphasis on non-availability of the proper corroborative way of details of transport receipt etc. In the present case, the evidence collected from the supplier's and is sufficient and cannot be disputed. The private records of the supplier have been observed and acquired for the convenience of date contents by the person who were in charge of the supplier's sale. When such evidence was brought before the person of the appellant and he categorically admitted and accepted clearance of excisable goods, however, he did not show any papers or when such papers were said to have supplied, it is strange that the appellant has not shown that the documents were not available for details of ledger and management of the finished goods in such manner. It is seen that the records maintained by the supplier, which were acquired by the person in-charge cannot be controverted. In fact the case of the appellant was the taxpayer maintained such records and to furnish sufficient the appellant. In fact, the supply of an excisable raw materials has been corroborated by the partner of the appellant's firm. In such situation, it is not possible for the appellant to claim in the appeal stage, now the point of requirement of corroborative evidence.”*

*Amended*

Admittedly, none of the private records or the statements given have been extracted or duly reviewed for their veracity. In the material before the Tribunal, the appellant is making a claim covering the statement by the partner of the appellant to be not witness. Further, no steps were taken by the appellants to meet any support in the present case. In the cases involving uncorroborated statements, the reliability of such evidence to be appreciated for determination. As under stands, the third party's records or the signature, etc. as alleged by the person in charge and further corroborated by the appellant cannot be compared with the presence of further witness. The investigation and review of same has not been carried. In a domestic transaction and clearance with scope of operation cannot be established with precision. 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]

2.7 Appellant No. 1 has cited Final Order No. A/11003-11004/2015 dated 17.10.2015 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 reads under :-

"In view of above proposition of law, a diary recovered 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]

2.8 On going through the grounds of appeals, as also the written submissions made before the lower adjudicating authority, as discussed in the impugned order, I find that no request for cross-examination 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. Bajrang Castings Pvt. Ltd and others is not applicable at all.

2.9 It is settled law that in cases of clandestine removal, department is not required to prove the case with mathematical precision. My this view is duly supported by judgments of the Hon'ble Supreme Court in the cases of

Shri Shan Gurmura reported as 1583 (10) E.L.T. 4631 (S.C.) & Aarlot Textiles (I) P. Ltd. reported as 2009 (235) E.L.T. 497 (S.C.).

5.5.4 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 *Mazesh J. Sukhawani* reported as 1996 (83) E.L.T. 748 (S.C.) and *Rakesh Kumar Garg* reported as 2016 (331) E.L.T. 2171-K-Delhi. I find that Statement of Director authorized persons of appellant admitting clearances of goods without payment of Central Excise duty and without issuing invoices fraudulent and specific and not retracted is admissible as held in the case of *M/s. Hi Tech Abrasives Ltd.* reported as 2017 (346) E.L.T. 648 (H. Del.).

14. On careful construction of the facts and circumstances as outlined above, I find that the statement of Director is the basis for the demand. The statement is incriminatory and is specific. The Director clearly admitted that the documents/private records recovered by the officers contained details of movement of raw materials as well as clearance of finished goods with and without payment of duty. This fact is further strengthened by the observation that many entries in the private documents are covered by the invoices issued by the assessee on which duty stands paid. The Director has clearly admitted the truth of the entries as well as clandestine clearance of goods covered by the entries in the private notebooks which are not covered by the invoices. Such statement is admissible as evidence as has been held by the Apex Court in the case of *Systems & Components Pvt. Ltd. (supra)*. The 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 and examined independently. The department in this case has relied upon the confessional statement of the Director which is also supported by the mentioned entries in the private records. There is no averment that the statement has been taken under duress. The assessee also does not appear to have asked for cross-examination during the process of adjudication.

15. In view of the foregoing, I find that the Commissioner (Appeals) has erred in taking the view that there is not enough evidence of clandestine removal of goods. Even though the statement of Shri Sanjay Kejriwal, who is said to be the author of the private records recovered has not been recorded, it stands admitted by Shri Tejpal, Director about the truth of the contents of the private notebooks. Consequently, I find no reason to disallow this piece of evidence.

*[Handwritten signature]*

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

[Emphasis supplied]

9.13 I also rely on the decision in the case of *M/s. Taryana Steel & Alloys Ltd.* reported as 2017 (355) ELT 454 (Tri. Del.) wherein it has been held that the unaccounted (dirties) seized from the possession of appellant's employee at the time of search having entries for accounted as well as unaccounted goods which have been explained in detail and disclosed by GM of the factory tally with Invoce/Bate passed is trustworthy; that statement of employee running into several pages and containing detailed knowledge to be considered reliable. I also rely on the decision in the case of *M/s. Ramchandra Sweets Pvt. Ltd.* reported as 2014 (302) ELT 451 (S.C.) where the similar view has been taken by the Hon'ble Supreme Court.

9.14 I am of the considered view that the admitted facts stand not be proved as has been held by the Hon'ble CESTAT in the cases of *Alex Industries* reported as 2008 (230) ELT 6673 (Tri-Mumbai) and *M/s. Dione Solutions* reported as 2008 (204) F.I.T 1605 (Tri. Chennai). Hon'ble CESTAT in the case of *M/s. Karori Engg. Works* reported as 2004 (166) E.L.T. 443 (Tri. Del.) has also held that Admission/Confession is a substantial piece of evidence, which can run against the matter. 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. Hon'ble CESTAT in the case of *M/s. N R Springs P Ltd* reported as 2014 (328) F.I.T 413 (Tri-Del.) has also held that when preponderance of probability was against the Appellant, pleading of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted and an input output ratio prescribed by law is of no use.

10. 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. 4,00,07/- by the lower adjudicating authority is correct, legal and proper.

10.1 It is natural consequence that the confirmed demand is required to be paid along with interest at applicable rate under Section 114A of the Act. I, therefore, uphold the impugned order to this extent.

11.1 I find that this is a case of clandestine clearances of the goods and hence, the impugned order has correctly imposed penalty equal to duty of Rs. 4,00,07/- under section 114C(1) of the Act on Appellant No. 1.

11.1 As far as penalty upon the brokers i.e. on Appellant No. 2 & 3 is concerned, it is contended that his role was limited as link person and they were not concerned with the goods and therefore, penalty is not imposable upon them. Incriminating documents establishing clandestine clearances of the goods were also found from premises of the Appellants No. 2 & 3 during the search proceedings on 12.09.2012. The details of clandestine transactions recorded in their diary/notebooks contained details of the goods, truck no., cash payments, etc. I find that their role was crucial in the whole episode of clandestine removal of goods. Therefore, I find that penalty of Rs. 1,00,000/- under Rule 26(1) of the Rules has been correctly imposed upon them by the lower adjudicating authority.

12. In view of above, I uphold that the impugned order and reject all appeals.

१२. अपीलकर्तोंके हकमें दर्ज की गई अपील का निम्न व अपरोक्त तरीके से किया जाता है।

12.1 The appeals filed by the Appellants stand disposed off in above terms.

१२.१ अपीलकर्तोंके हकमें दर्ज की गई अपील का निम्न व अपरोक्त तरीके से किया जाता है।

कुमार राजेश,  
आयुक्त (सूचीकरण)

IN HPAD

1.	675, A. I, Industries, Plot No. 411, CIDC-II, Sion, Dist.: Bhavnagar	असम ७ - १९. एम.ई.ए. जॉय नन्दा ए.ए. जी.के.इ.पी.सी. शीर्षक, त्रिलोक भवनगर
2.	Sri Himanshu Navdol Jagnani, 36, Vihar Complex, Fourth Floor, Near: Sakhal Hat, Maghwasai Road, Bhavnagar.	श्री हिमांशु नवलदल जगन्नी, ३६, विहार कॉम्प्लेक्स, चौथा मंजल, सहाकरी हाट के समीप, मागवासई रोड, भवनगर.
3.	Sri Virsingh Bhadouriya, Broker, Prop.: M/s. Radhe Steel, Bhavnagar. 2: 9, Sanyam Chamber, First Floor, Tap Naka, Station Road, Bhavnagar.	श्री विंसींग भदौरिया, ब्रोकर एण्ड प्रॉपर एम/स. राधे स्टील के मादरेण, एन. ९, सान्याम कैम्बर फ्लोर, टाप नाका, स्टेशन रोड, भवनगर.

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) The Super Intender, GST & Central Excise, Range: Sion, Bhavnagar.
- 6) Guard File.
- 7) F. No. V2/336/BVR/2017 (S) F. No. V2/220/BVR/2017.