





3. 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. 77/Excise/Demand/15-17 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'):-

Sr. No.	Appal No.	Appellant No.	Name of the appellant
1	M/2017/24/2017	Appellant No.1	Mrs. Saira Sult. A. Durrani Will, Flat No. 204-105, SIDCO, Sher. Dist.: Bhavnagar.
2	M/2017/24/2017	Appellant No.2	Shri Himanshu Nandlal Jagani, JE, Vihar Complex, Fourth Floor, Near Talsons Ind. Waghward Road, Bhavnagar.
3	M/2017/24/2017	Appellant No.3	Shri Nitish Khacouriya, Doctor, Proprietor, Disha Staff Quarters, At: 9, 5 room Chamber, 1st Floor, Tap Sata, Sadan Road Bhavnagar.
4	M/2017/24/2017	Appellant No.4	Shri Rajesh Rajwani, Partner in M/s. Rajesh Rolling Mill, Plot No. 104-105, GDC, Saha, Dist: Bhavnagar.

2. The officers of the Central Excise Bhavnagar Commissionerate on an intelligence that some re-rolling units of Jamn. Vartej and Bhavnagar were engaged in large scale evasion of Central Excise Duty by way of clandestine removal of Re-rolled products viz. M. S. Round/ T&I Bars etc., with the active help and support of few brokers, who procured orders from different customers/buyers and procured the goods viz. M. S. Round/T&I Bars etc. from different re-rolling units and Furnace units and dispatched the material through transporters without Central Excise tax/cess and without payment of Central Excise duty, conducted a coordinated search operation at the premises of S/Sri Himanshu Nandlal Jagani, 'Yogeshtha' Ramnidal wagher and through Khacouriya, the major brokers of Round/CTD Bars at Bhavnagar and recovered several incriminating documents. The scrutiny of the documents recovered from the various premises revealed that thorough investigation into various aspects involving evasion of Excise duty was required, which was undertaken.

3. Show Cause Notice No. M/15-24/2017/mahe/satra/srao/AJ/15-16 dated 29.07.2016 was issued imposing demand of Central Excise duty of Rs. 5,16,746/- under the proviso to Section 11A(e) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") alongwith interest under Section 11AA of the Act and

imposition of penalty under Section 11A(i) of the Act read with Rule 25 of the Central Excise Rules, 2006 (hereinafter referred to as 'the Rules') upon Appellant No.1 and also proposing personal penalty under Rule 25(1) of the Rules upon Appellant No.2, 3 and 4. The said Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order, in which (i) Central Excise duty of Rs. 3,16,746/- was confirmed under Section 11A(i) of the Act along with interest under Section 17Aa of the Act and penalty of Rs. 3,16,746/- was imposed under Section 11AC of the Act read with Rule 25 of the Rules upon Appellant No. 1 with benefit of reduced penalty under Section 11A(1)(b) of the Act, (ii) Penalty of 1,00,000/- each under Rule 25(1) of the Rules upon Appellant No. 2, 3 & 4.

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

Appellant No. 1 & 4:

(i) The allegation of illicit removal of excisable goods on the basis of entries made in the private records/ note books seized under Panchnama dated 12.05.2012, Panchnama dated 06.10.2012 & Panchnama dated 21.09.2011 at the premises of Appellant No. 2, Shri Yogesh & Sangham and Appellant No. 1; that these seized records had not been proved as 'authenticated documents' to sustain the charge of so called 'illicit removals as no such direct material evidences have been placed on records viz. Central Excise Records maintained by Appellant No. 1; weight slips had been taken on records to sustain the entry of weight shown in the said private note books 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 "GJ4, CJ", GJ2 etc."

(ii) The record 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 33 of the Act; that the private records/ note books were not available for defendant, the case and they rely on the decision in case of Mrs. Shyam Steel Corporation reported as 2016 (333) F.T. 310; that when the seized note documents supplied in form of "CD" not found in accordance with the conditions laid down under Section 36B of the Act read with Section 633 of the Indian Evidence Act, such documents cannot be accepted as 'evidence' to

frame a charge against such person or party; that no such evidence has been placed on record that the relied upon documents had been supplied to CD form 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 confirm 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 presumption ground without disclosing corroborative evidence; that the adjudicating authority failed to give 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.

(4) 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.

(5) No case had been made out only on basis of assumption presumption grounds as the adjudicating authority failed to establish that the coding name mentioned in the said seized private diaries was pertaining to Appellant No. 1 and no such question has been asked by the Central Excise officer establishing that the coding name "Sains Steel Re Rolling Mill" was 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.

(6) That owner of Trucks in his statement dated 01.04.2015 has not stated that all such impugned transactions had been carried out by him through his trucks so far as the charge of illicit removal was framed against Appellant No. 1; he also stated that he received payments of freight for such transportation in cash, sometimes from Appellant No. 2 and sometimes from the purchaser but this fact had not been corroborated by the independent evidences viz. specific

recording a statement of the sale broker as well purchaser; that no such investigation had been carried out at the end of the buyer/purchaser; that the say and submissions of the owner or trucks cannot be taken as corroborative evidence to establish the charge of illicit removal of the excisable goods.

(v) That the entries/notes on which basis the Annexure I was prepared, were not the authenticated one as the same were not got perused before the Appellant No. 1; that the comparison of such entries/ notes with the sales summary/ register of Appellant No. 1 is no sufficient without any corroborative evidences viz. daily stock account maintained by them wherein such particular of removal of excisable goods are being shown; that no such records pertaining to receipts 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.

(vi) 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 or 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.

(vii) The so called financial transactions taken place in so called illicit removal has not been proved by providing corroborative evidences on record inasmuch as the money flow back of Rs. 28,14,326/- has not been placed on record to charge the illicit removal of Central Excise goods without payment of Central Excise duty, that the so called 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.

(viii) That in absence of statement/confession of customers/buyers with reference to so called illicit removals of excisable goods, such transaction cannot

cannot be ascertained; that the Central Excise duty had been worked out on the basis of the sale price shown in the said second private note books/ records of the third party and therefore the duty demanded on the value shown in the sale second private records was not genuine as per Section 4 of the Act; that until such conditions are not fulfilled as laid down under Section 36(1) of the Act read with Section 69B of the Income Evidence Act, the supply of evidences in CD four was not proper.

(b) That the adjudicating authority wrongly held that the case laws cited by them are not applicable in this case; that they rely on decisions of Sir Aluminium Pvt. Ltd. reported as 2014 (311) ELT 354 (Trib. Ahmed.), Adani Enterprises Ltd. reported as 2015 (324) EIT 461 (Mad.) and CESTAT Ahmedabad Order No. A/11013/11034/2015 dated 17.07.2015 in case of M/s. Bajrang Castings Pvt. Ltd. which are applicable in the present case.

#### 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 called upon documents to defend their case, which was not entertained by the adjudicating authority; that Appellant No. 2 is not liable to penalty under Section 26 of the Rules as he had not knowingly and intentionally concerned with the clearance of the goods or engaged 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 taxpayer was called on by the purchaser of the M.S. Bars for purchase of the same; that since being broker had introduced and finalized the deal, it cannot be said that he being a broker had played any role which would render the M.S. Bars 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.

(ii) That he had only brokered the sale and had nothing to do with the sale of the excisable goods; that he had not asked the seller to sale his goods illicitly

but only introduced the purchasers to the seller i.e. calling mtg; 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. Bonds/ M. Bars from the calling mtg as mentioned in the Annexure-2; that even if it is admitted that he had indulged in clandestine removal of goods and whatever written documents are details of such facts/ transactions, then one has to have the evidence from sellers regarding such sale, transport of such goods; that his 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 a sine qua non 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, concealing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief; that he rely on the decision in the case of Godrej Boyce & Mtg. Co. reported as 233/ (148) E.L.T. 141 followed in *A. M. Kulkarni - 233 (16) E.L.T. 573 (ICGAT-Mumbai)* and decision of *Ram Nath Singh - 2005 (151) E.L.T. 431 (Trib. Sec.)*; that any person to be penalized under the provisions of rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act/ Rules; that he is not liable to penalty as imposed under the impugned order.

(iii) 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 adjudication proceedings with various authorities and 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 *Katji B. Uthari* reported as 190/ (28) E.L.T. 185 (SC), *Shag Singh & Others* reported as 1987 (32) E.L.T. 258 (SC), *Velabai* reported as 200/ (142) E.L.T. 15 (SC), *L. S. Steels (P) Ltd.* reported as 2003 (156) E.L.T. 931 (Trib. Kolkata).

Appellant No. 2:



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 submission of the concerned officer of Central Excise (AE), HQ, Bhubaneswar without taking into consideration the relevant facts and circumstances of the case made out 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. 3,16,746/- as determined in Annexure-C attached to the said show cause notice which was pertaining to the working/calculation of the Central Excise duty on the basis of the entries found in the seized private note books/loss weight slips; that he had not received the said Annexure-C, the adjudicating authority has failed to supply the copy of the said Annexure-E which was the relied upon document as mentioned in the Annexure-B attached to the said show cause notice; that the adjudicating authority has not supplied the Annexure-I and relied upon documents as requested by him and therefore, the impugned order is not proper and legal.
3. He received the intimation of personal hearing held on 04.01.2017 and produced written submissions on 24.01.2017 wherein it was clearly stated that the subject show cause notice had been issued on assumption/presumption grounds and the charges had 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 the 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/notes mentioned in the said seized diaries while comparing the sales particulars/registers etc. of the Appellant No. 1; that to prove illicit removal of the said goods manufactured by the Appellant No. 1, such corroborative evidences viz. illicit receipt of raw materials and illicit manufacturing of the final products from the raw materials were required to be taken or 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.

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5. In the present case, the 'Daily Stock Account' maintained by the Appellant No. 1 had not been taken on record and without seeing such concrete evidence on record it is not correct to say that the 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 evidence has been taken on record regarding receipt of the raw materials without proper cover of Central Excise Invoice etc and thus, it is proved that he was not involved in the manner as specified under Sub Rule (1) of Rule 26 of the Central Excise Rules, 2002.
6. The Appellant No. 1 was the proper person to follow the Central Excise Law; that he has acted only for better work say purchase and sale of the said goods in the open market and no any person of the 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 imposed.
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 extended 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 position 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 non-compliance 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 so called duty calculation was determined only on the basis of such amount shown in the said seized diaries. Without proving or material evidences that the amount shown in the said diaries was genuine transaction 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 Proprietor of his statement dated 29.03.2015 has stated that the

freight charges are being paid by the buyers/purchasers but, no such inquiry had been extended to the ear 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 envisaged 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 has abetted in the so-called clandestine removal; that the confessional statement made by him is not alone the document to establish such charge, but it should be with material corroborative evidences.

10. The relied upon 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 44 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 record-keeping books were not available for defending the case and relied upon the case of *M/s. Niyam Steel Corporation* reported as 2016 (338) F.T.R. that therefore, it is clearly established that when the relied upon documents supplied in the Form of CD are not found in accordance with the conditions laid down under Section 200 of the Central Excise Act, 1944 read with Section 65B of the Indian Evidence Act, such documents cannot be accepted as "evidence" to frame a charge against such person or party; that in the present case, no such evidence has been placed on record that the relied upon documents had been supplied in CD Form in accordance with the said Section 44B of the Central Excise Act, 1944; that the original relied upon the said Annexure-B had also not been provided though it was requested for; that such Annexures to the Benchnamas 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 relied upon documents that the said seized documents are available for inspection, if required by any of the Appellant 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 relied upon 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. But, 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 owners of the Truck owners whose such facts had been examined in the case and no such inquiry had also been extended up to the end of the buyer. 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 had been made on diaries maintained by third parties viz: Truckers, i.e. Appellant. As stated in foregoing para, he had submitted that the seized diaries were returned to owners through telephonically. In absence of corroborative evidences, demand cannot be sustained.

(a) The allegation made in the show cause notice confirmed only on the basis of unclaimed figures/entries made in the issue papers (weightment 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 had been made out only 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 discipline as laid

done) in the following case laws which were relied upon by him:

- a) 2014 (311) ELT 354 (Tri. App)- M/s Om Aluminium Pvt. Ltd. V CCA Madhya
- b) The Hon'ble CESTAT, Ahmedabad has passed an Order No. A/ 1103/ 11034/2015 dated 17.07.2015 in the case of an Appeal filed by M/s Bajrang Castings Pvt. Ltd, Shri Anil K. Ithraia.
- c) 2017 (345) ELT 179 (Tri. Delhi) - Ramadevi Steels Pvt. Ltd.,
- d) 2017 (345) ELT 285 (Tri. Delhi) - M Abrasives Pvt. Ltd.
- e) 2017 (346) ELT 421 (Tri. Ahmedabad) - Rajputana Steel Castings P. Ltd.
- f) 2017 (347) ELT 145 (Tri. Alt.) - Super Cassettes Industries Ltd.

5. Personal Hearing in the matter was attended by Shri H. G. Mann, Consultant on behalf of all Appellants No. 1, 3 & 4 and reiterated grounds of appeals and submitted two case laws reported as 2014 (311) ELT 354 (Tri. Ahmed) in the case of Om Aluminium Pvt. Ltd. and CESTAT's Order No. A/1103/ 11034/2015 dated 17.07.2015 in the case of M/s. Bajrang Castings Pvt. Ltd. contending that evidences of 2<sup>nd</sup> party can't be considered if not corroborated with evidences with the appellant; that there is no money flow bank 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. Personal hearing in the matter was attended by Shri Madhav Vaidya on behalf of Appellant No. 2 who 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 adjudicator, evidence in as much as all relied upon documents have not been supplied to them and impugned order passed.

#### Findings:

6.1 Tax authority 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.

6.2 Appellant No. 2 filed appeal beyond period of 60 days but within further period of 40 days by stating reasons 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 migration

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and consulting an SMI work, since the appeal has been filed within time limit of further 30 days. I am inclined to condone the delay in filing appeal and proceed to decide the appeal on merits.

7. I find that the officers of Central Excise, Bhavnagar conducted a coordinated search at the places of various orders and transporters, from where incriminating documents like various diaries, files, loose papers etc. were recovered. Further, searches were also conducted at the premises of travelling units and certain firm's units. During preliminary inquiry of the records returned, the intelligence gathered was validated and therefore detailed inquiry was carried out.

8. I find that the statements of Appellant No. 2, & B.4 recorded from time to time and the entries recorded in the notebooks/diaries retrieved during the course of investigation revealed that the manufacture and clearances of excisable goods viz. M. S. Round IAT Bars to buyers were made against cash transaction. Appellant No. 2 & B.4 explained the codes used and the transactions recorded in the said notebooks/diaries. Appellant No. 4 being partner of Appellant No. 1 in his statements dated 29.03.2014 and 24.08.2014 accepted that the goods had been removed without payment of Central Excise duty and without issuance of Central Excise invoices and payment were received in cash. He also accepted that no entries mentioned in the Annexure 10, Annexure 15 and Annexure 14 got tallied with their sales register; that in respect of entries mentioned in Annexure 11, Annexure 15 and Annexure 15, where no invoices or Sales B.I. have been issued by Appellant No. 1, the goods mentioned in the said entries have been removed by Appellant No. 1 without payment of Central Excise duty and without issuance of Central Excise invoices. Appellant No. 1 also accepted that page no. 61 of documents No. 14 seized under Fanchnama dated 12.09.2012 drawn at the office premises of Appellant No. 2 contains entries of date wise amount in real figures for the goods sold by Appellant No. 1 through Appellant No. 2. Appellant No. 1 further deposed that documents mentioned at sr. No. 5 and 8 seized under Fanchnama dated 12.09.2012 drawn at the office premises of Appellant No. 2 are daily cash book maintained by Appellant No. 2 which contained details of amount received in cash by him (Appellant No. 4) from the receiver of goods and also amount given in cash to the supplier of goods.

9. 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 statement/documents. I find that the officers of Central Excise, Bhavnagar 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 Hira Shah, Partner, Laxmi Shri Yogesh R. Sanghvi and Shri Virsingh Bhadouriya, all brokers were recorded by confronting them with recovered records and the entries recorded in the notebooks/diaries resumed under Panchnama proceedings revealed manufacture and clandestine clearances of M. S. Round/flat Bars to buyers against cash transaction without Central Excise invoices and without payment of Central Excise duty. Appellant No. 1 & 3 has in a detailed manner explained the codes used and the transactions recorded in the said notebooks/diaries.

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. On perusal of the impugned order, 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. I find that demand of Rs. 3,16,746/- 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 Shri Yogesh R. Sanghvi, Broker and based on records resumed from the Premises of Shri Virsingh Bhadouriya, Broker and proprietor of M/s. Radhe Steel. I find that before recording statement of Appellant No. 4, Partner of Appellant No.1, all documentary evidences recovered from the premises of Appellant No.1, Appellant No. 2 (Broker), Shri Yogesh R. Sanghvi (Broker) and Shri Virsingh Bhadouriya, Appellant No. 3 (Broker) were placed before him. Appellant No. 2 in his earlier voluntary statements dated 25.03.2013 and 21.09.2015 resumed 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 Shri Yogesh R. Sanghvi, Broker, Shri Virsingh Bhadouriya, Broker i.e. Appellant No. 3, Transporters etc. Appellant No. 2 was also given full opportunity to peruse incriminating documents, statements and

duty calculation worksheets before giving testimony about the truth and correctness thereof. He has also shown duty calculation Annexures prepared on the basis of investigation showing transactions carried out through Appellant No.2, Sri Yogesh R. Sanghvi and Appellant No. 3, 71 brokers of Appellant No.1.

and that the documentary evidences and statements of the buyers, 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 related appraisals and relevance of those for duty liability on Appellant No. 1.

9.3 I find 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. Appellant No. 4 in his capacity as Partner of Appellant No. 1 has admitted transactions without invoices.

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 scrutiny 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); Sri Yogesh R. Sanghvi, Broker and Appellant No. 3 (broker) have been duly corroborated and related 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 Sri Hemant H. Jagan (Appellant No. 2), Sri 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 concerned here, as well as their transactions of Appellant No. 1. I also find that many transactions recorded in private records tallied with invoices were actually issued by Appellant No. 1. Thus, materialness of diaries/invoices and other private records recovered from the brokers during search is clearly established.



also narrate both brokers have admitted to have dealt with the goods belonging to Appellant No. 4 without invoices and also sold such goods without invoices. Notwithstanding above, I also find that demand has been computed on the basis of Annexures based on the searches carried out at the premises of three brokers and one 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 as I find that multiplicity of party would itself negate the concept of the third party. In the instant case, the evidences of clandestine removal have been gathered by the investigating officers successfully from many places and therefore, it cannot be called third party evidences but corroborative and supporting evidences against Appellant No. 1.

9.6 Further, Appellant No. 4 and Partner of Appellant No. 1 has in his statement dated 21.09.2015 recorded during that part of the investigation, or being confronted with vital documentary and oral evidences along with duty calculation Annexures A, HJ, VB and VS, admitted that they cleared taxable goods without payment of duty and no Central Excise Invoices raised for such transactions. This statement of Appellant No. 2 dated 23.09.2015 has not been retracted till date and hence, has sufficient evidentiary value, which cannot be belittled. 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 hard evidences and are sufficient to prove the case against appellants. In this regard, I also rely upon the decision of principal bench of the Hon'ble CESTAT in the case of Om Prakash Agarwal recorded as 2017 (126) ELT 125 (Tri-Del) wherein it has been held as under :-

"5. I find that in both the proceedings direct evidence as to facts was involved. The allegation was that based on evidence collected from the suppliers' side, unaccounted receipts and further manufacture of goods done by the appellants was sought to be removed. Admittedly, the case is primarily based on the essential evidence collected from the supplier's side and also as corroborated by the responsive persons of the suppliers and the receipt and use of the such unaccounted raw materials for further manufacture by appellants have admitted by the appellants and the duty there paid has also been discharged during the course of investigation and the appellants great emphasis on responsibility of the goods

21/09/2015

consideration by way of debit of transport, power charges, etc. in the process and the continuous collection from the supplier's side is not genuine and cannot be ignored. The process records of the suppliers have been scrutinized and admitted for the correctness of their contents in the court proceedings in charge of the appellate court. When such evidence was brought before the partner of the appellant's unit, he categorically admitted unreserved clearance of dutiable goods. However, he did not know the dates as when such evidence was submitted in each instance. It is alleged that the appellant has taken a plea that the abovementioned evidence established the debit entries and payment of the bonded goods to each depot. It is seen that the entries mentioned in the suppliers' books were affected by the person in charge cannot be disputed. It is also the plea of the appellant that the suppliers maintained such records only to solely facilitate the appellant. In fact, the supply of manufactured iron materials has been discontinued by the partner of the appellant's firm. In such situation, it is not feasible for the appellant to seek in the appeal stage, extra the plea by requirement of cross examination. The duplicate copy of the private records or the movements going being being reported or later concerned for their authenticity. In the appeal before the Tribunal, the appellant is making a belated assertion that the statements by the partner of the appellant to be non-voluntary. Various case laws relied upon by the appellant are not of any support in the present case. In the cases involving manufactured merchandise, the evidence of each case are to be appreciated for conclusion. In recent decision, the third party's records of the supplier's side as approved by the person in charge and further corroborated by the appellant cannot be discounted with on the ground of further evidence like purchase order and receipt of goods has not been brought. In a clandestine manufacture and clearance, such state of operation cannot be established with conviction. 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 appeal is dismissed."

[Emphasis supplied]

9.7. Appellant No. 1 has also cited Final Order No. A/11033-11034/2013 Dated 17/07/2015 of the Hon'ble CESTAT in the case *M/s. Bajrang Castings Pvt. Ltd and Others* in support of their contentions. I find that the order of Hon'ble CESTAT held as under;

"5. In view of above proposition of law, a debt 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 w/o payment of duty during the relevant period. ...."

[Emphasis supplied]

9.8. On going through the grounds of appeal, as also the written submissions



made before the lower adjudicating authority, as discussed in the impugned order. I find that no request for cross-examining any of the witnesses has been made by the appellants in the present case and, therefore, the error of the Hon'ble CESTAT in the case of *M/s. Bajrang Castings Pvt. Ltd* and others supra is not applicable to the instant case.

9.9 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: 1984 (11) ELT 1531 (SC); C 2009 (21) EIT 1587 (SC);

9.9.1 The statements, if not retracted, are legal and valid in the eyes of law and have to be considered as corroborative evidences, as held in the cases of (i) *Naresh L. Sukliawari* [1996 (83) EIT 726 (SC)] (ii) *Rakesh Kumar Garg* [2015 (341) EIT 321 HC-Delhi]. I find that Statement of Director, authorized persons of assessee admitting clearances of goods without payment of Central Excise duty and without issuing invoices incriminatory and specific and not retracted is admissible as held in the case of *M/s. H. Tech Abrasives Ltd.* reported in *2017 (346) EIT 606 (SC-Del)*.

*M/s. Bajrang Castings Pvt. Ltd.*

9.14. On careful consideration 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 received by the officers contained details of procurement of raw materials as well as clearance of finished goods with and without payment of duty. This fact is further strengthened by the observation that many entries in the private documents are covered by the invoices issued by the assessee in which duty stands paid. The Director has clearly admitted the truth of the charts 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 admission 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 Kajriwal, who is said to be the author of the private records recovered has not been recorded, it stands admitted by Shri Lakshmi, Director about the truth of the contents of the private notebooks. Consequently, I find no reason to disallow this piece of evidence.

16. The evidence of clandestine clearance has been brought on record only as a result of investigation undertaken by the department. The evidences unearthed by the department are not statutory documents and would have gone undetected 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 invariable in this case and hence the demand cannot be held to be time-barred.<sup>7</sup>

[Emphasis supplied]

9.10 I rely on the decision in the case of M/s. Haryana Steel & Alloys Ltd. reported as 2017 (255) ELT 451 (Tri.-Del.) wherein it has been held that notebooks (diaries) seized from the possession of appellant's employee at the time of search showing entries for accounted as well as unaccounted goods which have been explained in detail and disclosed by GM of the factory table with Investigate 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 Boglas Pvt. Ltd. reported as 2014 (302) ELT 461 (S.C.) wherein similar view has been taken by the Hon'ble Supreme Court.

9.11 I am of the considered view that the admitted facts need not be proved as has been held by the Hon'ble CESTAT in the cases of Alex Industries reported as 2006 (240) ELT 1071 (Tri. Mumbai) and M/s. Divine Solutions reported as 2009 (205) E.L.T. 1005 (Tri. Chennai). Hon'ble CESTAT in the case of M/s. Karori Engg. Works reported as 2004 (156) E.L.T. 373 (Tri. Goa) has also held that Admission/Confession is a substantial piece of evidence, which can be used against the maker. Therefore, the Appellant's reliance on earlier 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. H R Sponge P Ltd reported as 2015 (328) ELT 453 (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

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CESTAT

raw material purchase found unaccounted and no input/output ratio prescribed by law is of no use.

9.12 In view of above facts, I find that the objections 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 continuation of demand of Central Excise duty of Rs. 3,16,746/- by the lower adjudicating authority is correct, legal and proper.

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

10.1 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. 3,16,746/- under Section 11AC(1) of the Act on Appellant No. 1.

11. Appellant No. 4 i.e. Partner of Appellant No. 1 has contended that the lower adjudicating authority has failed to establish as to how he has evaded the smaller evasina of Central Excise duty and thus wrongly imposed penalty on him under Rule 20(1) of the rules. I find that the facts of this case very clearly establish that he was key person of Appellant No.1 and was responsible for clandestine removal of the goods manufactured by Appellant No. 1. He, as Partner, was looking after day-to-day affairs of Appellant No. 1 and has concerned himself in various irregular activities related to excisable goods including manufacture, storage, removal, transportation, selling etc. of such goods, which he knew and had reason to believe that they were liable to confiscation under the Central Excise Act, 1944 and the rules made thereunder. Looking to the involvement of Appellant No. 2 in the case and apart therefrom, I find that imposition of penalty of Rs. 1,00,000/- upon him under rule 20(1) of the Rules is proper and justified.

11.1 As far as penalty on Appellant No. 2 & 3 is concerned, I consider that his role was limited as link person and they were not concerned with the goods and therefore, penalty is not imposable upon them. I find that they were the key persons and had got the goods supplied without Central Excise invoices and without payment of Central Excise duty. Circumstantial documents establishing

*(Signature)*  
 10/10/2000

the clandestine clearances of the goods were also found from the premises of Appellant No. 2 & 3 during search proceedings. The details of clandestine transactions recorded in their diary/notebooks contained details of the goods, truck no., cash payments, etc. Thus, their role is definitely proved in this case and in fact inquiry originated after recovery of documents from their premises and therefore, they cannot plead that their role was limited as a link person between buyers and seller. I find that their role was crucial in the case and therefore, I find that penalty of Rs. 1,00,000/- under Rule 26A(1) of the rules has been correctly imposed upon each of them by the lower adjudicating authority and there is no need to interfere with the impugned order.

12. In view of above, I hold that the impugned order has been passed after properly evaluating the evidences in this case and the order is correct, legal & proper and accordingly, I uphold the impugned order and reject all appeals.

इस प्रकार अपीलकर्तों के द्वारा उर्ध्व की गई अपीलों का निपटारा उपरोक्त तर्कों से किया गया है।

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

(कुमार संतोष)  
अध्यक्ष (अपीलेंद्र)

By APAD  
In

1.	M/s. Saini Steel Re-Rolling Mill, Plot No. 404-405, GIDC-I, Sibar, Dist.: Bhavnagar.	मिस्त्रि स्टील रोलिंग मिल, प्लॉट नंबर 404-405, जी. आई. सी. सी., सोडर, जिल्हा भावनगर.
2.	M/s. Imanshu Vardha Jagani, 18, Vihar Complex, Fourth Floor, Near: Sakinagar Hal, Wagdavad Road, Bhavnagar.	श्री हिमांशु वदवडा जागणी 18, विहार कॉम्प्लेक्स, चौथा मजरा, साकिनगर हॉल, वागदाव रोड, भावनगर.
3.	Shri Vinayk Bhadravaya, Partner, Prop.: M/s. Badhe Steel, Bhavnagar, Plot No. 3, Sitarani Chamber, First Floor, Top Naka, Station Road, Bhavnagar.	श्री विनायक भद्रवया, पार्टनर, एड एम्बेड, बधे स्टील के मालिक, प्लॉट नं. 3, सितारानी चेंबर, फर्स्ट फ्लोर, टॉप नाका, स्टेशन रोड, भावनगर.
4.	Shri Rajesh Gupta, Partner of M/s. Saini Steel Re-Rolling Mill, Plot No. 404-405, GIDC-I, Sibar, Dist.: Bhavnagar.	श्री राजेश गुप्ता, पार्टनर, मिस्त्रि स्टील रोलिंग मिल, प्लॉट नंबर 404-405, जी. आई. सी. सी., सोडर, जिल्हा भावनगर.

2)

Copy for information and necessary action:

- 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 Superintendent, GST & Central Excise, Range: Alang, Bhavnagar.
- 6) Guard File.
- 7) P. No. V2/336/BVR/2017 (8); P. No. V2/219/BVR/2017 (9); P. No. V2/269/BVR/2017