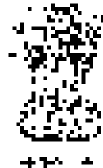


BHV-EXCUS-000-APP-441-TO-443-2018-19

Date of Order: 24.01.2018 Date of issue: 26.01.2018

Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

Name & Address of the Appellants & Respondent :

1. M/s Jay Ganesh Steel Rolling Mill, Plot No. 31-82, GIDC, [illegible], Bhavnagar
2. Shri [illegible] partner of M/s Jay ganesh steel rolling mill
3. Shri. Bharat M. Seth, Plot No. 619, B S. [illegible] Chowk, [illegible] Road, Bhavnagar

[illegible]

[illegible]

[illegible]

[illegible] the manufacture of the goods which are exported to any country or territory outside India [illegible]

[illegible]

[illegible]

:: ORDER IN APPEAL ::

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1" to Appellant No.3") as detailed in the Table against Order-in-Original No. 005/Excise/Demand/2017-18 dated 31.05.2017 (hereinafter referred to as 'the impugned order') passed by the Assistant Commissioner of Central Excise, Surendranagar Division (hereinafter referred to as 'the lower adjudicating authority') :-

| Sr. No. | Appeal No. | Appellant No. | Name of the Appellant |
|---|---|---|---|
| 1 | V2/283/BVR/2017 | Appellant No.1 | M/s Jay Ganesh Steel Rolling Mill, Plot No. 81-82, G.I.D.C.-I, Vartej, Bhavnagar. |
| 2 | V2/284/BVR/2017 | Appellant No.2 | Shri Rasikbhai B. Dabasiya, Partner of M/s Jay Ganesh Steel Rolling Mill, Plot No. 81-82, G.I.D.C.-I, Vartej, Bhavnagar. |
| 3 | V2/344/BVR/2017 | Appellant No.3 | Shri Bharat Sheth, Plot No. 676, R-7, Geetha Chowk, Opp. Derasar Road, Bhavnagar - 364 001 |

2. The brief facts of the case are that Show Cause Notice F.No. V/15-96/Dem/HQ dated 04.02.2011 was issued to the Appellant No.1 to Appellant No. 3 for clearances of M.S. Ingots clandestinely to various customers alleging as under:

(a) Appellant No.1 had clandestinely manufactured and cleared their finished excisable goods, namely, CTD/MS Round Bars, attracting Central Excise duty of Rs. 9,18,352/- to various customers without issuing the invoices and without payment of Central Excise duty;

(b) Appellant No. 2 is Partner of Appellant No. 1 who had concerned himself in selling, storing, keeping and removing of the excisable goods which he knew and had reason to believe that the same were liable to confiscation, which has made him liable to penalty under Rule 26 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules').

(c) Appellant No. 3 is a broker and had concerned himself in selling the excisable goods on commission basis in clandestine manner, which he knew and had reason to believe that the same were liable to confiscation and hence, he was liable to penalty under Rule 26 of the Rules.

2.1. The above SCN was adjudicated by the lower adjudicating authority vide

the impugned order, which confirmed demand of Central Excise duty of Rs. 9,18,352/- from Appellant No.1 under Section 11A(10) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") along with interest on the confirmed demand under 11AA of the Act and also imposed penalty of Rs. 9,18,352/- upon Appellant No.1 under Section 11 AC(1)(c) of the Act read with Rule 25 of the Rules and imposed penalty of Rs. 9,18,352/- upon Appellant No. 2 and penalty of Rs. 4,50,000/- upon Appellant No.3 under Rule 26 of the Rules.

4. Being aggrieved with the impugned order, Appellant No. 1 & Appellant No. 2 have preferred present appeals, inter-alia, on the following grounds :-

<u>Appellant No. 1 :</u>

(i) The impugned order has been passed on the basis of the third party evidence only and therefore not sustainable in law;

(ii) The lower adjudicating authority has passed order on the basis of the private note book seized from the office-cum-residence premises of Shri Bharat Shah, Broker under Panchnama dated 30.03.2010; that statements of various vehicle owners/transport agencies, Angadiya etc. have been recorded but these could not be considered as material evidence without any corroborative evidences pertaining to Central Excise records; that inquiry has not been extended at the end of buyers; that had they been supplied with proper relied upon documents they could have sought for the benefit of cross examination of the persons whose statements have been relied upon;

(iii) Annexures - Jay A, A. A1, A2, 1, 2, D and E prepared on the basis of the seized diaries; that on going through scanned copies of pages No. 53 and 54 of the Show Cause Notice it is found that Vehicle Number has been found written against the entry which has been considered to prepare the above Annexures; that "Jay" as explained by Shri Manish Patel in his respective statements did not prove that "Jay" represented the Appellant No. 1; that the lower adjudicating authority has confirmed demand of Central Excise duty without verifying vehicle number, freight charges etc., thus the lower adjudicating authority has also failed to establish whether the actual sale has taken place or not with reference to buyers, if any; that findings at Para 9.10 of the impugned order are not true; that confessional statement cannot be termed as direct material evidences unless the same are corroborated by other evidences; that receipt of sales proceeds in respect of unaccounted transactions has not been proved; that the impugned order has been passed on the basis of

unauthenticated documents.

(iv) The lower adjudicating authority has violated the principles of natural justice inasmuch as the case laws cited by them have not been considered and demand has been confirmed on the basis of assumption and presumption.

(v) The lower adjudicating authority has failed to disclose the name of buyers to whom Appellant No.1 has sold goods weighing 376.441 MT valued at Rs.1,06,91,[illegible]/- involving duty of Rs. 9,18,352/-; that receipt of sales proceeds has not been proved; that receipt of raw materials i.e. plates of Iron and Steel weighing 395.230 MT has not been proved; that no statement of ship breakers as shown in Annexures JAY A1 and JAY A2 has been taken from whom plates had been received by the Appellants; that no means of inward transportation of raw material has been taken on record along with weighment challans; that so called production of the final product weighing 376.441 MT has not been proved with corroborative evidences i.e. consumption of electricity power, number of labourers, etc; that daily production register has not been disputed; that aspect of payment of service tax on inward transportation of raw materials has not been established by the lower adjudicating authority; that Annexures have not been countersigned by the Central Excise Officers in token of genuinely with reference to 'entries' taken from the seized diaries for determining the duty.

(vi) The Appellant No. 1 and Appellant No. 2 relied upon the following case in their support :

- Padmanabh Dyeing & Finishing Work 1997 (90) ELT 343 (Tri)
- Associated Cylinder Industries 1990 (48) ELT 460 (Tri)
- Sangemeirer India Pvt. Ltd. 2003 (150) ELT 705 (Tri)
- Essene Polymer P Ltd. 2004 (165) ELT 291 (Tri)
- Parshuram Cement Ltd. 2003 (160) ELT 218 (Tri)
- Kapadia Dyeing Bleaching & Finishing Works 2000 (124) ELT 921 (Tri)
- Aum Aluminium Pvt. Ltd. 2014 (311) ELT 354 (Tri)

Appellant No. 2 :

Appellant No. 2 has not confessed anything during investigation; that he had simply signed Panchnamas, Statements, etc. which are relied upon documents in this case; that there is nothing on record to suggest that the so-called clandestine removal has been taken place with the aid of Appellant No. 2, partner of Appellant No. 1; that contention raised in respect of the Appellant

No. 1 have also been reiterated by Appellant No. 2; that penalty is imposable upon him under Rule 26(1) of the Rules as he has not dealt with the goods liable to confiscation in view of above case laws quoted.

Appellant No. 3 :-

(i) The impugned order is based on surmises and conjectures of the adjudicating authority. The impugned order in original is perfunctory and therefore, it is required to be quashed and set aside.

(ii) The adjudicating authority did not supply relied upon documents along with the Show Cause Notice; that it was not proper and legal, but supplied some copies of document only after request made by him; that there were huge numbers of documents had been relied upon which were mainly in the form of recorded statements; that for preparing defense reply, each and every document was required to be studied by comparing the contentions contained in the statements of the respective persons namely, Shri Manish Patel whose statements had been discussed in the Show Cause Notice; that this important work could not be done from the relied upon documents supplied in CD and therefore, it is clearly established that the adjudicating authority has grossly violated the principle of natural justice; that he relied upon the settled case law of M/s. Secure Industries Ltd. [2003 (155) ELT 559 (CESTAT)], wherein it has been laid down that "*adjudication order was set aside when copies of documents relied upon were not supplied to Assessee, even if he was given opportunity one month prior to hearing to take photo copies. It was held that department was obliged to supply all documents. Otherwise, there is violation of principle of natural justice*". In the case of M/s. [illegible] [2003 (1[illegible]2) ELT 26], the Hon'ble Divisional Bench of High Court, Rajasthan has held that "authenticated copies of documents relied upon are required to be supplied. Mere opportunity to inspect the documents and to obtained photo copy thereof is not sufficient". In the present case, the adjudicating authority has failed to supply the complete set of relied upon documents though requested; that therefore, the impugned order is not proper and legal, but deserves to be set aside.

(iii) The sub-Rule (1) of Rule 26 of the Rules provides for penalty against a person who has abetted in storing, transporting, concealing in illicit removal of excisable goods which he knew or had reasons to believe are liable to confiscation under the Act; that in the present case the Appellant No. 3 has carried out limited activities of recognizing seller and buyer to each other for

arranging iron and steel products; that payment of the sales proceeds have also been directly materialized by the appellant No. 1 from the concerned buyers; that the disputed goods have been directly loaded from the premises of the Appellant No. 1 and transportation of such goods have been arranged by the buyers and hence the Appellant No. 3 is not involved in the present case and therefore, no penalty under Rule 26(1) ... of the Rules.

(iv) The impugned order is not self-contained order; that the adjudicating authority has mainly repeated the facts narrated in the Show Cause Notice; that to sustain such charges of clandestine removals, such Central Excise records would have been verified; that in the present case, no such verification has been taken on record; that it is only on the basis of such statements, the charge of clandestine removal cannot be sustained and therefore, the impugned order is not correct and true in absence of such verification of the statutory records pertaining to the Act and Rules framed there under; that sales details submitted by the unit, clandestine removal cannot be sustained on the basis of the above sales particulars without corroborative evidences with reference to the Central Excise records and therefore, mens rea are not proved to sustain the charge of clandestine removal.

(v) The adjudicating authority has simply narrated the events mentioned in the SCN but failed to establish the charges framed in the Show Cause Notice; that the adjudicating authority has simply proved the charge by importing the facts and circumstances narrated in the Show Cause Notice.

(vi) Further, no signature of the appellant was taken in token of having the information shown in the said Annexure was correct and genuine. Therefore, the impugned order is not sustainable in the eyes of law in the circumstances when the worksheet of demand of SCN appears had been prepared on the basis of such particulars mentioned in the seized Diaries which were the records pertaining to the business carried out by him and not pertaining to the business carried out by the unit against whom the charge of clandestine removal was framed.

(vii) The subject SCN has been issued on the basis of hearsay and statements made by Shri Manish Patel, especially with regard to the use of name of such party in "short name". But such provisions are silent about any coded or secret data, if any, mentioned in Diary and decoded under pressure. This "decoded" explained by said Shri Manish Patel had not been demonstrated before the unit/Appellant No. 1.

(viii) The present case is covered under provisions of the Act which is an Act for collection of tax i.e. Central Excise duty. Therefore, for making such allegation of evasion of Central Excise duty, a document showing the illicit manufacture of excisable goods and document pertaining to illicit removal of excisable goods without payment of duty are to be produced by the department. In the present case, only the seized Diaries had been taken as evidence for demanding such duty. But these Diaries cannot be said as a "legal document" to frame charge of demanding of duty unless and until it is corroborated by any of the Central Excise documents prescribed under provisions of CER. Therefore, the impugned order deserves to be set aside.

(ix) It is further to submit that the buyer was always deploying their man known as Chhatiwala for loading of the required Scrap/able goods to the concerned unit/ ship breaking units. But, though the Chhatiwala was the key person to state whether the goods under reference had been removed clandestinely or not, there is no mention in this regard. Therefore, the finding of the adjudicating authority that the dutiable goods had been removed clandestinely is not correct and legal.

(x) In the SCN, it was also stated that the Angadias have played key role in the issue under reference. However, SCN had not been issued to the Angadias. The Angadias have been found to have been involved in cash transaction as alleged in the SCN. But no specific evidence has been placed with reference to particular consignment / Central Excise Invoice for which the so called transactions had taken place. Therefore, no direct specific evidence has been adduced and therefore, the findings given by the adjudicating authority are not correct.

(xi) The Appellant No. 3 further contended that:-

(a) He was not liable for a penal action under Rule 26 (1) & (2) of the Rules inasmuch as no such allegation or charge of confiscation of the so called clandestine removal of the excisable goods had been framed in the SCN. The penal action under the Rule 26 can be imposed only when the so called goods had been charged for confiscation. This legal position has been accepted in the case of M.N. Shah [2008 (232) ELT 110 (Tri. Ahd)].

(b) Even in absence of direct material evidences, the adjudicating authority has wrongly and without authority of law imposed penalty and inasmuch as there was no charge of confiscation, there was no material

evidences that he was concerned in transportation of goods illicitly, he had not created any documents of the unit. The Department has failed to prove that he was aware of clandestine manufacture and removal.

(b) The so called clandestine removal of the dutiable goods has not been proved on basis of the material evidences and it was necessary that each consignment as mentioned in the SCN, was independently proved, but in the present case, the same has been concluded in generalized manner which is not correct.

(c). The so called cash transaction had not been proved with each and every consignment as mentioned in the SCN.

(xii) No evidence has been produced regarding seizure of incriminating documents from the factory premises of the unit to prove the so called charge of clandestine removal reported to have been made by the unit. Therefore, it is clearly established that the case had been made out on the assumption presumption ground only. The findings of the impugned order appear to have been made without any corroborative evidences with reference to each and every so called consignments cleared clandestinely by the unit/appellants. Since, the case against the unit/Appellant No. 1 have not been proved with material evidence, the co-noticee i.e. the appellant No. 3 was also not liable for penal action.

(xiii) The adjudicating authority has failed to consider the various case laws as relied upon by him and mentioned in the written submission dated [illegible]. He relied upon the case laws reproduced below, which are squarely applicable in the present case :-

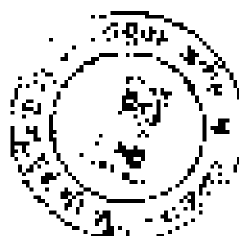
(a) Mukund Limited Vs. CCE - 2007 (218) ELT 120
(b) Neo Green Textile Vs. CCE - 2007 (212) ELT 345
(c) Vishal Shal Vs. CCE - 2007 (210) ELT 135
(d) S.R. Jhunjhunwala Vs. CCE 1999 (114) ELT 350
(e) S.L. Kirloskar Vs. UOI 1980 (84) ELT 550 (Bom HC), 1987(54) ELT A 248(SC)
(f) Gujarat Borosil Vs. CCE - 2007 (217) ELT 267 (CESTAT)
(g) Amit Foods Co. Ltd. Vs. CCE – 2003 (153) ELT 190 (Tri. Del)
(h) Arya Aluminium Pvt. Ltd. 2014 (311) ELT 354 (Tri-Ahd)
(i) Bajrang Castings P. Ltd. Order No. A/11033-11034/2015 dtd. 17.7.2015

4. Personal Hearing in the matter was attended to by Shri N. K. Maru, Consultant on behalf of Appellant No. 1 and Appellant No. 2, who reiterated the grounds of appeals and submitted case laws (i) Arya Aluminium Pvt. Ltd. reported as 2014(301) ELT 354 (Tri-Mumbai), (ii) Esvee Polymers (P) Ltd. reported as 2004 (165) ELT 291 (Tri-Chennai) and Parshuram Cement Ltd. 2008 (163) ELT 213 (Tri-Del) to emphasized that evidences corroborating purchase of raw material, freight payment, disproportionate power consumption are not available in these cases; that investigation has failed to establish as to whom the invoices have gone as there is huge quantity involved; that impugned order has just been passed to confirm duty without evidence.

4.1 Personal Hearing in the matter of Appellant No. 3 has been waived vide their letter dated 19.03.2018 (received on 22.03.2018). In the said letter, Appellant No. 3 contended that they were just middle man between buyer and seller and therefore, not "broker" as defined in Section 2 of the Act read with General Laws; that the Department has not produced any documentary evidence to show that he had aided and abetted Appellant No. 1 in evasion of Central Excise duty; that supply of relied upon document in Compact Disk (CD) is not proper and hence, they could not defend the case strongly; that confessional statements alone cannot prove the charge of clandestine removal; that private records like diaries etc. recovered from the Appellant No. 3 only indicated business carried out for limited purpose; that private records recovered from Appellant No. 3 have not been corroborated with Central Excise records maintained by ship breaking units at Alang as well as Hot Re-Rolling units/Furnace units and therefore, the impugned order is required to be set aside; that the investigation has failed to prove under which truck number, the disputed dutiable goods have been transported from the registered premises of the Appellant No. 1; that the seized diaries were written by him only for his personal purpose and not for other purpose; that particulars of consignment found in the written diaries were only "Notes" written during re-organization of seller/buyer; that nowhere in the diaries it is mentioned that the disputed goods had been actually sold by the Appellant No. 1; that lower adjudicating authority has not considered the case laws cited by him; that he relied upon Order-in-Appeal No. BHV-EXCUS-000-APP-273 TO 275-2016-17 dated 10.04.2017 passed by the Commissioner(Appeals-II), Rajkot; that their application of condonation of delay may be condoned; that he is not involved in any way which would make him liable to penalty under Rule 26(1)E(2) of the Rules.

4.2 Despite personal hearing notices sent to the Department, neither any written submissions were sent nor any one appeared for personal hearing.





**Findings:-**

5. I have carefully gone through the facts of the case, impugned order and written as well as oral submissions made by the Appellants.

5.1 Appellant No. 3 filed appeal beyond period of 60 days but within further period of 30 days by stating reason that due to weak financial position he was in process of arranging requisite fund for making pre-deposit of Rs. 33,290/- under Section 35F of the Act against imposition of penalty of Rs. 4,50,000/- and therefore, it took additional 19 days to file appeal. Since the appeal has been filed within condonable time limit prescribed under the Act, I condone the delay of 19 days in filing appeal.

6. The issues to be decided in the appeals are :-

i) Whether in facts and circumstances of the case, confirmation of demand of Central Excise duty of Rs. 9,18,352/- under Section 11A of the Act against Appellant No. 1 is correct, legal and proper or not;
ii) Whether ordering interest and imposing equal penalty under Section 11AC of the Act on Appellant No. 1 is correct or not;
iii) Whether penalty imposed upon the Appellant No. 2 and Appellant No. 3 under Rule 26 of the Rules is correct or not.

7. Appellant No. 1 and the Appellant No. 2 have contended that the lower adjudicating authority while passing the impugned order has completely denied and ignored the submissions made by them and passed the impugned order based upon third party evidences and therefore, the impugned order is legally not sustainable. I find that the lower adjudicating authority has dealt with the submissions of the Appellants in detail at various sub-paras of Para 9 of the impugned order, and has also discussed the same and offered his findings at length after discussing and referring to various oral and documentary evidences and therefore, this contention of the Appellants is not tenable.

7.1 I find that it is a matter of record that before recording the Statement dated 21.07.2014 of the Appellant No. 2 i.e. Partner of Appellant No.1, the officers allowed him to go through all the documentary evidences in form of documents/diaries/notebooks etc. recovered from the premises of Appellant No. 3 during the investigation. I also find that the search at the premises of the Appellant No. 3, i.e. Broker was the epicenter from where various vital private

documentary evidences establishing clandestine clearances of the goods by Appellant No. 1 were recovered. Appellant No. 2 has also seen Panchnama dated 30.03.2010 drawn at the premises of Appellant No.3 and the statements given by Appellant No.3 and Shri Manish Patel, Accountant of Appellant No. 3 and other concerned as mentioned at Para 4.2 ( Page 18 ) of the impugned order. Thus, Appellant No. 2 has been given full opportunity to peruse and contradict or controvert the evidences before giving his testimony about the truthfulness / correctness of these documents. It is seen from the statements of Shri. Manish Patel, Accountant of the Appellant No. 3 that Diaries were maintained by him, for and on instructions of Appellant No. 3. As may be seen from Para 4.4.3 of the impugned order, the son of Appellant No. 3, Shri Shrenik Bharat Shah had also confirmed that Shri Manishbhai Patel, Accountant of the Appellant No. 3 used to maintain accounts in the said seized Diaries as per directions of his father. Thus, Appellant No.2 was given full opportunity to examine various documentary evidences duly corroborated by the oral evidences collected from Appellant No.3 and his staff / accountant. At the time of recording statement of Appellant No.2, he was shown Panchnama dated 30.03.2010 various statements given by the Appellant No.3, Accountant of the Appellant No.3, Angadia, etc. also. He was also shown relevant Annexures prepared on the basis of records seized from the Appellant No.3 showing the details of the transactions carried out through the Appellant No.3 by the Appellant No.1. I find that from seized Diaries of Appellant No. 3 and statements of Appellant No. 3 based upon the seized Diaries, statement of Accountant and statements of Angadia and transporters, it is established that Appellant No.1 had removed the excisable goods in clandestine manner. These unaccounted transactions compared with the records of Appellant No.3 and were corroborated with the record of Angadia also, who have also admitted regarding transfer of cash amounts to concerned parties. I find that these are substantial evidences in the form of documentary and oral evidences on record, recovered from the Appellant No. 3 and other persons indulging in unaccounted transactions. I find that the investigation has amply corroborated various evidences recovered from the premises of Appellant No. 3 regarding evasion of Central Excise duty by the Appellant No.1. Therefore, it is sufficiently proved that Appellant No.1 had evaded duty of Central Excise amounting to Rs. 9,18,807/-.

7.2 I find that Appellant No. 2 and Appellant No. 3 were the real persons, who were privy to such unaccounted transactions on which Central Excise duty was not discharged. As stated in the impugned order, the private records clearly demonstrated that Appellant No. 3 and his Accountant, whose statements were perused without any qualification by Appellant No. 2 before giving his own

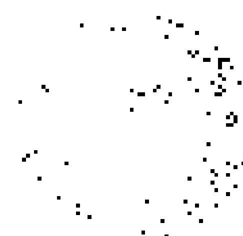
statement, had not raised any objection regarding proceedings proving charge of clandestine removal of excisable goods and also not proved filing of any retraction of his statement at any point of time. Therefore, all these documentary and oral evidences from multiple persons have to be considered to be valid piece of evidences in the eyes of law to substantiate the charges of clandestine removal of the excisable goods against Appellant No. 1.

7.3 From the facts and circumstances of the instant case, I find that Appellant No.1 have willfully and deliberately circumvented the provisions of Central Excise law with intent to evade payment of Central Excise duty. From the evidences available in the case and discussion hereinabove, mens rea of Appellant No.1 is clearly established and I have no hesitation to uphold the charge of removal of excisable goods in clandestine manner without payment of excise duty. If Appellant No. 1 and Appellant No. 2 had any grouse against the investigation and raising of demand of Central Excise duty, it was imperative for them to have immediately sought cross-examination of Appellant No. 3, his Accountant, Shri Manishbhai Patel, Angadia, Transporters etc. However, having not sought cross examination of the witness and no deponent who made statement under Section 14 of the Act retracted the statements given by them under Section 14 of the Act, it is not valid or legal for Appellant No. 1 and Appellant No. 2 now to challenge the impugned order confirming charges of clandestine removals.

7.4 Appellant No. 1 and Appellant No. 2 have contended that no show cause notice has been issued to Angadia and therefore, the proceedings are vitiated. In this regard, I find that issuance or non-issuance of show cause notice to other cannot help or determine the cause of these two Appellants. What is important is corroboration of details contained in the private records/diaries resumed from the premises of Appellant No. 3 in connection with the charge of clandestine removal by Appellant No. 1 in view of the details contained in the private diaries resumed from the Appellant No. 3 having been corroborated by the multiple persons and even admitted by Appellant No. 2, partner of the Appellant No. 1. I, therefore, do not see any merit in this contention of the Appellants in this regard.

7.5 The contention of the Appellants that other corroborative evidences like, transportation of goods from the premises of the Appellant No. 1, buyers of the excisable goods, receipt of raw material etc. were required to be adduced for confirming CE duty on the charges of clandestine removal, is also not tenable, inasmuch as the Hon'ble CESTAT in the case of M/s. N R Sponge P. Ltd. reported





as 2015 (329) ELT 256 (Tri-Del) has held that when preponderance of probability was against the Appellants, pleadings that no raw material purchase found unaccounted, no input-output ratio prescribed by law and no statements recorded from buyers, is not tenable as reproduced below:-

> *"10.2 The statement recorded from shift supervisors being self speaking cannot be brushed aside because they were the persons within whose knowledge goods were manufactured and cleared. Their evidence was believable, cogent and credible for the reason that they vividly described methodology of production.*
>
> *10.3 Added to the above, the director admitted clandestine removal of the goods not supported by Excise invoices that resulted in loss of revenue. He therefore, came forward to make payment of the duty evaded without controverting the incriminating implication of the entries in private handwritten ledger and chits recovered from possession of Appellant during search. Entire pleading of the Appellant therefore, failed to sustain when mala fide of the Appellant came to record. Clandestine removal was well within the knowledge of the shift supervisors, accountant, Director, transporters and commission agent. Each others evidence corroborated all of them and established unaccounted goods cleared without payment of duty. The most lively evidence of Kailash Agarwal brought the Appellant-company to the root of allegation. All of them established inextricable link of evasion. Shri Agarwal by his evidence attached all the persons involved in the chain of clandestine clearance without their detachment.*
>
> *10.4 Preponderance of probability was against the Appellant. Pleading of no statement recorded from buyer, no excess electricity consumption found, no raw material purchase found unaccounted and no input-output ratio prescribed by law is of no use to it. Revenue discharged its onus of proof bringing out the allegation in the show cause notice succinctly. But, the Appellant miserably failed to discharge its burden of proof. It did not come out with clean hands.*
>
> *(Emphasis supplied)*

7.6 In view of above, I find that the lower adjudicating authority has correctly confirmed demand of Central Excise duty amounting to Rs. 9,18,352/- under Section 11A of the Act against the Appellant No.1. As a natural consequence, the confirmed CE duty is required to be paid along with interest at applicable rate under the provisions of Section 11AA of the Act.

7.7 Since the charge of clandestine removal has been proven in this case as discussed in above Paras, it has to be held that the lower adjudicating authority has correctly imposed penalty equal to Central Excise duty of Rs. 9,18,352/- on Appellant No. 1 under Rule 25 of the Rules read with Section 11AC(1)(c) of the Act.

7.8 I find that Appellant No. 2 is Partner of Appellant No.1 was responsible

person of the Appellant No. 1, who played an important role in removal of excisable goods in this case of clandestine nature. I find from his statement dated 21.02.2014 that he looked after day to day business affairs of Appellant No.1 like production, purchase & sales, of Appellant No.1. Thus, Appellant No. 2 has concerned himself in manufacturing, selling and in all relevant clearances of excisable goods without CE invoices and without paying Central Excise duty. Thus, these are sufficient and strong evidence that he had reasons to believe that such goods so cleared were liable to confiscation under provisions of the Central Excise laws and yet he dealt with such goods contravening the provisions of the Act and Rules framed there under. In view of above, I find that Appellant No. 2 has to be considered to be accountable for the act of clandestine removal of the excisable goods by Appellant No. 1. Thus, the lower adjudicating authority has correctly imposed penalty under sub-rule (1) of Rule 26 of the Central Excise Rules, 2002 on the Appellant No.2 as partnership firm and partner are two different legal persons and penalty can be imposed on both legal persons simultaneously. However, I find that penalty of Rs. 9,18,352/- on him is on the higher side, I, therefore, reduce the same to Rs. 5 lakhs on Appellant No. 2 as partner of Appellant No. 1.

7.2 I find that Appellant No.1 and 2, in complicity with Appellant No. 3, had cleared the excisable goods in clandestine manner and therefore, penalty under Rule 26(1)&(2) of the Rules has been imposed by the lower adjudicating authority upon Appellant No. 3. I find that the excisable goods were cleared surreptitiously by the Appellant No.1 on cash basis to their different buyers with active assistance of Appellant No. 3, who played instrumental role in cash transactions in respect of amount receivable by Appellant No.1 either directly or through Angadia/s. Details of such clandestinely removed goods were noted in the Diaries recovered from his premises. Appellant No.3 is the person who recorded unaccounted transactions in his private diaries and he played role in transferring cash amounts received from various buyers of such goods, either directly or through Angadia/s. It is also seen from the impugned order that Appellant No.3 has prepared the private accounts for the said purpose including all such unaccounted transactions. Appellant No. 3 has confessed and confirmed on multiple occasions regarding the transactions contained in the seized private records/diaries. Hence, there are adequate evidences available and thus, Appellant No. 3 has concerned himself by way of abetment and facilitating unaccounted transactions between the buyers and seller. Thus, the lower adjudicating authority has aptly held that Appellant No. 3 had reasons to believe that such goods so removed, were liable to confiscation under the provisions of the Act and yet he dealt with the goods contravening the provisions of the Act

and the Rules framed thereunder. Thus, I am in agreement with the lower adjudicating authority that he had actively involved himself in dealing with the excisable goods in such manner having full knowledge that the same were in contravention of the Act and therefore, rightly imposed penalty under Rule 26 of the Rules.

7.9.1 The contentions of Appellant No. 3 that the impugned order is based on assumption and presumption and the adjudicating authority has erred in imposing personal penalty under Rule 26 of the Rules on Appellant No. 3 is, thus, not correct. The plea of Appellant No.3 that he was middle man and not broker, does not hold ground in view of aforesaid findings and admittance of serious breach of law by him. I, therefore, uphold personal penalty of Rs. 4,00,000/- imposed upon Appellant No.3.

7.10 I also find that the facts on hand are distinguishable from the relied upon case laws/judgments by Appellants, inasmuch as the documents resumed/collected from the Appellant No. 3 as well as statements of Appellant No. 3 and his accountant, Angadia and transporters have not been retracted and no cross-examination of any of deponents or witness has been sought. The sanctity of the Statements recorded under Section 14 of the Act cannot be undermined by just making bald contentions that oral and third party evidences cannot be made basis for confirming demand of clandestine removal of the excisable goods. I find that the lower adjudicating authority has given clear findings and it is not just narration of facts and circumstance as made out by the appellants, inasmuch as the private records/diaries recovered from the premises of Appellant No. 3 is an originating point which captured the details of clandestine removal of the excisable goods. I am, therefore, in agreement with the findings of the lower adjudicating authority and do not find any infirmity in the impugned order.

7.11 Appellant No. 1 has also cited Final Order No. A/11053-11054/2015 dated 17.07.2015 of the Hon'ble CESTAT in the case M/s. Bajrang Castings Pvt. Ltd. and Others in support of their contentions. I find that the order of Hon'ble CESTAT held as under :-

> "11. *In view of above disposition of facts, 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]

7.12 On going through the grounds of appeal as also the written submissions made before the lower adjudicating authority, I find that no request for cross-examining any of the witnesses/deponents 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 supra is not applicable to the instant case.

8. I also find that admitted facts need not be proved as held by the Hon'ble CESTAT in the case of Alex Industries reported at 2008 (230) E.L.T (Tri-Mumbai), Divine Solutions reported as 2006 (206) E.L.T. (Tri. (Chennai), M/s. Karori Engg. Works reported as 2004 (166) E.L.T. 373 (Tri. Del.), wherein Hon'ble CESTAT has held that "Confession is a substantial piece of evidence, which can be used against the maker."

8.1 I find that the ratio of the judgment of Hon'ble Supreme Court of India in the case of M/s. Kalvert Foods India Pvt. Ltd. reported as 2011 (270) E.L.T. 643 (S.C.) is applicable in the present case wherein it has been held that,

> *"18. During the course of arguments learned counsel appearing for the respondent submitted before us that although the aforesaid statements of Managing Partner of the Company and other persons were recorded during the course of judicial proceedings but the same were retracted statements, and therefore, they cannot be relied upon. However, the statements were recorded by the Central Excise Officers and they were not police officers. Therefore, such statements made by the Managing Partner of the Company and other persons containing all the details about the functioning of the company which could be made only with personal knowledge of the respondents and therefore could not have been obtained through coercion or duress or through dictation. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered, looked into and relied upon.*
>
> *19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides, the Managing Partner of the Company on his own volition deposited the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstances of the present case, the aforesaid statement of the counsel for the respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress.*
>
> *20. During the course of arguments our attention was also drawn to the statement of Managing Partner of the Company where he had admitted the fact of clandestine clearance of excisable goods and therefore has voluntarily come forward to sort out the issue and to pay the Central Excise duty liability and that he has paid Central Excise duty voluntarily*

*under TR6 Challans totaling to Rs. 11,09,000/- on various dates. Similarly, statement of Miss Vinita M. Kharatkar proprietor of RTC was also recorded under Section 14 of the Central Excise Act, 1944 along with Shri Shekhar Magrekar Production Supervisor of M/s. Kalard Foods India Pvt. Ltd. Statements of various other persons were also recorded under Section 14 of the Central Excise Act.*

8.2 I also find that in the case of M/s. Aafloat Textiles (I) Pvt. Ltd. reported as 2009 (235) ELT 587 (SC), the Hon'ble Apex Court has held as under :-

> *"11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which induces the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by wilfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi and Ors. (2003) 8 SCC 319)"*

8.3 It is also settled legal position that in case of clandestine removal of excisable goods it is not necessary to be proved with mathematical precision. In this regard, I rely upon the case of Shah Guman Mal reported as 1983 (12) E.L.T. 1546 (S.C.) :-

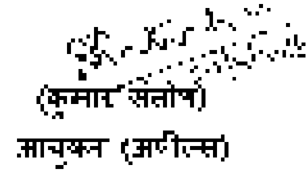
> *"Department is not required to prove its case with mathematical precision, to a demonstrable degree ..... All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case."*

8.4 I find that the voluntary statements of all the Appellants, which are never retracted later on by any of the Appellants are valid pieces of evidence.

9. In view of above, I uphold the impugned order and reject all appeals filed by the appellants, except for reducing penalty on Shri Rasikbhai H. Dalsaniya, Appellant No. 2 to Rs. 5 lakhs, as discussed in Para 7.8 of this order.

१०. अपीलकर्ताओं द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

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



(कुमार संतोष)

आयुक्त (अपील्स)

By R.P.A.D.

To,
1. M/s Jay Ganesh Steel Rolling Mill,
Plot No. 81-82,
G.I.D.C.-II, Vartej,
Bhavnagar.

2. Shri Rasikbhai D. Dalsaniya, Partner of
M/s Jay Ganesh Steel Rolling Mill,
Plot No. 81-82,
G.I.D.C.-II, Vartej,
Bhavnagar.

3. Shri Bharat Sheth,
Plot No. 615, B-2,
Geetha Chowk,
Jain Derasar Road,
Bhavnagar - 364 001.

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 Surendranagar, Surendranagar.
5) Guard File.
6) F No. V2/284/BVR/2017 7) F.No. V2/283/BVR/2017