

:: 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. J2/Excise/Demand/2017-18 dated 23.04.2017 (hereinafter referred to as 'the impugned order') issued by the Assistant Commissioner of Central Excise, Surandranagar Division (hereinafter referred to as 'the lower adjudicating authority') :-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/255/BVR/2017	Appellant No.1	M/s. -varshma Steels Survey No. 33-3072, Ghanghali-Bihar Road, Madia Siger, Bhavnagar.
2	V2/254/BVR/2017	Appellant No.2	Shri Visha Kanda, Partner of M/s. -varshma Steels Survey No. 30-3072, Ghanghali-Bihar Road, Madia Siger, Bhavnagar.
3	V2/418/BVR/2017	Appellant No.3	Shri Himanshu Nandlal Jewani, 35, 1st floor Complex, 1st Floor, Near Kankari Club, Waghnawad Road, Bhavnagar.

2. The officers of Bhavnagar Commissionerate on intelligence that some re-rolling units of Siger, Madia and Bhavnagar were engaged in large scale evasion of Central Excise Duty by way of clandestine removal of Re-roller products viz. M. S. Round, TMT Bars etc. with active support of brokers, conducted coordinated search operation at the premises of Shri Himanshu Nandlal Jewani and Yogesh R. Sangavi, both brokers at Sector M- Bars at Bhavnagar and incriminating documents were recovered from them during search. During investigations, another round of search operation was conducted at the premises of Shri Yogesh R. Sangavi, broker and various incriminating documents were recovered.

2.1 Show Cause Notice No. V215 121/Dem/1-EJ/2017-18 dated 26.02.2016 was issued imposing demand of Central Excise duty of Rs.11,01,739/- under proviso to Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') along with interest under Section 11AA of the Act and also proposing imposition of penalty under Section 11AC(1)(a) of the Act read with Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') upon Appellant No.1 and personal penalty under Rule 26(1) of the Rules upon Appellant No. 2 and Appellant No. 3. The Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order, in which (i) Central Excise duty of Rs.11,01,739/- was confirmed under Section 11A(4) of the Act along with interest under Section 11AA of the Act and penalty of Rs.11,01,739/-

was imposed under Section 114C of the Act read with Rule 25(1) of the Rules upon Appellant No. 1 with option of reduced penalty as envisaged under Section 114C(i)(b) of the Act. (ii) Penalty of Rs. 11,01,739/- under Rule 26(1) of the Rules upon Appellant No. 2 and (iii) Penalty of Rs. 5,80,000/- and Rs. 55,000/- has been imposed upon the Appellant No. 3. (Gruker and Shri Yogesh R. Sanghvi), Bankar respectively.

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

Appellant No. 1 :-

(i) The allegation of illicit removal of excisable goods on the basis of entries found in the private records / note books etc. seized under Searchwarrant dated 2.09.2012 at the premises of Appellant No. 1 under Searchwarrant dated 06.09.2012; from Shri Yogesh R. Sanghvi under Searchwarrant dated 06.10.2012 and from Shri Adish Trivedi under Searchwarrant dated 12.05.2013; that these seized records had not been proved as 'authenticated documents' to sustain the charge of 'so called illicit removal as no such direct material evidences have been placed on records viz. Central Excise Records maintained by the Appellant No. 1, weighment slips had been taken on record to sustain the entry of weight shown in the said private note book as well as no material evidences had been placed on record regarding means of transport.

(ii) The notes upon documents are only provided in the form of "CD" and not in hard form as required to meet with the principles of natural justice read with provisions of Section 33 of the Act; that the private records/ note books were not made available for defending the case and they rely on the decision in case of *M/s. Shyam Steel Corporation* reported as 2016 (339) I.L.T. 305 that when the relied upon documents supplied in form of "CD" not found in accordance with the conditions laid down under Section 38B of the Act read with Section 63 of the Indian Evidence Act, such documents cannot be accepted as 'evidence' to frame a charge against such person of party; that as such evidence has been placed on record that the relied upon documents had been supplied in CD form in accordance with the provisions of Section 46 of the Act and hence the impugned order passed beyond Show Cause Notice and on the basis of third party evidences is not proper and legal to demand and confirm the Central Excise duty.

(iii) The adjudicating authority failed to establish that they had clandestinely procured raw materials and manufactured the excisable goods from steel

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 and transportation of the good without recording statement of vehicle owner, the charge of clandestine removal of the excisable goods cannot be justified in the eyes of law.

(b) The case had been made out only on basis of assumption and presumption as the adjudicating authority failed to establish that the coding mentioned in the said seized private records was pertaining to Appellant No. 1 and no such question has been asked by the Central Excise officer establishing that the coding name "Aversine (Eversine)" was name of Appellant No. 1; that without such verification of the genuineness of the name of the recording unit mentioned in the so-called seized diaries, it is not justifiable that the so-called coding name as deciphered by Appellant No. 3 is the name of Appellant No. 1; that quantity of theft removal had been worked out on the basis of entries found in the seized private records but not established the quantity on the basis of weighing it etc.

(c) That transporters have stated in their statement that all such disputed transactions had been carried out by him through his truck 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 said broker as well purchaser; that no such investigation had been carried out at the end of the buyer/purchaser; that the said truck owner had not stated that such quantities mentioned against such entries found in the said seized private records from Appellant No. 3 and Shri Yogesh B. Sanghvi, had been loaded from the factory premises of Appellant No. 1 and therefore, the statement of the owner of trucks cannot be taken as corroborative evidences to establish the charge of illicit removal of the excisable goods.

(d) The entries/nodes on which basis Annexure B was prepared, were not the authenticator and the same were not perused by Appellant No. 1; that the comparison of such entries/nodes with the sales summary/register of Appellant No. 1 is not sufficient without any corroborative evidences viz. daily stock account maintained by them wherein such particular of removal of excisable goods are being shown; that no such records pertaining to receipt and consumption of raw material are taken on record; that the goods removed by them on payment of Central Excise duty and confession statement of petitioner is not alone the evidence to prove the charge.

(vi) The so-called financial transactions taken place in so called illicit removal, had not been proved by providing corroborative evidences on record inasmuch as money flow book had not been placed on record to connect the illicit removal of Central Excise goods with the payment of Central Excise duty; that the so called transactions contemplated by the adjudicating authority on the basis of the private note books/ records seized from the taxpayer cannot be said as corroborative evidences as the said money was not extended to the end of buyer/purchaser and no records were placed on record regarding payment of freight charges.

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

(ix) The case-laws cited by the adjudicating authority are not applicable; the adjudicating authority failed to give due respect to the case laws cited by Appellant No. 1 and thus failed to observe the general principle in as much as he has not proved the clandestine receipt and consumption of raw material, not concerned the inquiry at the end of buyers to sustain charge of illicit removal etc.; that they relied on decision of Mrs. Kam Aluminum Pvt. Ltd. reported as 2014 (311) E.T. 354 (Trib. Ahm.), *vs.* Acani Enterprises Ltd reported as 2013 (324) ILT 451 (Mad.) and the Hon'ble CESTAT Ahmedabad Order No. A/11133-11034/2013 dated 17.09.2013 in case of Mrs. Bapting Castings Pvt. Ltd. which were applicable in the present case; that the adjudicating authority has wrongly and without authority of law confined the duty which they are not required to pay and thus they are not liable to pay any penalty as well.

(x) The confessional statements dated 25.03.2013 and dated 15.03.2014 of Shri. Visha. Nanda, Partner/Appellant No. 1 can not be considered alone as evidence to prove the charge against Appellant No. 1; that he simply perused the statements and Panchnama and work sheet pertaining to calculation of Central Excise duty on the basis of entries found in the seized private note books

from the brokers; that perusing documents are not direct material evidences unless such entries are corroborated with the documents pertaining to the WKT procurement of raw material, their manufacture of the goods; that since they had not cleared excisable goods without payment of Central Excise duty, they are not liable to penalty.

Appellant No. 2 :-

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

Appellant No. 3:

(i) Appellant No. 3 stated that the impugned order is non speaking and non reasoned inasmuch as the lower adjudicating authority has not dealt with the pleas made by them in their written submission as well judgments referred by him were completely ignored; that the impugned order is issued in violation of principle of natural justice as during personal hearing they requested to supply relied upon documents to defend their case; that Appellant No. 3 is not liable to pay tax under Rule 26 of the Rules as he had not knowingly and intentionally concerned with the clearance of the goods or engaged him in any way; that he discharged his duties by introducing the purchaser and therefore, the imposition of penalty under Rule 26(1) of the Rules does not arise inasmuch as he being a broker was called in by the purchaser 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 he had played any role which would render M. S. Bars liable to confiscation under of Rule 25(1) of the Rules in order to attract penal provisions of Rule 25(1) of the Rules; that he had not in any way conspired or colluded with the rolling mill to facilitate 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; the rolling mill, represented by Shri Asha Tejwadi; that he was just a link between buyer and seller of the goods; that he was not required to get registered with the Central Excise authorities and they had not violated any rules or regulations; that even if it is admitted that he had indulged in clandestine removal of goods and whatever written in documents are details of such illicit transactions, then one has to have the evidence from sellers regarding such sale, transport of such goods; that

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this case is not covered under sub-section (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 under Rule 26(1), it is a condition that either he acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act or Rules or has been in any way concerned in transporting, moving, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge or belief; that he rely on the decision in the case of *Gaurej Boyce & Mfg. Co.* reported as 2002 (148) ELT 161 followed in *A. M. Kulkarni - 2002 (56) ELT 573* (CCE&T Mumbai) and decision of *Ram Nath Singh* - 2002 (151) ELT 451 (Tri-Delhi); that any person to be penalized under the provisions of rule should also be shown to have been concerned in physically dealing with excisable goods with the knowledge or belief that the goods are liable to confiscation under the Act/ Rules; that he is not liable to personal penalty of Rs. 500,000/- as imposed on him under Rule 26(1) of the Rules.

iii) The allegation of aiding and abetting Appellant No. 1 is not correct, inasmuch as there is nothing alleged regarding intentional, premeditated communication of Appellant No. 3 with Rolling Mills of Appellant No. 1; that at the time removal of goods, Appellant No. 3 had no knowledge that the Rolling Mills of Appellant No. 1 was to engage in the action of clandestine clearances of the excisable goods; that imposition of penalty is quasi-criminal in character and therefore, penalty can be imposed only in the case of sufficient evidence to bring out willful nature of the offences; there is no evidence on record to confirm that the Appellant No. 3 had in any way, conspired or colluded with the Rolling Mills of Appellant No. 1 and therefore, imposition of penalty under Rule 26 of the Rules is not proper and legal; that they relied upon the cases of *M/s. Gaurej Boyce & Mfg. Co.* reported as 2002 (148) ELT 161 (1) and *Ram Nath Singh* reported as 2002 (151) ELT 451 (Tri-Delhi) to contend that the ingredients contained in Rule 26 of the Rules for imposition of penalties are not satisfied in his case.

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4. Personal hearing in the matter was attended by *Shri N. K. Naru*, Counselor on behalf of Appellant No. 1 and Appellant No. 2 and reiterated the grounds of appeals and submitted that the case laws of Hon'ble CESTAT: Order No. 111333-11034/2015 dated 11.07.2015 in the case of *M/s. Dajrang Castings Pvt. Ltd. and M/s. Aurilium Pvt. Ltd.* reported as 2014(111)FT354(Tri-Andh) have held that third party evidence can be relied upon if not corroborated in the case of the appellant, viz., there is no money flow back established by the department in this case; that demand can't be upheld in absence of evidences

to prove any contravention of duty.

4.7 Personal Hearing in the matter was attended by Shri. Maulik Vaidyanath, advocate on behalf of Appellant No. 1 and reiterated grounds of appeals and submitted that the impugned order should be set aside and no penalty should be imposed on Shri Himanshu Harlal Jaxani i.e. Appellant No. 1, because there is no corroborative evidence; that principles of natural justice have not been followed by the Department, inasmuch as all RUDs have not been supplied to them.

Findings:-

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

6. I find that the officers of Central Excise, Bhavnagar conducted coordinated search operations at various places including of Appellant No. 1 and recovered incriminating documents like diaries, notebooks, files, loose papers etc. It is on record that statements of Shri Himanshu Harlal Jaxani and Shri Yogesh K. Sanghvi, both brokers were recorded by confronting them with recovered records and the entries recorded in the notebooks/diaries required under Section 68A proceedings revealed manufacture and clandestine clearances of M. S. Brindl (M) Farm to buyers against cash transaction without H.E. invoices and without payment of CE duty. As seen from Para 24 of the impugned order Appellant No. 1 has in a detailed manner explained the codes (AYER, AYER, SIH, EVER) used and the transactions recorded in the said notebooks/diaries.

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

6.2 I find that demand of Rs. 11,01,739/- comprises of Three Annexures viz. Annexure - E (FINAL) / Annexure - HJ / Annexure - YS / Annexure - C. I find that before recording statement of Appellant No. 1, Authorized Person of Appellant No.1, all documentary evidences recovered from the premises of Appellant No. 1 and Shri Yogesh K. Sanghvi (Broker) were placed before him.

Appellant No. 2 in his confirmatory statement dated 29.03.2016 recorded under Section 74 of the Act 1962 also went through all Panchnama drawn at the premises and all the statements tendered by Appellant No. 3 and Shri Yeesan R. Sanghvi, Broker, Shri Vikram A. Jain, Proprietor of M/s. Shree Sai Corporation, Bhavnagar dated 14.08.2015, Transporter's etc. Appellant No. 2 was also given full opportunity to peruse incriminating documents, statements and duty calculation worksheet before giving testimony about the truth and correctness thereof. He was duly shown duty calculation Annexures H1, Y3 and E prepared on the basis of investigation showing transactions carried out through Appellant No.3 and Shri Yagesh R. Sanghvi, both brokers of Appellant No. 1. I find that the documentary evidences and statements of the brokers, sales manager, transporters have been discussed and reproduced in a very elaborate manner in the impugned order and many transactions recorded in the seized private records were found tallying with the statutory records/transactions of Appellant No.1 which proves authenticity of transactions and details contained in relied upon documents and relevance of these for duty liability of Appellant No. 1.

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

(a) Para 29.1 of the impugned order. The Appellant No. 2 confirming the duty calculation sheet after comparing them with invoices and other statutory documents ;

Q. No. 6. Please peruse Annexure 'H1' prepared on the basis of documents mentioned at Sr. No. 12 and 14 seized under Panchnama dated 12/09/2012 from the premises of Shri Himanshu Jagnani and tallied the same with the original documents.

Answer: I peruse Annexure 'H1' prepared on the basis of documents mentioned at Sr. No. 12 & 14 seized under Panchnama dated 12/09/2012 from premises of Shri Himanshu Jagnani. On tallying the same with the original documents, I found them tallied. In token of perusing and tallying the same, I put my dated signature on Annexure 'H1'.

Q. No. 9: Please peruse Annexure 'C' prepared on the basis of documents mentioned at Sr. No. 6 and 8 seized under Panchnama dated 12/09/2012 drawn at office premises of Shri Himanshu Jagnani, Broker of M/s. Bata and tallied the same with the original documents.

Answer: I peruse Annexure 'C' prepared on the basis of documents mentioned at Sr. No. 6 & 8 seized under Panchnama dated 12/09/2012 drawn at office premises of Shri Himanshu Jagnani, Broker of M/s. Bata and found all the entries tallied with the original documents in token of perusing and tallying the same, I put my dated signature on Annexure 'C'.

Q. No. 13. Please peruse your sales report for the year 2011-2012 and 2012-13 and tallied the same with Annexure - H1 and Annexure Y3 prepared on the basis of documents as mentioned above.

Answer: I tallied Annexure H1 and Annexure Y5 with sales register for the FY 2011-2012 and 2012-2013.

Q No. 12: Please prepare Annexure H prepared on the basis of Annexure H1 and Annexure Y5 after removing the entries in respect of which Central Excise Invoice has been issued?

Answer: Expense, Annexure H and A (copy of its correctness), putting sales register of the same."

[Emphasis supplied]

(b) Para 3.3.6: Shri Yogesh R. Sarjani, Broker in his statement dated 27.07.2015 admitted that

"3.3.7 Further, a statement of the Broker No. 3 was obtained on 23.07.2015 for further clarifications, wherein he inter alia after perusing the statement dated 04.10.2014, confirmed the facts, contacted Sharma and further stated that the sheet mentioned in his documents No. 50) and 50) (two sheets) were the sheet consisting of Billing Method statements and on being asked the bill number of each sheet referred to in question no. 3, he has admitted that his bills "2128, 2128, 2128, 5128" were sent by him for bills regarding Sales, Sales to Broker No. 1. The second page of page no. 24 of document no. 50) has been shown in the above given Notice pertaining to the Notice No. 1 for the date 04.07.2014. Accordingly, it appeared that on 04.07.2014, the Broker No. 3 has purchased goods from the Broker No. 1 and sold the same to some M/s. Dealers as follows:

Seller	Description of goods	Quantity (KG)	Rate (Rs./MT)	Amount (Rs.)
Aree	GF	2000	40776	81552
	GF	4000	40558	162232

Purchaser	Description of goods	Quantity (KG)	Rate (Rs./MT)	Amount (Rs.)
M/s. Krishna Me. Assn	GF	2000	41000	82000
	GF	4000	39250	157000

[Emphasis

supplied]

21/07/15
Yogesh R. Sarjani

(c) Para no. 3.3. : Appellant No. 2, Shri Vishal Nanda, Partner of the Appellant No. 1 in his statement dated 15.10.2015, inter alia, admitted that,

"... that the amount of the Advances on account of which no Invoice or Sales Bill has been issued as per their sales records, the goods mentioned in the said invoices have been received by these dealers, payment of duty and other charges of Central Excise Invoice."

[Emphasis

supplied]

6.4 I find that on being confronted with the incriminating documents found during the searches, both brokers in their respective statements, and Appellant No. 2 partner of the Appellant No. 1 during investigation have categorically

admitted that Appellant No. 1 had cleared goods without CE 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. Some the entries in duty calculation worksheet which were found to be tallying with the statutory Invoices were also removed from the same after comparing it by the Appellant No. 2. Statements of various transporters also corroborate the clearances of goods in clandestine manner by the Appellant No. 1.

6.5 It is seen that these are substantial evidences duly corroborated which have not been retracted at any stage and therefore, as per the settled legal position genuineness of the same cannot be undermined by said arguments only. I also find that authenticity of records seized from the premises of Appellant No. 1, Appellant No. 3 (broker), and Shri Yogesh R. Sangher, broker have been duly corroborated and tallied with records seized from Appellant No. 1 before Quantifying Central Excise duty liable to be paid by Appellant No. 1. The Appellant No. 2 in his statement dated 15.10.2015 as referred to at Para 23.1 of the impugned order have clearly accepted Annexures containing duty calculations. While comparing the duty calculation, some of the entries which found to be tallying with the statutory records of Appellant No. 1 were also excluded and therefore, it is seen that the duty calculations were fine-tuned to the satisfaction of Appellant No. 2.

6.6 As seen from Para 24 of the impugned order, I find that Seller as well as Purchaser both have been identified and clandestine transactions of the excisable goods concealed which demonstrated clearances without bills accounted for in the books of account of Appellant No. 1.

6.7 Appellants No. 1 has argued that demand of duty cannot be confirmed on the basis of diaries and records recovered from the third party like brokers Shri Himanshu R. Jajani (Appellant No. 3) and Shri Yogesh R. Sangher, 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 retained ICB, as well as other transactions of Appellant No. 1. I also find that many transactions recorded in private records tallied with invoices were actually issued by Appellant No. 1. Thus, truthfulness of diaries/notebooks and other private records recovered from the brokers during search is already established, also because both brokers have admitted to have dealt with the goods belonging to Appellant No. 1 without Central Excise invoices and also sold such goods without CE Invoices. It is clear that demand has been computed on the basis of duty computation Annexures prepared on the basis of private records recovered from

the brokers. I also find that all links involved in the case, i.e. brokers, Appellant No. 1, Appellant No. 2, buyer, purchaser, 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 well. 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.

6.8 Further, Appellant No. 2 and Partner of Appellant No. 1 has in its statement dated 16.10.2015 recorded during final part of the investigation, on being confronted with vts. documentary and oral evidences along with duty calculation annexures, admitted that they cleared excisable goods without payment of duty and no CE invoices raised for such transactions. This statement of Appellant No. 2 dated 15.10.2015 has not been retracted till date and hence, have sufficient legal evidentiary value, which cannot be belittled. The admitted appreciation of all such corroborative evidences reflect that CE duty evasion has indeed taken place and Appellant No. 1 has indulged in it. Therefore, the list of them are required to be considered vital and main evidences and are sufficient to prove the case against appellants. In this regard, I also rely upon the decision of the Hon'ble CLS/A. In the case of Dny Prakash Awarwa, reported as 2017 (344) EIT 123 (Tri-Ben) wherein it has been held as under;

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It is to be noted in both the proceedings above identical set of facts were involved. The allegation was that based on evidences collected from the appellant's side, unaccounted receipt and further manufacture of excisable goods by the appellant was sought to be established. Significantly, the case is not only based on the material evidence collected from the appellant's and concluded as corroborated by the responsive parties of the appellant's side. The receipt and use of the such manufactured raw materials for further manufacture has repeatedly been admitted by the appellant and also they about paid has also been declared during the course of investigation itself. The appellants' great emphasis on non-availability of the purchase corroborations by way of details of warehouse money receipts are in the present case, the evidences collected from the supplier's side is corroborated and cannot be ignored. The purchase records of the suppliers have been corroborated and admitted, for the correctness of their contents by the persons who play in charge of the appellant's unit. When such evidence was brought before the partner of the appellant's unit, he categorically admitted unaccounted clearance of excisable goods. However, he did not name the buyers to whom such goods were sold in such manner. It is significant that the appellant has taken a plea that the statement has not established the details of his own and to many of the financial records in such regard. It is seen that the records maintained by the suppliers, which were

effected by the parties (including counter-beneficial sales). It is not the case of the appellant that the supplier's statements such as made only to fully explain the appeal. In fact, the supply of unmanufactured iron under the new terms manufactured by the partner of the appellant's firm. In such situation, it is not possible for the appellant to act in the appeal stage, since the point of departure of counter-beneficial sale. Initially, some of the sales records of the appellant's firm have been destroyed or being concealed for this purpose. In the appeal before the Tribunal, the appellant's position is related question that the appellant is the partner of the supplier's firm at that situation. Therefore, they relied upon by the appellant are not of any support in the present case. In the case involving unmanufactured iron, the evidence of such case are to be considered for conclusion. As stated above, the direct source records of the supplier's sale are offered by the person in charge and further substantiated by the appellant cannot be relied upon on the ground that the evidence like a bill of lading and receipt of goods has not been proved. In a commercial manufacture and clearance, each stage of operation cannot be attributed with practice. The careful consideration of the grounds of appeal and the findings in the impugned order, I find no reason to interfere with the findings recorded by the lower authority. Accordingly, the appeals are dismissed."

[Emphasis supplied]

6.9 During personal hearing, the consultant has referred to the case of Bharat Shah and Others decided by the Hon'ble CESTAT vide Final Order No. M/13817/13N/12807 whereby 15 cases were remanded back to the original adjudicating authority. I find that the facts and circumstances involved in these cases are different, inasmuch as in these cases invoices were issued in the name of iron manufacturers, whereas inputs were actually converted to rollers, was allegedly wrongfully utilized CENVAT credit which is not the issue in the present appeals.

6.10 Appellant No. 1 has also cited Final Order No. M/11045/11034/2115 dated 17.02.2015 of the Hon'ble CESTAT in the case Mrs. Jayrang 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, evidence 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]

6.10.1 On going through the grounds of appeals, as also the written submissions made before the lower adjudicating authority, as discussed at Para

37 to 40 of the impugned order, I find that no request for cross-examining any of the witnesses has been made by the appellants in the present case and therefore, the order of the Hon'ble CESTAT in the case of *M/s. Jayrany Sealings Pvt. Ltd* and others supra is not applicable to the instant case.

6.7.1 It is settled law that in cases of clandestine removal, department is not required to prove the case with mathematical precision. By this view is duly supported by judgments of the Hon'ble Supreme Court in the cases 1984 (14) ELT 1631 (SC); E 2309 (223); ELT 587 (SC).

5.11.1 The statements, if not retracted, are legal and valid in the eyes of law and have to be considered as corroborative evidences as held in the cases of (i) *Narash J. Sakhasani* (1996 (83) ELT 258 (SC)); (ii) *Rakesh Kumar Garg* (2006 (331) ELT 371 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. Hi Tech Abrasives Ltd.* reported as 2017 (346) ELT 506 (Tri.-Del.).

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 recovered by the officers contained details of procurement of raw materials as well as clearance of finished goods with and without payment of duty. This fact is further strengthened by the observation that many entries in the private documents are covered by the invoices issued by the assessee on which duty stands paid. The Director has clearly admitted the truth of the charts as well as clandestine clearance of goods covered by the entries in the private notebooks which are not covered by the invoices. Such statement is admissible as evidence as has been held by the Apex Court in the case of *Systems & Components Pvt. Ltd., supra*. The activities of clandestine nature is required to be proved by sufficient positive evidence. However, the facts presented in each individual case are required to be scrutinized and examined independently. The department in this case has relied upon the confessional statement of the Director which is also supported by the mentioned entries in the private records. There is no averment that the statement has been taken under duress. The assessee also does not appear to have asked for cross-examination during the process of adjudication.

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

16. The evidence of clandestine clearance has been brought on record only as a result of investigation undertaken by the department. The evidences mentioned 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."

[Emphasis supplied]

6.12 I also rely on the decision in the case of *M/s. Haryana Steel & Alloy Ltd.* reported as 2017 (355) 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 accumulated as well as unaccounted goods which have been explained in detail and enclosed by GM of the factory tally with invoice/gate pass 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. Ramachandra Razins Pvt. Ltd.* reported as 2014 (302) ELT 461 (S.C.) wherein similar view has been taken by the Hon'ble Supreme Court.

6.13 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 *Surx Industries* reported as 2005 (200) ELT 2073 (Tri-Mumbai) and *M/s. Divine Solutions* reported as 2006 (206) E.L.T. 1005 (Tri. Chennai), Hon'ble CESTAT in the case of *M/s. Anon Engg. Works* reported as 2004 (199) E.L.T. 373 (Tri. Del.) 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 various case laws are not applicable in light of the positive evidences available in this case as discussed above and in the impugned order. *Hanba* (L515) In the case of *M/s. N R Storage P Ltd* reported as 2015 (329) ELT 450 (Tri-Del) has also held that when preponderance of probability was against the appellant, blending of the statements recorded from buyers, no excess electricity consumption found, no raw material purchase record unaccounted and no month-wise ratio prescribed by law is of no use.

7. In view of above facts, I find that the contentions raised by the appellants are of no help to them and the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that the Appellants were engaged in clandestine removal of the goods. I, therefore, find that the confirmation of demand of Central Excise duty of Rs. 10,01,719/- by the lower adjudicating authority is correct, legal and proper.

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

8 I find that this is a case of clandestine clearances of the goods without Central Excise invoices and without payment of duty and hence the impugned order has correctly imposed penalty equal to duty of Rs. 11,01,739/- on Appellant No. 1 under Section 114C(1) of the Act.

8.1 Appellant No. 2 and Partner of Appellant No. 1 has contended that the lower adjudicating authority has failed to establish as to how he has evaded the so-called evasion of Central Excise duty and thus wrongly imposed penalty on him under Rule 26(1) of the Rules. I find that the facts of this case very clearly establish that he was the key person of Appellant No.1 and was responsible for clandestine removal of the goods manufactured by Appellant No. 1. He, as authorized person, was looking after day-to-day affairs of Appellant No. 1 and was concerned himself in various irregular activities related to excisable goods including manufacture, storage, removal, transportation, 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 fines made thereunder. Looking to the involvement of Appellant No. 2 in this case and gravity thereof, I find that imposition of penalty of Rs. 11,01,739/- upon him under rule 26(1) of the Rules is proper and justified.

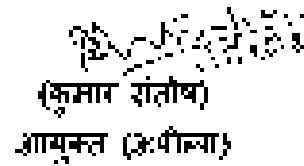
8.2 Insofar as penalty on Appellant No. 3 is concerned, he contended that his role was limited as link person and not concerned with the goods and therefore, penalty is not imposable upon him. I find that he was the key person and had been dealing with the goods on behalf of Appellant No. 1 without cover of CE invoices and supplied the same without payment of CE duty. Incriminating documents establishing clandestine clearances of the goods were also found from the premises of Appellant No. 3 during search proceedings on 12.09.2012. The details of clandestine transactions recorded in his diary/notebooks contained details of the goods, truck no., cash payments, etc. Thus, his role is elaborately discussed in the impugned order and in fact, inquiry was originated based on the documents recovered from his premises and therefore, he cannot now plead that his role was limited as a link person only between buyer and seller. I find that his role was very crucial in the whole episode of clandestine removal of goods. Therefore, I find that penalty of Rs. 5,00,000/- imposed on him under Rule 26(1) of the Rules is correct and there is no need to interfere with the impugned order.

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

9.1 अपीलकर्ताओं द्वारा नव जल नद अर्थात् जल निष्कास उपरोक्त तरीके से किया जाता है।

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




(कमल शंकर)
आयुक्त (अधीनस्थ)

By R.P.A.U,
Tn.

1. M/s. Evershine Steels,
Survey No. 30-31/P,
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Vadia, Sihor, Bhavnagar.

2. Shri Visha. Nanda, Partner of
M/s. Evershine Steels,
Survey No. 30-31/P,
Ganghaji-Sihor Road,
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3. Shri Himanshu Khandelwal Jagan, Partner
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Waglawadi Road,
Bhavnagar.

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) T. No. V2/254/BVR/2017

7) T. No. V2/413/BVR/2017