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**ORDER IN APPEAL**

The below mentioned appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1 and Appellant No.2") as detailed in the table against Order in Original No. 67/Excise/Demand/2016-17 dated 30.03.2017 (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.	V2143/ISWR/2017	Appellant No.1	M/s. Rameshwar Steel Re-Rolling Mill Plot No. 106, GIDC, Verdel, Distt: Bhavnagar.
2.	V2154/ISWR/2017	Appellant No.2	Smt Himanshu Mandali Jagani, 38, Vihar Complex, Farth Farm, Near Sakhar Hat, Waghawadi Road, Bhavnagar.

2. The officers of Bhavnagar Commissionerate are fully aware that some re-rolling units at Smer, Verdel and Bhavnagar were engaged in large scale evasion of Central Excise Duty by way of clandestine removal of Re-rolled products viz. 6. 5. Round/ TMT Bars etc. with active support of brokers, conducted coordinated search operation at the premises of Smt Himanshu Mandali Jagani, Broker of Round/TMT Bars at Bhavnagar and incriminating documents were recovered from him during search.

2.1 Show Cause Notice No. V/15-108/Dem/11Q/2015-16 dated 26.07.2016 proposing demand of recovery of Central Excise duty of Rs.12,87,617/- under the provision to Section 11A(f) 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 26 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. The Show Cause Notice was adjudicated by the lower adjudicating authority vice the impugned order, in which (i) Central Excise duty of Rs.12,87,617/- was confirmed under Section 11A(f) of the Act along with interest under Section 11AA of the Act and penalty of Rs.12,87,617/- was imposed under Section 11A(1)(a) of the Act upon Appellant No. 1 with option of reduced penalty as envisaged under provisions of Section 11AC(1)(a) of the Act and Penalty of Rs. 6,00,000/- under Rule 26(1) of the Rules upon Appellant No. 2.

*[Handwritten signature]*

3. Being aggrieved with the Impugned order, Appellant No.1 and 2 have preferred the appeals on various grounds, inter alia, as below :

Appellant No. 1 :

(i) The allegation of theft removal of excisable goods on the basis of entries found in the private records / note books etc. seized under Fardhama dated 12.09.2012 at the premises of Appellant No. 2; that these seized records had not been proved as 'authenticated documents' to sustain the charge of so-called theft removal as no direct evidences have been placed on records viz. Central Excise Records maintained by Appellant No. 1, no weighment slips taken on record to sustain the entry of weight shown in the said private note book as well as no material evidences placed on record regarding means of transport; that the vehicle numbers have been shown as "GJ-4, GJ-2, GJ-1 etc."; that such entries have not been found in seized private records to confirm the transportation of the excisable goods.

(ii) The relied upon documents have been provided in form of "CD" and not in hard form as required to meet the principles of natural justice read with provisions of Section 33 of the Act; that the private records/ note books were not available for defending the case; that they rely on decision in the case of *M/s. Shivani Steel Construction* reported as 2016 (205) E.T 310; that when the relied upon documents supplied in form of "CD" not found to accords with the conditions laid down under Section 36B of the Act 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 no 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 36 of the Act and hence the impugned order has been passed beyond the scope of Show Cause Notice and on the basis of third party evidences, which is not proper to demand and confirm Central Excise duty.

(iii) 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 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.

(vi) The case has been made out only on basis of assumptions and presumptions as the adjudicating authority has failed to establish that the coding name mentioned in the said seized private diaries/record was pertaining to Appellant No. 1 and no such question has been asked by the Central Excise officer establishing that the coding name "B4" was name of Appellant No. 1; that without such verification of the genuineness of the name of the resolving unit mentioned in the so called seized diaries, it is not justifiable that the so called coding name as deciphered by the broker is the name of Appellant No. 1; that quantity of illicit removal had been worked out only on the basis of entries found in the seized private diaries but not established the quantity on the basis of weighing slips etc.

(v) Shri Hardenshik B. Gohil, Owner of Truck No. GJ-17-9044, GJ-18-5044 and GJ-4W-9404 had not stated in his statement dated 07.04.2015 that all disputed transactions had been carried out by him through his above trucks; that he had sometimes received payment of freight in cash from Shri L. H. Jagani and sometimes from purchaser; that the said truck owner has not specifically stated that the quantities mentioned against such entries found in the said seized private records from the said broker.

(vi) The entries/notes on which Annexure-E was prepared, were not authenticated and the same were not got vetted by Appellant No. 1, that the comparison of such entries/notes with the sales summary / register of Appellant No. 1 is not sufficient without any corroborative evidences i.e. daily stock account maintained by them wherein such particular of removal of excisable goods were shown; that no such records pertaining to receipt and consumption of raw material were taken on record; that the goods removed by them or payment of Central Excise duty and confessional statement of partner was not sufficient evidence to prove the charge.

(vii) The so-called financial transactions taken place in so called illicit removal had not been proved by providing corroborative evidences on record in such as money flow back had also not been placed on record to substantiate the charges the illicit removal of Central Excise goods without payment of Central Excise duty; that the so-called transactions corroborated by the adjudicating authority on the basis of private diary/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 recovery of some documents cannot be the basis to establish the charge of clandestine removal unless it is proved with corroborative evidences, namely, illicit receipt of raw materials and manufacture of excisable goods from such illicit receipts and their illicit removal; that the department failed to establish the said transactions with evidences viz. money flow back; that in absence of statement/confession of customers/buyers with reference to so called illicit removal of excisable goods, such transaction value cannot be ascertained; that the Central Excise duty had been worked out on the basis of the sale price shown in the sale sheet/private note books / records of the third party and therefore, duty demanded on the value shown in the said sale sheet/private records is not proper/genuine.

(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 judicial discipline in as much as he has not proved the clandestine receipt and consumption of raw material, not recorded the inquiry at the end of buyers to sustain charge of illicit removal excisable goods; that they relied on decision of *M/s. Aum Aluminium Pvt. Ltd.* reported as 2014 (311) E.L.T. 354 (Trib. Andh.), *M/s. Adani Enterprises Ltd.* reported as 2015 (324) E.L.T. 461 (Mad.) and the Hon'ble CESTAT Ahmedabad Order No. A/C/033-11034/2015 dated 17.07.2015 in case of *M/s. Baijrang Castings Pvt. Ltd.* which were applicable in the present case; that the adjudicating authority has wrongly and without authority of law confirmed the duty which they are not required to pay and thus they are not liable to pay any penalty as well.

(x) The confessional statement dated 25.12.2015 at Shri Kamant Ashok Dixit, Proprietor of Appellant No. 1 can not be considered the sole basis as evidence to prove the charges of clandestine removal; that no other person whose statements have been recorded has stated that the said partner (sic) is involved in the clandestine removal of the excisable goods; that the said partner (sic) simply perused the statements and Panchnama and worked upon pertaining to calculation of Central Excise duty on the basis of entries found in the various private note books from the brokers; that banking documents are not direct material evidences unless such entries are corroborated with the documents pertaining to the illicit 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 :-

(i) Appellant No. 2 has stated that the impugned order is non-speaking and non-reasoned one inasmuch as the lower adjudicating authority has not dealt with the plea made by them in their written submission, as well as arguments 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 relied upon documents to defend their case; that the Appellant No. 2 is not liable to penalty 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 on him under Rule 26(1) of the Rules is not proper inasmuch as he being a broker was relied on by the purchaser of the M S Bars for purchase of the same; that he being broker had introduced purchaser to seller and finalized the deal, it cannot be said that he as a broker had played any role which would render M. S. bars etc. liable for confiscation under the provisions of Rule 26(1) of the Rules in order to attract penal provisions of Rule 26(1) of the Rules; that he had in no way conspired or colluded with 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 purchaser to the seller i.e. rolling mill, represented by Shri Dixit; i.e. Proprietor of Appellant No. 1; that he had not dealt with the goods but 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 he had not violated any rules or regulations; that even if it is admitted that he had indulged himself in clandestine removal of goods and whatever written documents are details of such illicit transactions, then there had to be evidence from sellers regarding such sale, transport of such goods; that investigation has not been extended upto buyer's end and whether sales proceeds had been received in cash; that this case was not covered under sub-rule (i) of Rule 26 as he has not dealt with excisable goods in any manner whatsoever and he had only introduced the purchaser; that for a penalty on any person under Rule 26(1), it is prime condition that either the said person acquired possession of any excisable goods with the knowledge or belief that the goods were liable to confiscation under the Act or Rules or had been in any way concerned in transporting, removing, depositing, keeping, concealing, selling, or purchasing or had in any other manner dealt with any excisable goods with such knowledge or belief; that he

referred on the decisions in the case of Garrey Royce & Mfg. Co. reported as 2007 (148) ELT 161 followed in A.M. Sulvarni - 2003 (150) ELT 573 (CESTAT-Mumbai) and decision of Ram Nath Singh - 2003 (151) ELT 451 (Tri-Devi); 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 excise duty under the Act / Rules; that charges of clandestine removal are quasi-criminal and required production of positive and tangible evidences as held by the Hon'ble CESTAT in the case of Chandan Tomara Co reported as 2011 (177) ELT 87 (Tri-Devi) and therefore, the case of clandestine removal is not proved; that in view of this he wasn't not liable to personal penalty of Rs. 5,00,000/- as imposed under Rule 26(1) of the Rules.

(iii) The allegation of aiding and abetting Appellant No. 1 is not correct. Inasmuch as there is no interaction, place and/or communication with Appellant No. 2 with alleged Rodhik Mills or Appellant No. 1; that at the time removal of goods, Appellant No. 2 had no knowledge that the Rodhik Mills/Appellant No. 1 was involved in clandestine clearance of the excisable goods; that there is no evidence on record to confirm that Appellant No. 2 had in any way, conspired or colluded with the Rodhik Mills/Appellant No. 1 and therefore, imposition of penalty on him under Rule 26 of the Rules is neither proper nor legal; that he relied upon the cases of M/s. Godrej Royce & Mfg. Co. reported as 2007 (148) ELT 161 (1); A.M. Sulvarni reported as 2003 (150) ELT 573 (CESTAT-Mum) and Ram Nath Singh reported as 2002 (151) ELT 451 (Tri-Devi) to contend that the ingredients of Rule 26 of the Rules for imposition of penalty are not available in this case.

*(Signature)*

4. Personal Hearing in the matter was attended by Shri. H. A. Maru, Consultant on behalf of Appellant No. 1 and he reiterated the grounds of appeal and submitted Written Submissions dated 21.03.2018; submitted that no money flow back or purchase of raw material, etc. found during investigation; that impugned order may be set aside and appeal allowed in view of facts of this case.

4.1 Personal Hearing in the matter was attended by Shri. Madhav Vaidyanath appeared on behalf of Appellant No. 2 and reiterated grounds of appeal and also submitted written submission that the impugned order should be set aside and no penalty should be imposed on Sri. Himanshu Nandlal Jaganlal, Appellant No. 2, because there is no corroborative evidence. The principle of natural justice

have not been followed by the Department, inasmuch as all B.LTs have not been supplied to them.

#### Findings:-

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

5.1 I find that the officers of Central Excise, Bhavnagar conducted search operations at various places including that of broker and recovered incriminating documents like diaries, notebooks, files, loose papers etc. I also find that the statements of Shri Himanshu Anandlal Jangni, Appellant No. 2 were recorded by conferring him and others with recovered records and the entries made in the notebook/books etc. seized under Panchama proceedings, which revealed manufacture and clandestine cargoes of their finished goods to buyers against cash transactions without CE invoices and without payment of CE duty. As seen from Para 22 of the impugned order, Appellant No. 2 has in a detailed manner explained the cases ("B.A / H") written in diaries etc.

5.1.1 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, I find that the adjudicating authority has mentioned the defense submissions in details in the impugned order. Hence, this argument advanced by the appellants is devoid of merits.

5.2 I find that demand of Rs. 12,37,617/- comprises of three Annexures viz. Annexure - E (FINAL) / Annexure - H.1 / Annexure - C. I further find that before recording the statements and documentary evidences recovered from the premises of Appellant No. 2 were shown to Shri Hemant A. Daxi, Proprietor of Appellant No. 1 in his confirmatory statement dated 25.12.2016 recorded under Section 14 of the Act had gone through all Panchama drawn at the premises and all statements tendered by Appellant No. 2, transporters etc. Appellant No. 1 was given full opportunity to peruse incriminating documents, statements and duty calculation worksheets before giving statements about the truth and correctness thereof. He was shown duty calculation Annexures H.1, I, and E prepared showing transactions carried out through Appellant No. 2. I find that the documentary evidences and statements of the broker, transporters, etc. have been discussed and reproduced in elaborate manner in the impugned order.

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and many transactions recorded in the seized private records were found tallying with the statutory records/transactions of Appellant No.1 which amply prove authenticity of transactions and details contained in the relied upon documents and relevance of those for duty liability on Appellant No. 1.

6.3 Before proceedings, would like to discuss relevant and important paragraphs of the impugned order, which are important to decide these two Appellants Order :-

- (a) Para 29 of the impugned order - Proprietor of the Appellant No. 1 confirming the duty calculation sheet after comparing them with Invoices and other statutory documents :

Q. No. 12 - Please peruse Annexure "II" prepared on the basis of documents mentioned at Sr. No. 12 and 14 seized under Searchwarrant dated 12.09.2012 from the premises of Shri Himanshu Jagani and tallied the same with the original documents.

Answer :- please Annexure "II" prepared on the basis of documents mentioned at Sr.No. 12 & 14 seized under Searchwarrant dated 12.09.2012 from premises of Shri Himanshu Jagani. On talling the same with the original documents, I found them tallied. In token of certaintly, and tallying the same, put my dated signature on Annexure "II".

Q. No. 13 - Please peruse Annexure "C" prepared on the basis of documents mentioned at Sr. No. 5 and 6 seized under Searchwarrant dated 12.09.2012 from the premises of Shri Himanshu Jagani, Director of M/S. Bery and tallied the same with the original documents -

Answer :- please Annexure "C" prepared on the basis of documents mentioned at Sr.No. 5 & 6 seized under Searchwarrant dated 12.09.2012 from premises of Shri Himanshu Jagani, Director of M/S. Bery and found all the entries tallied with the original documents in token of its certaintly, I put my dated signature on Annexure "C".

Q. No. 14 - It is observed that in respect of notices issued in above mentioned Assessment, where no invoices or Sales Bill have been issued by you, the goods mentioned in these entries have been issued by you, the goods mentioned in the said entries have been removed by you but without payment of duty and without issuance of Central Excise Invoice. Is it true?

Answer :- Yes.

Q. No. 15 - How did you receive payment for the goods sold / removed by your firm without issuance of invoice and without payment of duty?

Answer :- received payment of goods sold / removed by my firm without issuance of invoice and without payment of duty in cash.

Q.21. Please peruse Annexure B and C prepared on the basis of Annexure II after removing the entries in respect of which Central Excise Invoice has been issued?

Answer :- I peruse Annexure B and C prepared on the basis of Annexure II after removing the entries in respect of which Central Excise Invoice has been issued.

[Emphasis supplied]

(b) Para 30 of the impugned order :- Seeking pardon for their first mistake  
 "30 In view of the above and categorical admission by the authorised person of  
 Notice No. 2, it leaves no scope that the notices no. 1 or 2 along with the other notices  
 have cleared the goods without preparation of invoice and without payment of duty  
 and received amount in cash for such clandestine clearance. The Notice No. 1 fully  
 admitted the duty liability of Rs. 72,67,512/- as stipulated and sought to determine such  
 factual details of the date, purchase amount and the total duty liability of Rs.  
 1,27,67,077/- (including) and processed and duty signed by him under his signature, dated  
 25.12.2015. The Notice No. 2 clearly admitted in his defence submission dated  
 20.02.2017 that

6. "Therefore, it is requested to consider this and leave a final case and drop the  
 charges altogether of our client and refrain from imposing a penalty."

[Emphasis supplied]

(c) Para No. 17 of the impugned order :-

"17 The personal meeting for Notice 2 was held on 06.03.2017 which was  
 attended by Shri Madan N. Vasudevan, Chartered Accountant, and retained their  
 copy dated 27.02.2017 and submitted their written submission dated 06.03.2017. He  
 pleaded that his client has not gone against the law."

[Emphasis supplied]

6.4 I find that on being confronted with the recovered incriminating  
 documents, Appellant No. 1 and Appellant No. 2 in their respective statements,  
 during investigation have categorically admitted that Appellant No. 1 had  
 cleared goods without CE invoices and without payment of the duty and they  
 knew these transactions and entries available in their private records. Many  
 entries in duty calculation worksheet which were found to be tallying with the  
 statutory invoices were removed from the same after comparing. Statements of  
 various transporters also corroborated the clearances of the finished goods in  
 clandestine manner by Appellant No. 1.

6.5 I find that these substantial evidences duly corroborated have not been  
 retraced at any stage and therefore, as per settled legal position, sanction of  
 the same cannot be undermined by bare arguments only. I also find that  
 authenticity of records seized from the premises of Appellant No. 2 has 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. Appellant  
 No. 1 in his statement dated 25.12.2015, referred to at Para 29 of the impugned  
 order, has also accepted Annexure computing duty calculations. While  
 comparing the duty calculation, the entries found to be tallying with the  
 statutory records of Appellant No. 1 were excluded and therefore, I find that  
 duty calculations were fine tuned to the satisfaction of the Proprietor of  
 Appellant No. 1.

6.6 I find that Appellant No. 2 had sought apology, i.e. being their first mistake and had requested not to impose penalty for clandestine transactions of the excisable goods carried out without bills and without accounting for in the books of account.

6.7 Appellants No. 1 has argued that demand of duty cannot be confirmed on the basis of diaries and records recovered from third party like broker Shri Himanshu N. Jagani (Appellant No. 2) and the demand made on the basis of third party documents is not sustainable. In this regard, I find that the diaries maintained by Appellant No. 2 recorded legal as well as illicit transactions of Appellant No. 1 and many transactions recorded in private records called with the invoices actually issued by Appellant No. 1. Thus, truthfulness of diaries/notebooks and other private records recovered from Appellant No. 2 during search is clearly established, also because Appellant No. 2 has admitted to have dealt with the goods belonging to Appellant No. 1 without invoices and also sold such goods without payment of CE duty. I also find that demand has been computed on the basis of duty computation Annexures prepared on the basis of private records recovered from Appellant No. 1 and 2. I also find that all facts involved in the case, i.e. brokers, Appellant No. 1, Appellant No. 2, transactions 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 duty corroborated by rest of other statements and evidences recovered from Appellant No. 2 also. I find that the fact of many persons involved negate the concept of 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, Frontman of Appellant No. 1 in his statement dated 25.12.2015 has on being confronted with vcd, documentary and oral evidences along with duty computation Annexures, admitted that they cleared finished excisable goods without payment of CE duty and no 14 invoices were issued for such transactions. The statement of Appellant No. 2 dated 15.10.2015 has not been rejected till date and hence, have sufficient legal, evidentiary value, which cannot be brushed aside. The combined appreciation of all corroborative evidences reflect that CE duty evasion has indeed taken place and Appellant No. 1 has indulged in CE duty evasion. I, therefore, find that all vital and hard evidences are required to be considered, are sufficient to prove the case against

appellants, rely upon the final order of the Hon'ble CESTAT in the case of On Prakash Agarwal reported as 2017 (346) ELT 125 (Tri-Tri), wherein it has been held that :-

"5. I note that in both the proceedings above identical set of facts were involved. The allegations were based on evidence collected from the suppliers' side, unmanufactured inputs and further manufacture of finished goods by the appellant. The scope of the evidence relating to the cargo was only based on the supplier's evidence collected from the supplier's end and also as corroborated by the reasonable records of the supplier's end. The receipt and use of the such unmanufactured raw materials for further manufacture for appearing been advised by the appellants and the duty should have also been discharged during the course of investigation itself. The appellants' great emphasis on non-availability of the further corroborations by way of details of transport, storage charges etc. in the present case, the evidence collected from the suppliers' end is uncorroborated and cannot be treated. The private records of the suppliers have been examined and admitted for the correctness of their contents by the assessing authority in charge of the supplier's side. When such evidence may be brought before the partner of the appellant's unit, an independently verified unmanufactured statement of supplier's raw materials, to did not serve the purpose to show such produce were sold in such situation. It is stated that the appellant has taken a plea that the department has not established the details of inputs and transport of the finished goods in such cases. It is seen that the records maintained by the suppliers' goods were affirmed by the persons in charge cannot be treated as such. It is not the case of the appellants that the suppliers' maintained such records only in factitious manner that appellant. In fact, the supply of unmanufactured raw materials had been manufactured by the partner of the appellant's firm. In such situation, it is not feasible for the appellant to rely on the department's order for prima facie evidence of cross-examination and ultimately, none of the private records of the appellants' goods have been treated as being corrected for their authenticity in the annual return tax. However, the appellant's pleading is rejected inasmuch that the statement by the partner of the appellant's firm is not voluntary. Various cases have relied upon by the appellants are not of any account in the present case. In the cases involving unmanufactured manufacture, the evidence of such case was to be appreciated for construction of total duty, the third party's evidence at the supplier's end is supported by the private books and papers maintained by the appellant cannot be disregarded only on the ground of further evidence like unmanufactured inputs of inputs has not been proved. In unmanufactured manufacture and delivery, such cases of systematic manner or established with previous. On careful consideration of the grounds of appeal and the pleading by the appellant's side, I find no reason to interfere with the findings recorded by the assessing authority. Accordingly, the appeals are dismissed."

[Emphasis supplied]

6.9 Appellant No. 1 has cited Fina. Order No. A/TIO/3 1134/2015 dated 17.07.2015 of the Hon'ble CESTAT in the case M/s. Beijing Castings Pvt. Ltd. and Others in support of their contentions. I find that the order of Hon'ble CESTAT in the order;

"5. In view of above proposition of law, a diary recovered from the broker and few statements there cannot be made the basis

for denying CENVAT credit to the Appellant in the absence of cross-examination of the third party witness statement. 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]

6.9.1 On going through the grounds of appeals, as also the written submissions made before the lower adjudicating authority, as discussed at Para 07 to 17 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 this case or *M/s. Bapting Castings Pvt. Ltd* and others stands not applicable to the instant case.

6.10 During personal hearing, the consultant has referred to the case of *Bharat Shah and Others* decided by the Hon'ble CESTAT vide Imp. Order No. A/13877-13911/2007 whereby SE cases were remanded back to the original adjudicating authority. I find that the facts and circumstances of these cases are different, inasmuch as in these cases invoices were issued in the name of input manufacturers, whereas inputs were actually diverted to retailers, who allegedly wrongfully obtained Cenvat credit which is not the issue in the present appeals.

6.11 It is settled law that in cases of clandestine removal, Department is not required to prove the case with mathematical precision as has been held by the Hon'ble Supreme Court in the cases of *Shri Guman Vs* reported as 1983 (13) JT 163 (SC) and *Nalco Textiles (I) P. Ltd.* reported as 2006 (28) JT 187 (SC).

6.11.1 The statements, if not retracted, are legal and valid and have to be considered as corroborative evidences as held in the cases of *Narain J. Sushwan* reported as 1996 (24) ELT 718 (SC) and *Balesh Guman Gang* reported as 2016 (331) ELT 321 HC-Delhi. I find that the Statement of Promotor of Appellant No. 1 admitting clearances of goods without payment of CE duty and without issuing CE invoices are inculpatory and not retracted has to be held as admissible as held in the case of *M/s. Hi-Tech Abrasives Ltd.* reported as 2017 (346) ELT 606 (Tri.-Delhi).

"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 inculpatory 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 charges 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 considerable 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 confidential statement of the Director which is also supported by the mentioned entries in the private records. There is no comment 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 Kishorwal, who is said to be the author of the private records recovered has not been recorded, it stands admitted by Shri Jekmal, Director about the truth of the contents of the private notebooks. Consequently, I find no reason to disallow this part 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 inapplicable in this case and hence the demand cannot be held to be time-barred."

[Emphasis supplied]

6.11.2 I also rely on the decision in the case of M/s. Haryana Steel & Alloys Ltd. reported as 2017 (355) ELT 451 (Trib-Del.) wherein it has been held that notebooks (charts) seized from the possession of a peon'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 CO of the factory tally with investigation passed is trustworthy; that the statement of employee running into several pages and containing detailed knowledge to be considered reliable, whereas in the instant case it is Proprietor. I also rely on the decision in the case of M/s. Ramchandra Textiles Pvt. Ltd. reported as 2814 (502) ELT 861 (S.C.) wherein similar view has been taken by the Hon'ble Apex Court.

6.12 I am of the considered view that the admitted facts need not be proved as has been held by the Hon'ble TFD in the cases of Alex Industries reported as 2006 (230) FT 13074 (Tr. Mumbai) and M/s. Divine Solutions reported as 2006 (204) F.I.T. 1005 (Tr. Chennai). Hon'ble CESTAT in the case of M/s. Karuri Engg. Works reported as 2004 (156) F.I.T. 375 (Tr. Co.) has held that the statement 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. Hon'ble CESTAT in the case of M/s. N R Sponge 2 Ltd reported as 2013 (178) FT 453 (Tr. Del) has also held that when preponderance of probability was against the Appellant, pleadings of no statement recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted for and no input-output ratio prescribed by law etc. are of no use.

7. In view of above facts, I find that the various points made by the Appellants are of no help to them since the department has admitted sufficient oral and documentary corroborative evidences to demonstrate that the Appellants were engaged in clandestine removal of the finished goods without preparing CE invoices and without payment of CE duty, therefore, find that the confirmation of demand of Central Excise duty of Rs. 12,09,517/- by the lower adjudicating authority is correct, legal and proper.

8.1 Since demand is confirmed, it is natural that the confirmed demand is required to be paid along with interest at applicable rate under Section 112A of the Act, 1, therefore, uphold order to pay interest on confirmed demand.

8. I find that this is a case of clandestine removals of the finished goods and therefore, the impugned order has correctly imposed penalty of Rs. 12,87,817/- (i.e. equal to demand or duty confirmed) on Appellant No. 1 under Section 115C(1)(a) of the Act.

8.1 Insofar as penalty on Appellant No. 2 is concerned, it is contended that his role was limited to that person and he was not concerned with the goods and therefore, penalty is not imposable upon him. But that he was the key person and was being dealing with the goods on behalf of Appellant No. 1 without cover of CE invoices. Incriminating documents establishing clandestine clearances of the finished goods were also recovered from the premises of Appellant No. 2 during the search operation on 12.09.2012. The details of clandestine transactions recorded in his diary corroborates another details of the

goods, truck no., cash payments, etc. Thus, his role cannot be denied as inquiry has originated based on the documents recovered from his premises and therefore, he cannot now plead that his role was limited as a link person between the buyer and the seller only. I find that his role was crucial in the whole episode of clandestine removal of goods and hence, imposition of penalty on him under Rule 26(i) of the Rules by the lower adjudicating authority is correct. However, I find that the quantum of personal penalty on him is very high and needs to be reduced to Rs. 2 lakhs in the interest of justice.

9. In view of above, I reject appeal of Appellant No. 1, but partially allow the appeal of Appellant No. 2 by reducing personal penalty on him to Rs. 2 lakhs in this case.

10. आदेशकताओं द्वारा बल की गई शर्तों का निम्नानुसार उपरोक्त तरीके से विचार किया है।

10. The appeals filed by the Appellants are disposed off as above

(कुमार संतोष)  
अध्याक्ष (अपीलक)

By R.P.A.D

To,

1. M/s. Rameshwar Steel Re-Rolling Mill,  
Plot No. 105,  
GIDC, Vartaj,  
Distt. Bhavnagar.

2. Shri Himanshu Handal Jagan, Ricket,  
38. Vihar Complex, Fourth Floor,  
Near Sakari Hat,  
Waghodwar 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-1, Bhavnagar.
- 5) Copy File.
- 6) F No. Y2/E-7/340/2017.