::आयुक्त (अपील्स) का कार्यालय, केन्द्रीय वस्तु एवं सेवा कर और उत्पाद शुल्क::
O/O THE COMMISSIONER (APPEALS), CENTRAL GST & EXCISE,
द्वितीय तल, जी एस टी भवन / 2nd Floor, GST Bhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142
Email: cexappealsrajkot@gmail.com

रजिस्टर्ड डाक ए. डी. द्वारा :-

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/282,183,268,263/BVR/2017	**54/AC/Rural/BVR/RR/2016-17**	**15.03.2017**

ख अपील आदेश संख्या (Order-In-Appeal No.):

BHV-EXCUS-000-APP-190-TO-193-2017-18

आदेश का दिनांक / Date of Order: **09.03.2018** जारी करने की तारीख / Date of issue: **15.03.2018**

Passed by **Shri Gopi Nath, Additional Director General (Audit), Ahmedabad Zonal Unit, Ahmedabad.**

अधिसूचना संख्या २६/२०१७-के.उ.शु. (एन.टी.) दिनांक १७.१०.२०१७ के साथ पढ़े बोर्ड ऑफिस आदेश सं. ०५/२०१७-एस.टी. दिनांक १६.११.२०१७ के अनुसरण में, श्री गोपी नाथ, अपर महानिदेशक ऑडिट, अहमदाबाद जोनल यूनिट को वित्त अधिनियम १९९४ की धारा८५, केंद्रीय उत्पाद शुल्क अधिनियम १९४४ की धारा ३५ के अंतर्गत दर्ज की गई अपीलों के सन्दर्भ में आदेश पारित करने के उद्देश्य से अपील प्राधिकारी के रूप में नियुक्त किया गया है.

In pursuance to Board's Notification No. 26/2017-C.Ex.(NT) dated 17.10.217 read with Board's Order No. 05/2017-ST dated 16.11.2017, Shri Gopi Nath, Additional Director General of Audit, Ahmedabad Zonal Unit, Ahmedabad has been appointed as Appellate Authority for the purpose of passing orders in respect of appeals filed under Section 35 of Central Excise Act, 1944 and Section 85 of the Finance Act, 1994.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, राजकोट / जामनगर / गांधीधाम। द्वारा उपरलिखित जारी मूल आदेश से सृजित: /
Arising out of above mentioned OIO issued by Additional/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

घ **अपीलकर्ता &** प्रतिवादी का नाम एवं पता /Name & Address of the **Appellants &** Respondent :-

1. M/s Arya Ship Breaking Company(P) Ltd., Plot No. 62-(24-H), Ship Braking Yard Sosiya/AlangDist: Bhavnagar.
2. Shri Bharat M Sheth, Broker, Plot No. 61, B-2, Geetha Chowk, Bhavnagar
3. Shri Kishorbhai A. Patel Prop. Of Shree Krishna Enterprises, Bhavnagar
4. Shri. Vinodbhai Amarshibhai Patel, Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क ,केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है ।/
Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए ।/
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलें सीमा शुल्क, केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६ को की जानी चाहिए ।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016 in case of appeals other than as mentioned in para- 1(a) above

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए । इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम, 1994 की धारा 86(1) के अतगत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5 में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम, 5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए । संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है । स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा ।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम, 1994 की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी । /

The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) & 9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" मे निम्न शामिल है

(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं होगे।/

For an appeal to be filed before the CESTAT, under Section 35F of the Central Excise Act, 1944 which is also made applicable to Service Tax under Section 83 of the Finance Act, 1994, an appeal against this order shall lie before the Tribunal on payment of 10% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute, provided the amount of pre-deposit payable would be subject to a ceiling of Rs. 10 Crores,

Under Central Excise and Service Tax, "Duty Demanded" shall include :

(i) amount determined under Section 11 D;
(ii) amount of erroneous Cenvat Credit taken;
(iii) amount payable under Rule 6 of the Cenvat Credit Rules

- provided further that the provisions of this Section shall not apply to the stay application and appeals pending before any appellate authority prior to the commencement of the Finance (No.2) Act, 2014.

(C) **भारत सरकार को पुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षण याचिका निम्नलिखित मामलों में, केंद्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतुक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छुट (रिबेट) के मामले में, जो भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात की गयी है। /
In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

(iii) यदि उत्पाद शुल्क का भुगतान किए बिना भारत के बाहर, नेपाल या भूटान को माल निर्यात किया गया है। /
In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (न॰ 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec. 109 of the Finance (No.2) Act, 1998.

(v) उपरोक्त आवेदन की दो प्रतियां प्रपत्र संख्या EA-8 में, जो की केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001, के नियम 9 के अंतर्गत विनिर्दिष्ट है, इस आदेश के संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए । उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। /
The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए ।
जहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 1000 -/ का भुगतान किया जाए ।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है । / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं । /
For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

ORDER-IN-APPEAL

:: Order-in-Appeal ::

Sr. No.	Name & of the Appellant	Address	Appeal No.	Herein after referred to as
01	M/s. Arya Ship Breaking Company (P) Ltd.,	Plot No. 62(24-H), Ship Breaking Yard, Sosiaya/Alang, Dist. Bhavnagar.	**V2/282/BVR/2017**	Appellant No. **1**
02	Shri B. M. Sheth (Shri Bharat Sheth)	Plot No. 619, B-2, Geeta Chowk, Jain Derasar Road, Bhavnagar-364001	**V2/183/BVR/2017**	Appellant No. **2**
03	Shri Kishorbhai Amarshibhai Patel, Proprietor of M/s. Shree Krishna Enterprise.	Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar-364 002. And; 304, Shoppers Point, Parimal Chowk, Waghawadi Road, Bhavnagar-364001.	**V2/268/BVR/2017**	Appellant No. **3**
04	Shri Vinodbhai Amarshibhai Patel	Plot No. 20, Santosh Park Society, Subhash Nagar, Bhavnagar. And; Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar-364002.	**V2/263/BVR/2017**	Appellant No. **4**

The present appeals have been filed by the above mentioned four appellants along with Applications for Condonation of Delay, against the Order-in-Original No. 54/AC/RURAL/BVR/RR/2016-17 dated 15.03.2017 (herein after referred to as 'the impugned order') passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar (hereinafter referred to as the 'Adjudicating Authority').

2. Briefly stated the facts of the case are that –

(i) the Directorate General of Central Excise Intelligence (here-in-after referred to as the 'DGCEI' for brevity) of Ahmedabad Zonal Unit gathered an intelligence that the most of the ship breaking units of Alang, Dist. Bhavnagar, including the Appellant No.1 were engaged in large scale evasion of Central Excise duty by way of (i) clandestine removal and Diversion of

goods and (ii) undervaluation of the finished goods . It was also gathered that the ship breakers had carried out aforesaid illicit activities with the help of various brokers and commission agents. Based on the same, the office premises of the Appellant No.1 situated at 2282/A-1, 'Vatsalya', Hill Drive Road, Bhavnagar was searched and relevant documents were withdrawn under Panchnama dated 05.10.2010. The premises of various transporters and brokers were also searched, during which several incriminating documents were recovered. Scrutiny of the documents and its correlation with the documents seized from the premises of various transporters and brokers, it revealed that the Appellant No.1 was indulged in evasion of Central Excise Duty by way of clandestine removal as well as also involved in abetting the various buyers in availing cenvat credit by issuing the cenvatable invoices without delivering the goods to them apart from evading the central excise duty by undervaluing the excisable goods manufactured and cleared by them.

(ii) After completion of inquiry, a Show Cause Notice dated 21.05.2013 was issued to the concerned including to the above appellants. The Adjudicating Authority under the impugned order, confirmed and ordered to recover the Central Excise duty amounting to Rs. 10,44,205/- form Appellant No.1 under proviso to erstwhile sub-section (1) of Section 11A [thereafter substituted as Section 11A(4)] of Central Excise Act, 1944 alongwith Interest under the provisions of erstwhile Section 11AB [thereafter substituted as Section 11AA] of Central Excise Act, 1944 and also imposed Penalty of Rs. 10,44,205/- under Rule 25 of the Central Excise Rules, 2002 read with Section 11AC [now Section 11AC(1)(a)] of Central Excise Act, 1944. Also imposed Penalty of Rs. 10,44,205/- under Rule 26(1) ibid. Penalty of Rs. 3,99,924/- under Rule - 26(2) of the Central Excise Rules, 2002 also imposed on Shri Pradeep Kochhar, Director of the Appellant No.1. Also imposed Penalty of Rs. 4,97,167/- under Rule 26(1) and Rs. 3,99,924/- under Rule - 26(2) of the Central Excise Rules, 2002 on Shri Bharat Sheth, Appellant No.2. Also imposed penalty of Rs. 31,970/- each on Shri Kishorbhai Patel, Appellant No.3 and Shri Vinodbhai Patel, Appellant No.4 under Rule 26(1) of the Central Excise Rules, 2002.

3. Being aggrieved, the above appellants No. 1 to 4 filed present appeals on the various grounds .

3.1 The **Appellant No.1** has interalia contended as under:-

(i) The Adjudicating Authority has failed to construe, contemplate, comprehend and appreciate the material facts of the case while disposing the case. The OIO has been passed without considering and discussing the written reply as well as dictums cited. The appellant has never indulged into clandestine removal and the subject case is purely based on imaginary grounds and assumptions and presumptions.

(ii) The subject case is purely based upon the records / documents / diaries / misc.

papers etc. seized from the premises of Shri Bharat Manharbhai Sheth and his statement as well as statement of his accountant, Shri Manish Himmatbhai Patel and diaries and electronic storage devices resumed from the place of Shri Kishore Ambrishbhai Patel and Shri Vinod Ambrishbhai Patel. The demand made on the basis of assumptions and presumptions is not sustainable and not tenable. They cited few decisions in their support.

(iii) The penalty cannot be imposed on the basis of statements of co-accused without corroborative evidences. They relied upon four judgments in this regard.

(iv) The SCN and OIO are wholly relied upon various records, documents, diaries, misc. papers, pads etc. recovered from the possession of the transporters, brokers, GMB registers and various statements of various persons and data of price / valuation obtained from the various institutes. Said seized documents are not at all relevant for the appellant or with their business activities. It is the belief of the appellant that such records might have been maintained by said brokers and others as a preventive measure and to accommodate their false business and to seal their business leakages so as to hide their illegal activities. There is no provision in the Central Excise Act or laws made there under to rely upon simply on such private records. Said brokers, transporters etc. have maintained such records in coded language or in short / abbreviated manner for the purpose of saving or surpassing their false business activities. The charge of clandestine removal must be corroborated by independent documentary evidences such as excess raw materials, excess consumption of electricity, mode of payment between consignor and consignee. They relied upon four decisions in this regard.

(v) The transporters, angadia firms, etc., whose statements were recorded, have no deep rooted knowledge of excise law. Therefore, they simply accepted the story delineated before them by the inquiring officer and they signed their statements under pressure against their will and wish.

(vi) The adjudicating authority has exclusively relied upon various statements of brokers, his accountant, transporters, angadia firm etc. But simply confirmative statements recorded under mental pressure should not be sole reason and ground for confirmation of clandestine removal and to confirm the duty demand and also imposition of penalty.

(vii) They have cleared all goods under proper and valid invoice after payment of central excise duty. That being the registered unit, they manufactured, stored and effected delivery of excisable goods only from approved premise/plot area. They properly accounted for production, issue and sale of goods. They filed periodical returns in time and the statutory returns / reports filed by them have not been challenged by the central excise authorities. Further, during audit also the transactions held by them were not objected by the department.

(viii) During search of their premise no cash amount was seized and without such seizure and documentary evidence, the department cannot allege and confirm that the appellant had dealt with excisable goods in illicit manner without payment of duty. It is the responsibility

of the brokers, transporters etc. for maintaining their records in coded language and for that purpose the appellant cannot be charged. And for all these reasons the appellant cannot be penalized.

(ix) They cited four judgments in their support and stated that the burden of proof is on the revenue to adduce evidence to prove that the excess goods had been manufactured and the private records are only a piece of evidence and not be a sole factor in deciding false production. Further, the authority did not care to note the version of their authorized person and recorded his statements as per the will and wish of authority.

(x) With regard to demand on account of undervaluation, it was submitted that all agencies listed in the SCN and OIO were private and not registered with govt. for doing such work. The Central Excise valuation rules does not indicate and compel the assessee to adopt price declared by such institutes. Further, CBEC, New Delhi or local Central Excise authorities have not issued any direction to follow such pricing. The sale price of goods depends upon several elements. The monthly / quarterly reports / returns filed by the appellant were never challenged by the department. Whatever prices declared by them were their transaction value, which were decided as per the Central Excise laws and the same cannot be challenged without proper valid and unimpeachable documentary evidence.

(xi) Every power, either given under statute or common law, must be exercised by the authority lawfully, reasonably and in good faith. And before initiating any penal action three vital elements viz. (i) means rea (ii) mala fide intention and (iii) deliberate defiance of law to defraud govt. revenue. No where it is found or proved that the appellant or management of the appellant or partner had acted with guilty mind or wicked mind. Therefore, no penalty can be imposed under Section 11AC of the Central Excise Act. They cited several judgments in their favour and requested to drop the proceedings initiated against them.

3.2. The **Appellant No.2** has interalia contended as under:-

(i) That being a ' Middle Man' between buyer and seller, he can not be considered as 'Broker' as per the provisions of the Central Excise Act. No evidences that he had entered into 'Written agreement/condition' and how and under what manner he had dealt with the Appellant No.1 so as to help in evasion of Central Excise Duty as alleged. That being a middle man, he got nominal commission of Rs. 15/- to Rs. 25/- per MT. There was no written contract made / entered into by him for his job.

(ii) The transportation of the disputed goods was always being managed by the buyers i.e. Re-rolling Mills or Furnace Unit who used to contact the Appellant No.1 over telephone for said sale / purchase. The prices of said goods were fixed by the respective sellers and buyers as per the prevalent market conditions, as such Appellant No.2 has no role to play in fixing of price. That the transportation of said traded goods was arranged by the buyers

viz. re-rolling units, furnace units etc. Further, loading of goods were done in the presence of persons known as 'Chhatiwala', deployed by the buyers, who segregated the required plates / scrap, in the plots of ship breaking units.

(iii) The department has not supplied the copies of the relied upon documents with SCN and instead supplied the CD containing copies of relied upon documents, which is not the material evidence and hence, could not make effective reply.

(iv) The case is based on the statements of various persons recorded on the basis of private records viz. seized diaries (maintained by him for limited purpose only) , trip registers, private records of Angadias etc. However, all these private records have not been corroborated with the Central Excise Records by the Appellant No.1 and also of Re-Rolling units/ Furnace units.

(v) The seized Diaries under reference had been written by him only for his purpose only and not for other purpose. If he was involved in illicit removal, then such vehicle numbers and freight charges would have been written therein. The particulars of weighment found in the Diaries were only 'Notes" which were written during reorganisation of the seller and buyers and nowhere it is mentioned that the goods under dispute had been actually sold by the Appellant No.1.

(vi) The details of the various Annexures to SCN, based on Diaries recovered under panchanama from the premises of Appellant No.2, are not further corroborated and no statements of the concerned mentioned therein have been recorded during the investigation. Hence, it is a case of no corroborative evidences regarding the receipt of the so called clandestine removals.

(vii) That the OIO passed by the adjudicating authority was not legal and correct, as the same was passed on the basis of third party's evidence, without corroborative evidences. The demand for clandestine removal in case of 18 entries was determined on the basis of entries made in seized diaries of the appellant and trip registers of the transporters. Statements of drivers were not recorded and inquiry at the end of buyers were not undertaken. Further, the demand for undervaluation was also confirmed on the basis of inquiry conducted at the end of various market research agencies. Therefore, the SCN was decided on assumptions and presumptions and the same was passed by gross violation of Section 33B and 65B of the Indian Evidence Act.

(viii) He had no concern in transporting, removing (as the removal of disputed goods taken place at place of Appellant No.1 and no proof of his presence at the time of removal), depositing (he had no place of depositing the disputed goods and no evidence thereto produced), keeping, selling or purchasing (these words not applicable to him as he had not involved in physical sale and purchase of the disputed goods) or in any other manner as mentioned in Rule-26(1) ibid. Further, he was not involved in the matter of issuance of C.Ex. invoices as the same is the responsibility of the Appellant No.1. Hence, penaltities wrongly imposed on him under the impugned order.

(ix) Various case laws relied upon have been ignored by the Adjudicating Authority. The same are onceagain relied upon by him in the present proceedings.

(x) Reliance is placed on the OIA dated 10.04.2017, wherein the Appellate Authority had taken lenient view as the charges have been confirmed only on the basis of third party evidences and without corroborative evidences.

3.3 The **Appellant No. 3 and Appellant No.4** have contended mainly on the following grounds:

(i) They have requested for supply of relied upon documents but the same was not provided by the adjudicating authority, which in violation of principles of natural justice.

(ii) Regarding findings recorded at Para 3.7.3.1 & 3.7.3.2 of the impugned order, it was contended that he had received many SCNs and due to adjudication drive of the department, he and his consultant were busy and therefore he could ask for relied upon documents at the time of personal hearing only. He had not received soft copy of RUD. Therefore, the findings recorded are vague. Unless each and every document is supplied, the department cannot expect a reply him. Once the responsibility is cast upon the department, it cannot be charged by shifting the burden of the appellant by saying that their request for hard copy of documents is only a dilatory tactics.

(iii) The Appellant No.3 and 4 are brothers but their business are different. Appellant No.3 was engaged in trading of goods and a proprietor of M/s Shree Krishna Enterprise. Appellant No.4 is engaged in brokerage of goods obtained from ship breaking. During the search of at their residence premises, DGCEI seized some papers and pen drive which contained some details scribbled by the appellant No. 4 for his own purpose/business regarding survey of goods lying at different premises, estimates of prices, which he can offer to his customers for sale and thus, certain so called accounts found therein pen drive/computer hard discs /laptop were just written for learning accounting etc. These facts not accepted by DGCEI and hence, wrongly linked the same to the business of Appellant No.3 considering their joint business of the said Appellant No.3 & 4.

(iv) The adjudicating authority has not dealt with the pleas made by him in written reply. Not only this, the judgments referred to and relied upon been completely ignored by the adjudicating authority and hence, the order is non-speaking and non-reasoned one.

(v) He always co-operated with the investigation and as per his availability and summons, remained present and he has never provided evasive replies as he never indulged himself in any illicit activities and no such evidence was brought by the investigating officer. The ship breaker from whom it is alleged that he had concerned himself with these goods have not admitted to this fact nor any documentary evidence even remotely suggesting that he was involved in clandestine removal of such goods.

(vi) In absence of enquiry at buyer's end, allegations of purchase and also flow back are not sustainable.

(vii) He has not dealt with the goods in the manner prescribed under rule 26 of the Central Excise Rules, 2002. The *sine qua non* for a penalty on any person under the above rule is that either he has acquired possession of any excisable goods with the knowledge or belief that the goods are liable to confiscation or he has concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing or has in any other manner dealt with any excisable goods with such knowledge of belief. They relied upon the case law of Godrej Boyce & Mfg. Co. – 2002 (148) ELT 161 (T). and also on the other decisions of the higher judicial forum in his support. Therefore, he is not liable to a penalty, which is imposed under the impugned order.

4. Hearing for appeal filed by the Appellant No. 1 was held on 16.02.2018, wherein Shri A.H.Oza, Excise Consultant appeared on behalf of the appellant and reiterated the submissions of the appeal memorandum. In case of Appellant No. 2, the hearing was held on 15.02.2018, which was attended by Shri N. K. Maru and Shri U. H. Qureshi, both Consultants, wherein they reiterated the submission made in the appeal memorandum and submitted written submission dated 15.02.2018 for consideration and requested to set aside the impugned order. In case of Appellant No. 3 and No.4, hearing was held on 22.02.2018 wherein Shri Sarju Mehta, Chartered Accountant reiterated the submissions made in the respective appeal memos and submitted additional submission dated 22.02.2018 for consideration. Since all the appeals are against same OIO No. 54/AC/RURAL/BVR/RR/2016-17 dated 15.03.2017 passed by the Assistant Commissioner, Central Excise, Rural Division, Bhavnagar , I take all of them under a single order.

5. I have gone through the appeal memorandums, written and oral submissions made during hearing . I proceed to decide the case since the said four appellants have already made the payment of service tax or penalty as the case may be vide [(i) CIN No. 02102181606201700011 dated 16.06.2017 for Rs. 78,315/- in case of Appellant No.1 (7.5% of Central Excise Duty of Rs. 10,44,205/-), (ii) CIN No. 05100040706201752465 dated 07.06.2017 for Rs. 67,290/- in case of Appellant No.2 (7.5% of penalty Rs. 4,97,167/- under Rule 26(1) and penalty of Rs. 3,99,924/- under Rule 26(2) ibid), (iii) CIN No. 02005291206201700024 dated 12.06.2017 for Rs. 2,398/- in case of Appellant No.3 [7.5% of penalty Rs. Rs. 31,970/- under Rule 26(1)] and (iv) CIN No. 02005291206201700026 dated 12.06.2017 for Rs. 2,398/- in case of Appellant No. 4 [7.5% of penalty Rs. Rs. 31,970/- under Rule 26(1)] and thus, complied with the requirement of fulfillment of mandatory pre deposit in pursuance to the amended provisions of Section 35F of the Central Excise Act,1944 effective from 06.08.2014 against their service tax/penalty liabilities as the case may be in the present case.

6. Before deciding the appeals, I would first decide the Condonation of Delay Applications filed in the present case ,by all the above four Appellants.

6.1 I find that the Appellant No.1 has filed appeal on 21.06.2017 after receipt of the impugned order on 24.03.2017 . As per the provisions of Section-35 (1) of the Central Excise Act, 1944, an appeal was required to be presented before the Commissioner, Central Excise (Appeals) within 60 (Sixty) days from the date of receipt of the impugned order. I find that the appeal should have been filed within 60 days from 24.03.2017 but the same was filed on 21.06.2017 and thus, there is a delay of 28 days in filing the appeal, for which the appellant filed a Condonation of Delay Application dated 17.06.2017, received on 21.06.2017 ('COD' for short). I find that the Appellant No.1 in the COD interalia contended that ".. original copy of the impugned order so received by our person was immediately handed over to our senior most Director who is looking after Customs & C.Ex. related work for his perusal and necessary further action and instruction/guidance. Sir, our said Director was very much busy on that day and therefore had kept the said original copy in his custody to examine the issue on merits and to decide the matter after consulting the issue involved with others and particularly with our excise consultant for his guidance and for future action of filing the appeal. Sir, meantime our said Director has to proceed at Mumbai and outside Gujarat Region for our company's pre-scheduled marketing and other work. Sir, unfortunately, the said original copy which was after perusal kept by our said Director in his office attaché/bag which was also taken by the said Director with him in travelling. Sir, the said Director almost remained outside Bhavnagar for along spell of time say more than and nearly 45 days as he has to attend company's official work as well as other important financial work including certain social, personal and domestic work at Mumbai. Meantime our excise clerk through telephonic talk reminded and inquired from our said Director as to where the original copy of the said OIO has been kept by him on that day after perusal being expiry period of 60 days to file appeal was approaching fast and to decide early as to whether an appeal is required to be filed or otherwise. Sir, our said Director alerted himself and immediately talked from Mumbai with our excise consultant and decided to file an appeal against the said impugned order. Sir, looking to the urgency of the issue our said Director urgently returned to Bhavnagar nearly during first week of June-17 and met our excise consultant to file an appeal..... Finally, our consultant was at the material time was very busy however he assured us that the appeal will be filed at the earliest ....".

03. ....**due to above adverse, unforeseen and untoward situation**., there is slight delay of nearly 24 to 25 days which may keeping in mind the above situation kindly be condoned...".

6.2 From the above reproduced version of the COD, I find that there is no dispute that the impugned order was received by the Appellant No.1 on 24.03.2017 and was immediately handed over to the senior most Director who is looking after Customs & C.Ex. related work for his perusal and necessary further action and instruction/guidance. Thus, issue was made known to the highest level of management immediately after receipt of the same. Thus, inspite of being perused the said impugned order by the said senior most Director, the same as mentioned in the COD was kept in his office attaché/bag by the said Director and then he proceeded to Mumbai and outside Gujarat Region for their company's pre-scheduled marketing and other work. From this, it transpires that the said Director inspite of being aware of his company's pre-scheduled

marketing and other work at Mumbai and other places as well as inspite of being aware of the receipt of the impugned order which he had perused and also understood that the same is against their company, he kept the same in his attaché/bag and taken away with him. I find that a person of the rank of senior Director attached directly with the Central Excise matter, had even after being perused the said impugned order left for Mumbai for his company's marketing and other work matter which was pre-scheduled, without giving any direction on the issue to the personnel attached with excise work in the said company. Thus, this act of the Senior Director in no case can be termed as mistake but a severe negligence on his part. Further, as stated above, as the expiry period of 60 days to file appeal was approaching fast, the excise clerk through telephonic talk reminded their said Director who very suitably preferred to talk from Mumbai with their excise consultant and returned to Bhavnagar as late as during first week of June-17 after attending his certain **social, personal and domestic work at Mumbai** also. So inspite of being reminded by the excise clerk well before the expiry period of 60 days, the said Senior Director neither rushed to Bhavnagar immediately and only returned as late as in the First week of June nor activated the procedure of filing the appeal in the present case. Thus, I find that the delay in filing appeal in the present case has occurred due to severe negligence on the part of the top level of management.,which can not be attributed as due to adverse, unforeseen and untoward situation as claimed/contended by the appellant and thus, consequently it can not in any case be considered as sufficient cause which prevented the appellant No.1 from filing the appeal in time.

6.3 Further, the said COD in itself narrates the contradictory versions. On one side it is found that " the said Director almost remained outside Bhavnagar for along spell of time say more than and **nearly 45 days** "and on the other side it is found that the said Director returned in the first week of June,2017. Further, it speaks that the excise clerk through telephonic talk, reminded the said Director "being expiry period of 60 days to file appeal was approaching fast". Thus, stay of 45 days outside and returned date 1st week of June,2017 and reminding call before expiry of 60 days, in itself are found to be contradictory when we examine the same in context of the period of 60 days from of receipt of impugned order on 24.03.2017.

6.4 Further from the impugned order I also find that apart from the Appellant No.1, under the impugned order, Shri Pradeep Kochhar, Director of the Appellant No. 1 firm was also penalized to whom the copy of the said impugned order was sent at the same address of the Appellant No.1. Thus, two copies thereto were available with the said appellant No. 1. Further, from para-3.11.4 of the impugned order, it clearly transpires that Shri Pradeep Kochhar was the Director who was looking after the Central Excise and other works and hence, he was made notice and accordingly penalized under the impugned order. In the above COD, it is categorically mentioned that the original copy of the impugned order so received was immediately handed over to their senior most Director who is looking after Customs & C.Ex.

related work for his perusal. Thus, from this point of view also, if one copy of the impugned order taken by the said Director to Mumbai, can not be considered as sufficient cause for not presenting appeal in time, when it is a fact that the second original copy was also available with the appellant.

6.5 Further, I perused the proviso of Section 35(1) of the Central Excise Act,1944 which is reproduced as under for ease of reference.

> **"Appeals to SECTION 35. [Commissioner (Appeals)].** Any person — (1) ...
>
> [**Provided** that the Commissioner (Appeals) may, if he is satisfied that the appellant was prevented by sufficient cause from presenting the appeal within the aforesaid period of sixty days, allow it to be presented within a further period of thirty days.]".

From plain reading of the above proviso, it clearly transpires that the Commissioner (Appeals) may allow the appeal to be presented within a further period of thirty days only in those cases when he is satisfied that the appellant was prevented by sufficient cause form presenting appeal in time. From the facts and discussion herein foregoing paras, it is clear that the delay in presenting appeal in the present case, has been caused due to severe negligence on the part of the top authority of the management of the Appellant No.1 and in no case the same can be considered as sufficient cause for not filing appeal in time. Thus, this contention for seeking condonation for delay appears to be a concocted story just to camouflage their inadvertent delay which is caused due to their severe negligence only. Hence, I hold that the plea of condoning the delay is not considerable and maintainable and thus, Application for Condonation of Delay is rejected. Consequently, the appeal filed by the Appellant No.1 is also rejected being time barred.

7. I find that in the case before me the Appellant No.2 has filed appeal on 22.05.2017 after receipt of the impugned order on 22.03.2017. As per the provisions of Section-35 (1) of the Central Excise Act, 1944, an appeal was required to be presented before the Commissioner, Central Excise (Appeals) within 60 (Sixty) days from the date of receipt of the impugned order. I find that the appeal should have been filed within 60 days from 22.03.2017 but the same was filed on 22.05.2017 and thus, there is a delay of 1 day in filing the appeal, for which the appellant filed a Condonation of Delay Application dated 22.05.2017 wherein he pleaded that as his financial condition was not sound hence and thus, for arrangement of the pre-deposit of Rs.67,290/- under Section-35 (F) of the Central Excise Act, 1944, they could not file appeal in time. Looking to the facts of the case and delay for the period of 1 day, I condone the said delay and proceed to decide the appeal on merits.

8. I find that in the case before me the Appellant No.3 and Appellant No.4 have filed appeal on 16.06.2017 after receipt of the impugned order on 21.03.2017. As per the provisions of Section-35 (1) of the Central Excise Act, 1944, the said two appeals were required to be presented before the Commissioner, Central Excise (Appeals) within 60 (Sixty) days from the

date of receipt of the impugned order. I find that the appeals should have been filed within 60 days from 21.03.2017 but the same were filed on 16.06.2017 and thus, there is a delay of 27 days in filing the said two appeals, for which the appellants filed Condonation of Delay Applications both dated 14.06.2017 received on 16.06.2017 wherein they pleaded that as their consultant was busy with the adjudication proceedings of various authorities due to drive of adjudication and further, the consultant being the Chartered Accountant was also busy with the migration and consulting work of GST and hence, appeals could not be prepared within time which resulted in delay of filing the appeals. Looking to the facts of the case and delay for the period of 27 days , I condone the said delay and proceed to decide the said two appeals of Appellant No.3 and Appellant No.4, on merits.

9. On the Appeal filed by the Appellant No. 2, 3 and 4, I have gone through the appeal memorandums, Written Submissions submitted during hearing, and also oral submission at the time of hearing. They contended as interalia mentioned at Paras-3.2 and 3.3 above. I find that in the case of Appellant No.2 , the issue to be decided is whether or not the Adjudicating Authority, under the impugned order had correctly imposed Penalty of Rs. 4,97,167/- under Rule 26(1) and Rs. 3,99,924/- under Rule - 26(2) of the Central Excise Rules, 2002. Further, in the case of Appellant No.3 & 4, the issue to be decided is whether or not the Adjudicating Authority, under the impugned order had correctly imposed Penalty of Rs. 31,970/- each on both of these two appellants under Rule 26(1) of the Central Excise Rules, 2002. I find that the case of illicit removal, diversion of goods and under valuation of the excisable goods manufactured at Appellant No.1, has been based on the confessional statements of the concerned, various Diaries, pen drives, laptop computers etc. recovered during the course of investigation from the premises of the Appellant No.2 and two brokers Appellant No.3 and Appellant No.4, and also on the basis of the Trip/Booking registers etc. of the transporters and details/records made available from GMB. Further, from the enquiry at Angadias etc. followed with their statements, it also established that the said Angadias had admitted to have transferred amount on behalf of the Appellant No. 1 and Appellant No. 2 .There is no dispute about the withdrawal of the said evidences apart from the facts that the statements of various persons recorded during investigation in the present case, have never been retracted. In view of these facts, the said statements recorded and the records/documents etc. withdrawn during investigation can legally be termed as valid evidences.

9.1 Further, I find that the Appellant No.2, 3 and 4 vehemently contended that the department has not supplied the copies of the relied upon documents with SCN and instead supplied the CD containing copies of relied upon documents being not the material evidence and hence, could not make effective reply. I find that this contention is not sustainable in as much as the said three Appellants were provided the soft copies of the relevant documents. Further, it is not their case

that the documents supplied in soft copies are not legible or are not opening. Further, these three appellants used to operate the computers in their routine course of business and thus, were acquainted with the said technology and operating system. Further, it is also not their case that certain documents provided in CD are not available therein soft copy. Further, after receipt of the SCN, if any particular documents if found to be missing or not legible, then the same could have been asked by them but I do not find that this situation has arisen. This is what exactly held by the Adjudicating Authority at para 3.7.3.1 and para3.7.3.2 of the impugned order. Thus, this contention of these appellants is rejected being not sustainable in the eyes of law.

10. On the contention of the Appellant No.2, I find that enquiry at the end of various transporters and from their statements and the Trip Registers/Booking Registers etc. recovered, it clearly transpired that against total transactions of 98 as detailed in Annexure TR-1 to the SCN, Excise Invoices in 80 cases have been found to be issued by the Appellant No. 1 and in case of remaining 18 cases no excise invoices are found to be issued by the Appellant No.1. Further, details of these transactions on being compared with the details of GMB Registers, the independent evidences, as reflected in Annexure TR-2 of the SCN it was also gathered that in the case of 18 transactions no excise invoices are found to be issued as detailed in Annexure TR-3 of the SCN. Thus, these transactions of the 18 consignments totally weighing of 376 MTs. valued at Rs. 71,09,400/- involving C.Ex. duty Of Rs.6,43,202/- as detailed at Annexure-TR-3 to the SCN, were illicitly cleared from the premises of Appellant No.1. Further, I find that during the search at the premises at Appellant No.2, various diaries etc. were withdrawn under panachnama dated 30.03.2010 and subsequent statements of Shri Manishbhai Patel, Accountant of Appellant No. 2, Statement of Shri Shrenik Sheth, son of the Appellant No.2 and statements of the Appellant No.2 were recorded. In his various statements, Shri Manishbhai Patel, Accountant of Appellant No.2, has deposed that all entries in the diaries which were recovered under panachanama dated 30.0.3.2010 were written by him and the same were pertaining to all the business transactions of the Appellant No.2 and he also deciphered the said entries in diaries which were in coded language. Accordingly, the details of entries in Diaries marked as A/8 and A/13 , which were found to be pertaining to the Appellant No. 2 and found to be mentioned there in 'Annexure Bharat Sheth-A1' to SCN and accordingly, on being compared the details thereto with the excise invoices issued by Appellant No.1, it transpired that in respect of six transactions details thereof is mentioned at in 'Annexure Bharat Sheth-A2', no excise invoices are found to be issued, involving Central excise duty of Rs. 75,040/-. Further, I find from the 'Annexure Bharat Sheth-A3' to the SCN that the same is based on the details of entries in Diaries marked as A/8 and A/13 seized from the Appellant No.2 under panachanama dated 30.03.2010 according to which in 27 cases involving Central Excise duty of Rs. 3,99,924/-, the goods have been diverted to some other manufacturers whereas the invoices thereto have

been diverted to another buyers by the Appellant No.1. Further, I find from the 'Annexure Bharat Sheth-A4' to the SCN that the same is based on the details of entries in Diaries marked as A/8 and A/13, seized from the Appellant No.2 under panachanam dated 30.03.2010 according to which in 15 cases involving Central Excise duty of Rs. 22,203/-, the Appellant No.1 had paid duty on the lesser value of Waste & Scrap but have cleared the Old & Used Plates of higher value. These transactions altogether involving total Central Excise duty of Rs. 4,97,167/- (Rs. 3,99,924 + Rs.75,040/- and Rs. 22,203/-), details thereto were found to be mentioned in the Diaries A/8 and A/13 seized from the Appellant No.2 under panachanam dated 30.03.2010 in presence of Appellant No.2. Further, the details thereof have been deposed by Shri Manishbhai Patel, Accountant of Appellant No.2 in his various statements recorded during investigation wherein he categorically admitted that the said entries were written by him and the same are pertaining to all the business transactions of the Appellant No.2 and he also deciphered the said entries in diaries which were in coded language. Further, Shri Shrenik Sheth, son of the Appellant No.2 has also admitted that these diaries containing transactions carried out on day to day basis, were written by Shri Manish Patel on the instructions from Appellant No.2 and also further directed by Appellant No. 2, he used to verify and check the entries thereto and then he used to put his signature thereon the said diaries. Further, the said statements of Shri Manishbhai Patel and Shri Shrenik Sheth were also shown alongwith relevant diaries to the Appellant No.2 who in his different statements very categorically admitted and accepted the same being true and correct. Further, details in the said diaries are also corroborated with independent evidences Viz. Trip/Booking registers of the transporters, Registers details of GMB as well as the details revealed by various Angadias. Further, Shri Hemant Agrawal, authorized Signature of the Appellant No.1 has also admitted that their company had done business with the Appellant No.2. Further, on matching of all details as mentioned in the said diaries with Central Excise Invoices issued by the Appellant No.1, wherever issued, also shows that the entries found in the said Diaries are correct being the details thereto are matched that with the said central excise invoices. Further, the Angadias in their respective statements have deposed that they used to transfer cash on behalf of various parties as mentioned in their statements and also deposed that they knew and did business with the Appellant No. 2. Further, most important thing I would like to mention at the cost of repetition that none of the statements recorded during investigations including the statements by Shri Manish Patel, Shri Shrenik Sheth as well as of the Appellant No. 2, have been retracted so far and also the details reveled by each of the persons in their statements have been corroborated with the private records being maintained during course of their normal business as well as with the certain independent evidences like Register details of GMB and also accepted by each persons when being shown to them while recording their statements.

10.1 Thus, from the facts and discussion herein above, I find that the Appellant No. 2 has

concerned himself by way of abatement and facilitating the transactions between the buyers and sellers and thus, involved himself in removing, selling and in all such manner dealt with excisable goods on which appropriate amount of excise duty was not paid with clear knowledge that such goods are liable for confiscation under the provisions of Central Excise Act. Further, I also find that the Appellant No.2 has also abated in issuance of only invoices or diversion of goods supplied by the Appellant No.1. Thus, I find that the Appellant No.2 was correctly imposed Penalty of Rs. 4,97,167/- under Rule 26(1) and Rs. 3,99,924/- under Rule - 26(2) of the Central Excise Rules, 2002 .

11. On the contention of the Appellant No.3 and 4, as interalia mentioned at para-3 above, I find that on the basis of intelligence, investigation in the present case was carried out and search at the residence premises of the said Appellant No. 3 & 4 and also search at business premises of M/s Shree Krishna Enterprise, owned by the Appellant No.3 were carried out under which various incriminating documents, loose papers, pocket diaries, CDs, two computer pendrives, hard discs, laptop etc. recovered under panchanama dated 30.03.2010. I also find from the scan copies of the page-20 (Diary A/6) and page-32 (Diary A/7) at page no.108 & 111 of SCN do indicate the details of plot No. 24H pertaining to Appellant No. 1 alogwith other details of the transactions as detailed at Annexure VK-1 to the SCN. Further, DGCEI also verified the invoices issued by the Appellant No.1 to these two appellants and it was found that the Appellant No.1 had not issued invoices on 15.10.2009 in respect of these transaction as mentioned at Annexure VK-1 to the SCN. Further, both the appellant No.3 & 4 though not cooperated and had given evasive replies during the investigation, I find that as observed by the Adjudicating Authority at Para 3.7.1 of the impugned order, the forensic analysis of the storage devices unearthed the details of all transactions carried out by these two appellants and the same had been further tallied with the hard records Viz. personal/pocket diaries recovered duringpanchanama dated 30.03.2010. These facts have not been rebutted by these two appellants. Further, I find that Shri Hemant Agrawal, Authorized Signatory of the Appellant No.1 also admitted in his statement that he knew both these two appellants and further deposed that Appellant No.1 sold the scrape through them. Thus, I find that these two appellants acquired the possession of the goods involving duty of Rs.31,970/- without cover of any invoices from the Appellant No.1, with clear knowledge that the said acquired goods were cleared clandestinely and hence liable for confiscation. Therefore, the plea that they had not dealt with the offended goods is ridiculous and both these two appellants are certainly liable for penal action under Rule 26 (1) of the Central Excise Rules, 2002. Further, the plea of making available relied upon documents is already dealt with by the Adjudicating Authority and I fully agree with the findings of the Adjudicating Authority. Therefore, I find that there is no need to interfere with the order of the Adjudicating Authority in this regard.

12. Further, I find that the facts of the present case are distinguishable from the judgments relied upon by the appellants in as much as the documents resumed / collected, analysis thereof and data storage devices have been corroborated by the various statements of the appellants and their employees and relatives recorded during investigation as well as the statements of transporters, angadias etc. which were never been retracted and independent records obtained from the GMB authorities and also compared the same with excise invoices of the Appellant No.1. The persons involved in this case have closely monitored, arranged, financed and managed all affairs of clandestine clearances made by the Appellant No.1. Moreover they also managed and handled the cash amounts for the sale of clandestine removal and diversion of excisable goods, thus played vital role in evasion of Central Excise duty. Considering the facts and discussion herein above, various citations relied upon by the appellants are of no help to them. Instead, I find the following case laws relevant for impugned case.

(a) The statements of the accused, if not retracted, the same is legal and valid in the eyes of law. And the same can be considered as corroborative evidence and no further evidence is required. (i) Naresh J. Sukhawani [1996 (83) ELT 258 (SC)] (ii) Rakesh Kumar Garg [2016 (331) ELT 321- HC-Delhi]

(b) That the evidence or statement or admission or confession is a substantial piece of evidence, which can be used against the maker of it. (i) Commissioner of Central Excise, Mumbai-V Vs. Alex Industries [2008 (230) 073 ELT (Tri. Mumbai)] (ii) M/s. Divine Solutions Vs. Commissioner of Central Excise, Coimbatore [2006 (206) ELT (Tri. Chennai)] (iii) M/s. Karoi Engg. Works Vs. Commissioner of Central Excise, Delhi [2004 (168) ELT 373 (Tri. Delhi)]

(c) Even if the statement was retracted, considering the other facts of the case and corroboration made with other evidences, the same can be relied upon and the persons involved can be penalized for their acts. CCE, Mumbai Vs. M/s. Klavert Foods India Pvt. Ltd. [2011-TIOL-76-SC-CX]

(d) Fraud is a well known vitiates every solemn act. Fraud and Justice never dwell together. Fraud is a conduct either by letter or words and also includes known misrepresentation. 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*. (i) CC (P) Vs. Aafloat Textiles (India) Pvt. Ltd. [2009 (235) ELT 587 (SC)] and (ii) Ram Chndra Singh Vs. Savitri Devi and Ors. [2003 (8) SCC 319]

(e) Further, it is also settled legal position that once the case of clandestine removal of excisable goods, in the manner it has been executed in the current case is established, it is not necessary to prove the same with mathematical or clinical precision. (i) Madras and Others Vs. D. Bhoormull [1983 (13) ELT 1631 (SC)] and (ii) Shah Guman Mal Vs. State of Andhra Pradesh [1983 (13) ELT 1546 (SC)]

13. In view of the facts and discussion herein foregoing paras, the appeal filed by the Appellant No. 1 is rejected being time barred. The Appeals filed by the Appellant No. 2, Appellant No.3 and Appellant No.4 are also rejected being not sustainable in the eyes of law.

(Gopi Nath) 9/3/18
Commissioner (Appeals)/
Additional Director General (Audit)

To,

F.No. V2/282/BVR/2017,
F.No. V2/183/BVR/2017
F.No. V2/268/BVR/2017
F.No.V2/263/BVR/2017

By Regd. / Speed Post A. D.
To,

(i) M/s. Arya Ship Breaking Company (P) Ltd., Plot No. 62(24-H), Ship Breaking Yard, Sosiaya/Alang, Dist. Bhavnagar.

(ii) Shri Bharat Manharbhai Sheth, Plot No. 619, B-2, Geetha Chowk, Jain Derasar Road, Bhavnagar--364001

(iii) Shri Kishore Ambrishbhai Patel, Proprietor of M/s. Shree Krishna Enterprise, Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar-364 002.
AND -304, Shoppers Point, Parimal Chowk, Waghawadi Road, Bhavnagar-364001

(iv) Shri Vinod Ambrishbhai Patel, Plot No. 20, Santosh Park Society, Subhash Nagar, Bhavnagar.
AND- Plot No. 102, Escon Mega City, Opp. Victoria Park, Bhavnagar-364002.

Copy To:-

1. The Chief Commissioner, CGST, Ahmedabad Zone, Ahmedabad.
2. The Principal Commissioner/ Commissioner, CGST, Bhavnagar.
3. The Commissioner, CGST, Appeals, Bhavnagar.
4. The Assistant Commissioner, CGST Division, (formerly *Central Excise, Rural Division, Bhavnagar)* Bhavnagar (Adjudicating Authority).
5. The Assistant Commissioner, Systems, CGST, Bhavnagar
6. Guard File.
7. P.A. File.