O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

[illegible] Race Course Ring Road,

[illegible] Rajkot – 360 001

Tele Fax No. 0281 – 2477952/2441142 Email: [illegible]@gmail.com

[illegible]

[illegible] Appeal File No.	[illegible] O.I.O. No.	[illegible] Date
V2/784,[illegible], [illegible]/2017	[illegible]/2016-17	[illegible]-2017

[illegible] (Order-In-Appeal No.):

RAJ-EXCUS-000-APP-006-TO-008-2018-19

[illegible] Date of Order:	09.04.2018	[illegible] Date of issue:	11.04.2018

[illegible]

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

[illegible]

[illegible] Name & Address of the Appellants & Respondent :-

1. M/s. Pattani Impex, Plot No. 4043,4437 & 4438 GIDC Phase-III Dared, Jamnagar,
2. Shri Kamal K. Lohiya, Prop. M/s. Jayshree Metal Corporation, Jamnagar
3. Shri Sureshbhai G. Patel, Partner M/s. Suresh Impex, Jamnagar

[illegible]

Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

[illegible]

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:-

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

(i) [illegible]

[illegible] of the Finance Act 1994 shall be filed in [illegible] 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) [illegible] Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) [illegible]

(i) [illegible]
(ii) [illegible]
(iii) [illegible]

[illegible]

For an appeal to be filed before the CESTAT, [illegible] of the Finance Act, 1994 [illegible] Section 35F of the Central Excise Act, 1944 [illegible] duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute [illegible] 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) [illegible]

Revision application to Government of India:

[illegible]

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-110 001 under Section 35EE of the CEA 1944 [illegible] of Section 35B ibid:

(i) [illegible]

In case of any loss of goods, where the loss occur 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) [illegible]

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) [illegible]

In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.

(iv) [illegible]

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 and 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) [illegible]

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) [illegible]

The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved is Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) [illegible]

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, [illegible]

(E) [illegible]

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) [illegible]

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) [illegible]

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 ::

The below mentioned appeals have been filed by the Appellants (herein after referred to as "Appellants No.1 to Appellants No.3) as detailed in the Table against Order-in-Original No. 20/JAM/24/2016-17 dated 15.02.2017 (hereinafter referred to as 'the impugned order') passed by the Deputy Commissioner of Central Excise & Service Tax, Jamnagar Division, Jamnagar (hereinafter referred to as 'the lower adjudicating authority'):

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/198/RAJ/2017	Appellant No.1	M/s. Pritam Impex, Plot No. 4217-18, 4217-18, GIDC, Phase-II, Dared, Jamnagar.
2	V2/260/RAJ/2017	Appellant No. 2	Shri Kamal Kanaiyalal Joshi, Proprietor of M/s. Jaydeep Metal Corporation, Plot No. 5, Vijay Industrial Estate, Shankar Tekri Udyognagar, Jamnagar-361004
3	V2/259/RAJ/2017	Appellant No.3	Shri Sureshbhai Raghavbhai Patel, Partner of M/s. Super Impex, Plot No. 4116-17, GIDC-II, Dared, Jamnagar-361006.

2. The brief facts of the case are that the Central Excise officers acting on an intelligence of clandestine manufacture and clearances without obtaining Central Excise registration and without accounting for the same in the statutory records, carried out search under Panchnama Proceedings dated 18.12.2015, which revealed that Appellant No. 1 was registered with the Department as a dealer only, for the said premises and was not holding Central Excise Registration for manufacturing but carried out activities to manufacture 'Brass Ingots' by melting the scrap through a furnace installed inside the said premises. During the course of Panchnama Shri Rushikeshbhai Vinodbhai Patel, Accountant of Appellant No. 1 and Shri Jasminbhai Sojitra, Supervisor of Appellant No. 1 informed that Appellant No. 1 was engaged in trading of brass scrap under Central Excise dealer's registration No. BVHPK3651DEM001 dated 27.05.2013. The search revealed that Appellant No. 1 purchased imported brass scrap from M/s. West Coast Extrusion Pvt. Ltd., Dared, Jamnagar on High Seas Sale basis and subsequently sold the same by passing CVD and SAD under the cover of dealer's invoice; that Appellant No. 1 used to segregate the imported mix brass scrap in their godown and used to sell iron, aluminium, plastic, zinc

etc. to various customers without cover of invoices and direct the purchasers to make payment to whom the dealer's invoices were issued by the Appellant No. 1; that they issued dealer's invoice to their customers for full weight of Brass Scrap as mentioned in the invoices, but actually delivered less goods as compared to the quantity shown in the said invoices and in turn received full payment from the customers; that Brass Ingots (Pattis) of approximate 250 kg. was being manufactured at a time and the furnace was used twice or thrice a day; that some scrap such as radiators etc were received by Appellant No. 1 from M/s. West Coast Extrusion Pvt. Ltd., Jamnagar without invoice, which were also melted in the said furnace installed in the premises of Appellant No. 1 and thus they carried out manufacturing of 'Brass Ingots' (Pattis). Shri Jasmin Sojitra, Supervisor of Appellant No. 1 stated that the weight of 1 brass ingot used to be 12.5 Kgs. The video recording of entire manufacturing process was carried out through a videographer and DVD thereof was prepared during the Panchnama. As per Notification No. 08/2003-CE dated 01.03.2003, as amended, the benefit of value based SSI exemption was not available to Brass Ingots (Pattis) having weight more than 5 kilograms. Therefore, Appellant No. 1 was not eligible for benefit of Notification No. 8/2003-CE since they were manufacturing brass ingots having weight more than 5 kilograms and they were required to obtain Central Excise registration for manufacturing of brass ingots from the first clearance itself. During search brass ingots of 1099.650 kilograms valued at Rs. 15,67,0887/- lying in the premises of Appellant No. 1 was placed under seizure under reasonable belief that same were manufactured in contravention of the provisions of Central Excise law and would have been removed clandestinely, if the team of Central Excise officers would not have visited the premises. The said seized goods were handed over to Shri Husenbhai Jumabhai Khoti, Proprietor of Appellant no. 1 for safe custody.

4.1 The Show Cause Notice alleged that the business transaction of Appellant No. 1 and M/s. West Coast Extrusion Pvt. Ltd. were done from Office No. 144, Golden Point Complex, Sikram Times, Rajkot, Jamnagar owned by Shri. Akbar Pattani, son of Shri Husenbhai Jumabhai Khoti, Proprietor of Appellant No. 1. Panchnama dated 18.12.2013 were also drawn at the factory premises of M/s. West Coast Extrusion Pvt. Ltd.,

Jamnagar as well as at the residential premises of Shri C. R. Patel, the then authorized person of M/s. West Coast Extrusion Pvt. Ltd. and records were resumed therein. Panchnama dated 26/28/29.10.2015 was drawn at Hdqrs. of Rajkot Central Excise Commissionerate for opening of electronic devices resumed under Panchnama dated 18.12.2015 drawn at the premises of M/s. West Coast Extrusion Pvt. Ltd. Statements of the Appellants and of Shri Hasenbhai Jumabhai Khafi, Proprietor of Appellant No. 1 were recorded, which revealed that Appellant No.1 was engaged in clandestine removal of Excisable goods without obtaining Central Excise registration and without issuing invoices. The investigation culminated into issuance of Show Cause Notice No. V/74/AR-JMR/ADC(RRS)/2017-18 dated 17.04.2018 issued by the Additional Commissioner (Adj), Central Excise, Rajkot proposing confiscation of 1,00,245.80 kilograms of Brass Ingots (Pattis) valued at Rs. 3,16,89,126/- under Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') and imposition of fine in lieu of confiscation as the said goods have already been clandestinely cleared. The Show Cause Notice also proposed to levy Central Excise duty of Rs. 39,16,776/- under Section 11A(4) of Central Excise Act, 1944 (hereinafter referred to as 'the Act') alongwith interest under Section 11AA of the Act and a penalty under Section 11AC of the Act read with Rule 25 of the Rules. It was also proposed to impose penalty on appellant No. 2 and 3 i.e. buyers of the goods under Rule 26 of the Rules. The Show Cause Notice was decided by the lower adjudicating authority wherein he (i) held that 1,001,441.80 kilograms of Brass Ingots (Pattis) valued at Rs. 3,16,89,126/- cleared by Appellant No. 1 without payment of duty and/or without issuing any invoices, during the period from 11.06.2013 to 17.12.2015 were liable to confiscation under Rule 25 of the Rules. However, since the said goods were not available for confiscation, he refrained from passing order regarding redemption fine under Section 34 of the Act (ii) confirmed demand of Central Excise duty of Rs. 39,16,776/- upon Appellant No. 1 under Section 11A(4) of the Act alongwith interest under Section 11AA of the Act (iii) imposed penalty of Rs. 39,16,776/- upon Appellant No.1 under Section 11AC of the Act read with Rule 25 of the Rules with option to pay reduced penalty under Section 11AC(1)(e) of the Act (iv) imposed penalty of Rs. 5,00,000/- upon Appellant No. 2 and penalty of Rs. 75,000/- upon Appellant no. 3 under Rule 26(1) of the Rules.

3. Being aggrieved with the impugned order the Appellants have preferred present appeals on the following grounds:

Appellant No.1

(i) The lower adjudicating authority erred in confirming the demand on the grounds as mentioned in the order. The order passed by the lower adjudicating authority without allowing the cross examination of the witnesses is bad in law and in violation of principles of natural justice.

(ii) The lower adjudicating authority erred in confirming the demand without considering the fact that the documents relied upon were not impounded from the premises of appellant but were impounded from the premises of third party and thus no demand can be confirmed.

(iii) The lower adjudicating authority erred in confirming the demand as the same has already been demanded from M/s. West Coast Extrusion Pvt. Ltd.

(iv) The lower adjudicating authority confirmed the demand by ignoring the submission that the computer printouts are not reliable unless and until the provisions of Section 36B are proved to be complied with as the said provisions are not complied with in this case.

(v) The lower adjudicating authority erred in confirming the demand without producing any evidence to prove so called clandestine removal since the appellant No. 1 being a registered dealer and has passed on the Cenvat Credit under valid documents, could not have the stock of raw material to produce so called brass ingots /pallet and specifically when the department has preferred not to record any statement of the person to whom the goods have been sold under valid document.

(vi) The lower adjudicating authority erred in confirming the demand on the basis of statement based on the documents impounded from the premises of M/s. West Coast Extrusion Pvt. Ltd. and not confirmed from the appellant No. 1 which proves that none of the entry or evidence is against the appellant No. 1 and thus no part of demand is liable to be confirmed.

(vii) The lower adjudicating authority confirmed the demand without producing any evidence to prove that the Appellant No. 1 had capacity to manufacture such huge quantity of brass ingots out of the sweeping scrap. The allegation based on the presumptions and assumption is bad in law.

(viii) The lower adjudicating authority erred in demanding interest and imposition of penalty upon the Appellant No. 1.

3.1 Appellant No 2 & Appellant 3 have filed the appeals on the grounds that the lower adjudicating authority erred in imposing penalty on the ground that they dealt with the goods in the manner as prescribed under the law, that the observation of the lower adjudicating authority is without considering the facts of the case and submission made by the main appellant as the documents relied upon are of third party and thus no part of demand was liable to be confirmed; that the lower adjudicating authority erred in imposing the penalty without considering the fact that the appellants have purchased the goods under the bonafide belief and the said purchase is duly accounted for and since the main appellant is a dealer and not a manufacturer could not have cleared any goods in violation of provisions of Central Excise Act and thus it cannot be said that appellants have dealt with the goods in the manner as laid down under the provisions of Central Excise Rules; that the lower adjudicating authority erred in imposing penalty without considering the fact that the Show Cause Notice did not clarify the relevant provisions. The name of Appellant No. 3 was involved for introduction of the customer and he was not the buyer of the goods and hence provisions of Rule 26 are not applicable.

4. Personal Hearing in the matter was attended by Shri Paresh Sheth, Advocate on behalf of all Appellants who reiterated the grounds of appeals; submitted that Appellant No. 1 is trader and not manufacturer of Brass Ingots; that they had kiln to manufacture ingots out of these scrap only; that production of one lakh tons has been alleged in the Show Cause Notice without evidences that they had any such capacity to manufacture that much quantity in short span of 5 months; that the documents relied upon is of 3rd party i.e. West Coast Extrusion Pvt. Ltd. which is not legal at all; that the relied upon documents of 3rd party are not relevant/valid as held by Hon'ble CESTAT, Mumbai in case of Shri Sidhbali Ispat Ltd. reported as 2017

(Vol) II : 424 (Tri.-Mumbai), that order of CESTAT, Ahmedabad in Sateen Alloys Pvt. Ltd. - 2013 (296) ELT 492 (Tri.-Ahmd.) has been upheld by the Hon'ble Apex Court reported as 2015 (319) ELT A117 (SC) on the ground that that 3rd party evidences cannot be relied upon to confirm demand; that the impugned order should be set aside and their appeal be allowed.

Findings:

5. I have carefully gone through the facts of the case, impugned order and written as well as oral submissions made by the Appellants. The issues to be decided are

(i) whether the goods seized were liable to confiscation;

(ii) whether Appellant No. 1 is liable to pay Central Excise duty of Rs. 99,14,720/- alongwith interest;

(iii) whether equal mandatory penalty under Section 11AC of the Act is imposable on Appellant No. 1;

(iv) whether penalty imposed on Appellant No. 2 and Appellant No. 3 is correct.

6. It is on record that Appellant No. 2 and 3 have received the impugned order on 08.03.2017 but filed appeal on 24.05.2017 i.e. on 77th day. The time limit for filing appeal before Commissioner (Appeals) is 60 days. It is also on record that none of the two Appellants No. 2 and 3 requested to condone delay in filing Appeal in as much as they have not filed any application for condonation of delay in filing Appeals. In my view, provisions of law are required to be followed who want to take benefit of the law. In the instant case, Appellant No.2 and 3 have failed to follow the provisions of law and hence, I am of the considered view that their appeals are liable to be rejected on limitation, without going into merits of their case. My views get support from the judgment in the case of Universal Textile Industries Ltd. reported as 2006 (203) ELT 45 (P&H) wherein the Hon'ble High Court held as under:

> 6. *As far as second issue is concerned, as per the provisions of Section 128 of the Act, the appeal could be filed against the order of the Deputy Commissioner (Customs) to the Appellate Commissioner of Customs within three months from the date of receipt thereof. Admittedly, the order was received by the appellant on 31.7.2000 and appeal against the same was filed by the appellant on 24-2-2001, which was clearly delayed. As far as the period of limitation is concerned, Section 128 of the Act provides that in case there is a delay in filing of appeal, the same can be condoned to*

> *the extent of further three months. <u>Further from a perusal of order of the Commissioner (Appeals) it is evident that sufficient reason was not shown by the appellant for filing the appeal late. In the absence thereof, the</u> authorities were not wrong in not condoning the delay in filing the <u>appeal</u>."*

(Emphasis supplied)

6.1 I find that search of the factory premises of Appellant No. 1 revealed that furnace was installed behind godown of Appellant No. 1 and Brass Ingots were being manufactured by Appellant No. 1 from scrap whereas they were registered with Central Excise as Dealers only. Appellant No. 1 used to purchase brass/copper scrap from M/s. West Coast Extrusion Pvt. Ltd. (hereinafter referred to as 'West Coast' for brevity) on high sea sale basis and to clear the same to various buyers by passing on CVD and SAD duty. The entire process of manufacturing was recorded through videographer in a DVD and during search brass ingots of 4699.600 kilogram valued at Rs. 15,67,888/- was found lying in the premises of Appellant No. 1 which was placed under seizure under Panchnama proceedings. The investigation proved beyond doubt that Appellant No. 1 was manufacturing excisable goods i.e. brass ingots weighing more than 5 kilograms without obtaining Central Excise registration which was against Notification No. 8/2003-CE dated 01.03.2003, as amended, as exemption to brass ingots was available for ingots weighing less than 5 kilograms, whereas in this case, Appellant No. 1 had manufactured brass ingots having weight 12.5 kilogram (Approx.) which is much more than the limit fixed by the Government for availment of threshold limit exemption prescribed in Notification No. 8/2003, as amended. Therefore, Appellant No. 1 was required to obtain Central Excise registration and was also required to pay Central Excise duty from their very first clearance which they failed to do.

7. Appellant No. 1 argued that the impugned order passed by the lower adjudicating authority is liable to set aside since their request to cross examine the witnesses was not considered in violation of principles of natural justice.

7.1 The Appellant No. 1 has made request for cross examination of the two witnesses who are nothing but Appellant No. 2 and 3 i.e. buyer of finished goods of Appellant No. 1. However they have not mentioned that

for what reason they wish to cross examine them. It is settled law that they should give in writing the reasons leading to cross examination of the witnesses pointing out factors in the investigations. It is on record that Appellant No. 2 and 3 are the buyers of Appellant No. 1 and none of two had retracted their statements or challenged the validity of any statements recorded by the Central Excise officers and relied upon in the impugned order. In fact, Appellant No. 1 had also not retracted their own statements. It was categorically admitted that they had purchased the goods from Appellant No. 1 without invoice and the payments of such purchases were made by them in cash to Appellant No. 1. On the basis of seized documents and computer printouts, they had admitted the purchase of goods, its quantity and value and based on that the amount of duty evaded was worked out.

7.2 The statements of Appellant No. 2 and 3 were corroborated by statements of proprietor of Appellant No. 1 with various incriminating documents, printouts taken from pen drives and lap-top clearly and all these had established clandestine removal made by Appellant No. 1. I also find that details of quantity, rate, name of buyer available in the print out cannot be diverted by any person in an imaginary way. Therefore, I am of the considered view that the facts stated by Appellant No. 2 and 3 in their statements have to be granted due evidentiary value, more so, when admitted by Appellant No. 1 also. The arguments made by Appellant No. 1 are not genuine but after thought and have been made to contest the duty liability and to get out of clutches of law. The confessional statements along with corroborative facts available in the case are credible and hence, admissible as has been held in the below cases:

(a) M/s. Rochiram Steel Industries Vs CCE Chandigarh (2014 (306) E.L.T. 169 (P & H)

"5. Having heard learned counsel for the assessee-Appellant at length we are of the considered view that the instant appeal is devoid of merit and does not warrant interference of this Court. There is no legal infirmity in the order passed by the Tribunal. There are cogent and justifiable reasons assigned by the Tribunal in negating the retracted statement given by proprietor of the assessee-Appellant. Even the learned counsel has not been able to point out anything from the record that the alleged admissions were not voluntary or by coercion in support of the retracted statement. The case of the Revenue is well supported that there was excess of 11.11 MTs of finished goods, which were not accounted for in the records maintained by the assessee-Appellant. The Tribunal has rightly held that the assessee-Appellant was aware of the fact that the raw material of the goods in question was purchased from the grey market and the same was not accounted for.

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and there being no deficiency, the finished goods must have been clandestinely cleared without payment of duty and without issuance of any invoice. The retraction is nothing but to create a false plea of defence only. Thus, the redemption fine and penalty has been rightly imposed. The appeal does not warrant interference".

(b) *M/s. Karori Engg. Works V/s CCE, New Delhi- 2004 (166) ELT 373 (Tri. Del.):*

"It is well settled that admission made by the maker can be accepted as a substantial piece of evidence under the law. He cannot be later on permitted to turn round and deny that his admission was not voluntary, unless he is able to establish that the admission was extorted from him under coercion, duress, threat, etc. This being the position in law, in my view, the admission made by Shri Ashoke Sinha, the proprietor of the Appellant's firm which he never retracted or alleged to have been taken out from him, by beating, coercion, provides substantial piece of evidence for proving the allegations against him, as confirmed. In the S/N, he even deposited the duty without any protest. Therefore, the non-examination of the Panchnama and failing of the independent witnesses, under these circumstances, has got no bearing on the merit of the case."

7.3 I am also of the view that admitted facts need not be proved as has been held by CESTAT in the cases of Alex Industries reported as 2008 (230) ELT 0073 (Tri-Mumbai), M/s. Divine Solutions reported as 2006 (206) E.L.T. 1005 (Tri. Chennai) that confessional statements would hold the field and there is no need to search for evidence. Hon'ble CESTAT in the case of *M/s.* Karori Engg. Works reported as 2004 (166) E.L.T. 373 (Tri. Del.) has also held that Admission/Confession is a substantial piece of evidence, which can be used against the maker. Therefore, Appellant's reliance on various case laws relating to corroborative evidences and establishing clandestine removal cannot be made applicable in light of the positive evidences available in the case as discussed hereinabove as well as in the findings of the impugned order.

7.4 I am also of the considered view that once there is existence of ingredients substantiating manipulation and deception on part of Appellant No. 1, then non cross examination would not vitiate the proceedings. It is settled legal position that in cases of clandestine removal, the department is not required to prove the same with mathematical precision as has been held by the Hon'ble Apex Court in the cases of Aafloat Textiles (India) Pvt. Ltd. reported as 2009 (235) ELT 587 (SC) and Shah Guman Mal reported as 1983 (13) E.L.T. 1546 (S.C.).

7.5 The Hon'ble CESTAT in the case of *M/s. Surya Cotspin Ltd* reported as 2015 (329) ELT 650 (Tri-Del) has also held that it is established principle of law that fraud and justice are sworn enemies, as under:

"15. Evidence gathered by Revenue unambiguously proved that the dealer respondents officers were complicit to cause evasion of Customs duty engineered by Respondent manufacturer. It is established principle of law that fraud and justice are sworn enemies. Therefore, revenue deserves consideration and it should be allowed to arrest fraud.

16. It is settled law that Revenue need not prove its case with mathematical precision. Once the evidence gathered by investigation brings out preponderance of probability and nexus between the modus operandi of the respondent with the goods it dealt, and movement of goods from origin to destination is possible to be comprehended, it cannot be ruled out that circumstantial evidence equally play a role. In the present case, it is not only the photocopy that was used against the respondents, there are other credible and cogent documentary evidence, circumstantial evidence including oral evidence as well as expert's report went against the respondents for which stand of Revenue cannot be criticized. The best evidence which demonstrate the modus operandi beginning from finding of unaccounted goods in the factory till parking of clandestinely removed goods and also throw light on the intention behind suppression of production which was established and corroborated by recording of higher quantity after search, the respondents made futile exercise in their defence.

17. Apart from the photocopies of the invoices the other evidences gathered by investigation were not infected at all. That directly brought out nexus of the respondent to the evasion committed. When the respondent failed to rebut all other evidence adduced by investigation, these equally became vital to appreciate the case of Revenue.

(Emphasis supplied)

7.6 Hon'ble CESTAT in the case of M/s. N R Sponge P Ltd reported as 2015 (328) ELT 453 (Tri-Del) has held that when preponderance of probability was against the Appellant, pleading of no statements recorded from buyers, no excess electricity consumption found, no raw material purchase found unaccounted and no input-output ratio prescribed by law is of no use. The relevant portion of the decision is reproduced below:

10.2 The statement recorded from shift supervisors being self-speaking cannot be brushed aside because they were the persons within whose knowledge goods were manufactured and cleared. Their evidence was believable, cogent and credible for the reason that they vividly described method/stage of production.

10.3 Added to the above, the director admitted clandestine removal of the goods not supported by Excise invoices. That resulted in loss of revenue. He therefore, conceded to make payment of the duty evaded without controverting the fact of maintenance of the entries in pencil handwritten ledger and chits recovered from possession of Appellant during search. Entire pleading of the Appellant therefore, failed to establish which mala fide of the Appellant came to record. Clandestine removal was well within the knowledge of the shift supervisors, accountant, Director, transporters and commission agent. Each other's evidence corroborated all of them and established unaccounted goods cleared without payment of duty. The most likely evidence of kutcha agenda brought the Appellant-company to the root of allegation. All of them established inextricable link

of evasion. Shri Agrawal by his evidence attached all the persons involved in the chain of clandestine clearance without their detachment.

10.4 Preponderance of probability was against the Appellant. Meaning of the statements recorded from Jaiswal, no excess electricity consumption found, no new material purchase found unaccounted and no input-output ratio prescribed by law is of no use to it. Revenue discharged its onus of proof by bringing out the aforesaid in the show cause notice and OIO. But, the Appellant miserably failed to discharge its burden of proof. It did not come out with clean hands.

(Emphasis supplied)

7.7 I find that no statements have been retracted by any person and facts recorded in Panchnama and contents of seized items are accepted by Appellant No. 2 as well as Appellant No. 3 in their statements. It is not a case that a single statement has been recorded and relied upon but various statements of proprietor of Appellant No. 1, Appellant No. 2 and Appellant No. 3 establishing clandestine removal of final products by Appellant No. 1. In the circumstances, I am of the view that the statements recorded at different time and at different persons are not recorded under duress or threat. Facts of the statements have been independently corroborated by the facts and contents of Panchnama dated 18.12.2013 drawn at the factory premises of Appellant No. 1, Panchnama dated 19.12.2013 drawn at the factory premises of West Coast and Panchnama dated 26/28/29.12.2013 for opening of electronics devices and print outs taken therefrom scanned at the time of search as well as at the time of taking out print outs from the pen-drives and laptop computer. Therefore, I am of the considered view that denial of cross examination by adjudicating authority does not violate principles of natural justice in the given facts of this case. My views are supported by Hon'ble Bombay High Court's judgment in the case of M/s. Sharad Ramdas Sangle reported as 2017 (347) ELT 410 (Bom.) wherein it has been held that when directors have themselves admitted the guilt and statements have not been retracted, there is no question of cross examination and denial of same does not to give rise to any substantial question of law. Relevant portion of the judgment is reproduced below:

"3. The Tribunal recorded following reason :-

"5.1 As regards the denial of cross-examination of Shri Thorve and Shri Ashok Kumar Yadav and whether the said denial has caused any prejudice to the Appellants, it is seen from the records that the entries made in the private records were corroborated by Shri

Ramdas Shivram Sangle, Director of the Appellant firm and Shri Sharad Prakash Sangle, Proprietor of M/s. Ambica Scrap Merchant through whom the clandestinely removed goods, were sold wherein they had admitted that the entries recorded are true and correct and pertain to the unaccounted production, purchase of raw materials without accounting and sale of the finished goods in cash without payment of duty. Further from the records it is seen that about sixteen buyers (referred to in para 17.13 of the impugned order), who purchased the finished goods from the Appellants without payment of duty have also confirmed that they had received these goods without the cover of proper excise documentation and without payment of duty. Similarly, two scraps suppliers, Mr. Yunus Ahmed Shaikh and Mr. Manish Mulchand Gehlot have also admitted that they have supplied the MS scrap which is the raw materials for the manufacture of these goods without the cover of documents and they have received consideration for sale of such scrap in cash. Considering these evidences available in record, we hold that the denial of cross examination of the authors of the private records has not caused any prejudice to the Appellants. In fact none of the statements recorded have been retracted or disputed. In such a scenario, when <u>the fact is not disputed, cross-examination of the party is not necessary. The Hon'ble Apex Court</u> in the case of Kanungo Company - 1983 (13) E.L.T. 1486 (S.C.) and the Hon'ble High Court of Andhra Pradesh <u>in the case of Shalini Steels Pvt. Ltd. (supra) have held that there is no absolute</u> right for cross examination and ; if sufficient corroborative evidences exist, cross-examination of the deponent of the <u>statement is not necessary.</u> In view of the above we hold that the denial of cross-examination of Shri Tharve and Shri Ashok Kumar Yadav who maintained the private records has not caused any prejudice to the Appellants."

From the above conclusions, we are also of the view that this was not a case which required cross-examination. The Directors themselves admitted the guilt. So, almost all allegations stood proved. As said above, <u>the statements recorded were not retracted or disputed.</u> Learned counsel for the Appellants reiterated that he can succeed in showing that these appeals should be admitted for deciding following question, which according to him, is substantial question of law :-

"Whether denial of <u>cross-examination</u> of witnesses caused any prejudice to the Appellants?"
<u>We are not inclined to accept this submission at all. In these appeals, there was no question of cross-examination, and therefore, denial of</u> the same would not give rise to any substantial question of law. We perused the judgment of the Tribunal and find the same is quite pertinent. It is not necessary to interfere in it."

(Emphasis supplied)

7.8 I find that Hon'ble CESTAT in the case of M/s. Shalini Steel P Ltd reported as 2010 (258) E.L.T. 545 (Tri. - Bang.) has held that evidentiary value of the documents could not be lost in absence of cross examination of an employee. While denying the request of cross examination made by the Appellant No. 1, the adjudicating authority has discussed the issues at

length and relied upon the various judicial case-laws as is seen from para 18 to 18.8 of the impugned order. The most crucial fact in this case is that none of the deponents have retracted their statements. Therefore, I do not see any infirmity in the decision of the lower authority in denying the cross examination to the Appellant No. 1, especially when no specific reason for seeking cross examination has been stated by Appellant No. 1.

8. Appellant No. 1 submitted that the lower adjudicating authority erred in confirming demand without considering the fact that the documents relied upon were not impounded from their premises but from premises of third party and thus not reliable and no demand can be confirmed on that basis.

8.1 It is on record that office situated at 146, Golden Point Complex, Shivam Circle, Phase-III, Dared, Jamnagar owned by Shri Ashokbhai Patani, son of the owner of Appellant No. 1 which was commonly used by West Coast and Appellant No. 1. The incriminating records, pen drive, laptop resumed under Panchnama dated 18.12.2013 drawn at the premises of West Coast and its office. Further incriminating records were also resumed under Panchnama dated 18.12.2013 drawn at the premises of Appellant No. 1. Search was also carried out at the residential premises of Shri C. R. Patel, earlier working as authorized person of West Coast and was also looking after office routine work, sales & purchase, accounting etc of Appellant No. 1 and incriminating documents were found and resumed from his premises also. The investigation has corroborated all these documents with each other and established that Appellant No. 1 had purchased brass scrap clandestinely from West Coast without invoices on cash basis, manufactured brass ingots without obtaining Central Excise registration and cleared the same clandestinely without payment of Central Excise duty on cash basis. Details mentioned in one of the diary resumed from the premises of Appellant No. 1 duly corroated with the print outs taken from the electronic gadgets resumed from the premises of West Coast and based on which Annexure S-1 i.e. details of brass scrap and other items purchased by Appellant No. 1 without invoice and Annexure S-2 i.e. details of brass scrap and other items sold by Appellant No. 1 without invoice were prepared wherein all entries based on records resumed from Appellant No. 1 as well as records resumed from West Coast were duly corroborated by incriminating

date, name of party, description of goods, slip no., pcs., quantity/weight, sr. no. of Annexure to Panchnama dated 18.12.2013, page no. of Panchnama dated 26/28/29.10.2013 drawn for taking print outs from the pen drives and laptop seized from the premises of West Coast. Based on these Annexure S1/52, the proprietor of Appellant No. 1 categorically deposed about purchase of raw material without invoices on cash basis and sell of finished goods without invoices on cash basis. Based on these Annexures, Appellant No. 3 and 4 being buyers of the goods have also accepted purchases of brass ingots without invoices on cash basis. Thus, investigation has proved beyond reasonable doubt that Appellant No. 1 as well as West Coast had maintained data of illicit receipts of material as well their clearances of finished goods for their accounting purpose. Therefore, the facts finding truth revealed by proper investigation cannot be termed as data impounded from premises of third party as the same got corroborated based on data recovered from West Coast as well as from Appellant No. 1. Hence, the arguments made by Appellant No. 1 are devoid of merits and not tenable at all.

8.2 It is settled position that the persons indulged in clearing the goods clandestinely and removing the goods illicitly keep their records at A to Z manner either in note books, diaries, chits or in electronic gadget or in other form until and unless they receive payment thereof to complete the circle of transaction. The payment of goods received/removed illicitly is to be made/received in cash only and no one can account these illegal transactions in their books of accounts. Once the payment/receipt of cash for illicit receipt/clearance of goods is done, then only such details can be destroyed.

8.3 Appellant No. 1 argued that the lower adjudicating authority erred in confirming demand as the same has already been demanded from M/s. West Coast Extrusion Pvt. Ltd.

8.3.1 On this, it is on record that duty demanded from Appellant No. 1 for manufacture of excisable goods i.e. brass ingots (Part 1) from the scrap procured illicitly and clearances of brass ingots made illicitly. Since Appellant No. 1 carried out manufacturing activity on brass scrap and a new product i.e. brass ingots emerged which were cleared by them illicitly without issuing invoices and without paying Central Excise duty, the

Department has demanded Central Excise duty from them. The case of Appellant No. 1 is out of purview of Notification No. 8/2003 as amended. During the course of search, it was established beyond doubt that Appellant No. 1 was having a furnace to manufacture brass ingots from the brass scrap and they have manufactured Brass Ingots, cleared these excisable goods without obtaining Central Excise registration and without paying Central Excise duty on it and hence, they have to pay Central Excise duty and only they can pay Central Excise duty. Therefore, the plea advanced by Appellant No. 2 that demand has already been made from West Coast and hence no demand can be made from them is misconceived and is an afterthought to get out of duty liability.

8.4 Appellant No. 1 further submitted that the lower adjudicating authority confirmed the demand by ignoring their submissions that the computer printouts are not reliable unless and until the provisions of Section 36B are proved to be complied with and the said provisions are not complied with in this case. The provisions of Section 36B is re-produced below for better appreciation of facts:

> Section 36B. Admissibility of micro films, facsimile copies of documents and computer printouts as documents and as evidence. -
>
> (1) Notwithstanding anything contained in any other law for the time being in force,
>
> (a) a micro film of a document or the reproduction of the image or images embodied in such micro film (whether enlarged or not); or
>
> (b) a facsimile copy of a document; or
>
> (c) a statement contained in a document and included in a printed material produced by a computer (hereinafter referred to as a "computer printout"),
>
> the conditions mentioned in sub-section (2) and the other provisions contained in this Section are satisfied in relation to the statement and the computer in question,
>
> shall be deemed to be also a document for the purposes of this Act and the rules made thereunder and shall be admissible in any proceedings thereunder without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible.
>
> (2) The conditions referred to in sub-section (1) in respect of a computer printout shall be the following, namely:-
>
> (a) the computer printout containing the statement was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer;
>
> (b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;
>
> (c) throughout the material part of the said period, the computer was operating properly or, if not, than any period in which it was not operating properly or

was out of operation during that part of the period as to affect the information or the accuracy of the contents; and

(b) the information contained in the statement reproduced or is derived from information supplied to the computer in the ordinary course of the said activities.

(3) Where over a period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in clause (a) of sub-section (2) was regularly performed by computers, whether -

(a) by a combination of computers operating over that period; or

(b) by different computers or different combinations of computers operating in succession over that period; or

(c) in any other manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers, all the computers used for that purpose during that period shall be treated for the purposes of this section as constituting a single computer; and references in this section to a computer shall be construed accordingly.

(4) In any proceedings under this Act or the rules made thereunder where it is desired to give a statement in evidence by virtue of this Section, a certificate doing any of the following things that is to say, -

(a) identifying the document containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that document as may be appropriate for the purpose of showing that the document was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5) For the purposes of this Section,

(a) information shall be taken to be supplied to a computer if it is supplied thereto in any appropriate form and whether it is supplied directly or (with or without human intervention) by means of any appropriate equipment;

(b) whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for the purposes of those activities by a computer operated otherwise than in the course of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities;

(c) a document shall be taken to have been produced by a computer whether it was produced by it directly or (with or without human intervention) by means of any appropriate equipment.

Explanation. - For the purposes of this section, -

(a) "computer" means any device that receives, stores and processes data, applying stipulated processes to the information and supplying results of those processes; and

(b) any reference to information being derived from other information shall be a reference to its being derived therefrom by calculation, comparison or any other process.

8.4.1 On going through the above provisions of Section 368 of the Act, the case of Appellant No. 1 falls under Section 368(1)(c) of the Act and the facts of this case satisfy the conditions mentioned under Section

36(2)(3)(4) and 9A of the Act. It is not the case of Appellant No. 1 that the two pen-drives and one laptop were not used by them for the period for which data have been stored by them and subsequently produced by the said pen-drives and laptop in form of printouts from the data/software stored therein. Therefore, I have no hesitation to hold that the printouts taken from two pen-drives and one laptop have duly passed out the test of provisions of Section 36B of the Act and thus, arguments put forth by Appellant No. 1 is of no help to them being devoid of merits.

8.5 Appellant No. 1 also contended that the lower adjudicating authority erred in confirming demand without producing any evidence to prove so called clandestine removal since Appellant No. 1 being a registered dealer and has passed on the Cenvat Credit under valid documents, could not have the stock of raw material to produce so called brass ingots (pallis) and specifically when the department has protected not to record any statement of the person to whom the goods have been sold under valid document.

8.5.1 I find that it is on record that Department has proved the clandestine receipt of raw material, manufacturing process carried out by Appellant No. 1 and clearance of excisable goods illicitly without obtaining Central Excise registration number, without issuing any invoices, without following procedures laid down under Central Excise Act/Law/Rules and without payment of Central Excise duty etc. The documents resumed from the factory premises as well as office premises of Appellant No. 1 duly corroborated with the computer printouts taken from pen drives and laptop seized from the premises of West Coast by matching each and every entry recorded therein. The veracity of the documents seized and computer printouts were never ever challenged neither by Appellant No. 1 or by West Coast. The voluntary and confessional statements of both the Appellant cannot be termed as mistake as they have realized their wrong doing and accordingly accepted the same and declared the modus operandi adopted by Appellant No. 1 as well as West Coast. The incriminating documents/records of Appellant No. 1 found at the factory/office/ residential premises of West Coast and vice versa cannot be termed as a co-incidence. Appellant No. 1 is trying to put across vague arguments to save their skin without producing any cogent evidences especially when

Appellant No. 2 and 3, being buyer of finished goods have accepted that they had purchased the Brass Ingots manufactured by Appellant No. 1 on cash payment basis and none has retracted their statements.

8.6.2 Appellant No. 1 also argued that they could not have the stock of raw material to produce so called brass ingots (pattis) and specifically when the department has preferred not to record any statement of the person to whom the goods have been sold under valid document. On this, it is on record that over and above the goods purchased by Appellant No. 1 under high sea sales basis from West Coast, Appellant No. 1 used to receive unaccounted brass scrap from West Coast which has been proved from the documents viz. Triplicate Note Book No. 1 (Annexure) Note Book Vanik (mini kharcheshi). Made up files mentioned at Sr. No. 1, 2, 3 & 4, resumed from both the assessees as well as print outs taken from pen drives and laptop resumed from West Coast and corroborated in various Annexures viz. Annexure-A1, A2, A3, I1, I2 made from such incriminating documents. So far as recording of statement of persons to whom the goods have been sold under valid document, it is on record that West Coast as well as Appellant No. 2 and 3 being buyers of finished goods, have categorically accepted purchase of such finished goods from Appellant No. 1. Shri Dhaval Virendrabhai Varia, Authorised Person of West Coast in his statement dated 16.03.2016 has categorically accepted that they have sent the goods outside factory premises for getting job process from other parties but without following procedure as prescribed under Notification No. 214/86-CE or 84/94-CE and 44/94-Central Excise. He specifically depicted various Annexures and stated that Annexure-A2 contains details of Brass/Copper extrusion Rods and Brass/Copper Ingots have been sold by West Coast without cover of invoices to Appellant No. 1; that Annexure-A3 contains details of Brass/Copper Extrusion Rods and Brass/Copper Ingots sold by West Coast in the guise of job-work to Appellant No. 1. He also stated that Annexure-I1 contains details of Brass/Copper scrap purchased by West Coast without invoices and Annexure I2 contains details of Brass/Copper scrap sold by them without invoices from Appellant No. 1. Thus, it is proved beyond doubt that Appellant No. 1 got through the material i.e. brass scrap from West Coast without invoice to manufacture the Brass Ingots and cleared Brass Ingots to West Coast and Appellant No. 2 & 3 without invoices.

Therefore, argument of Appellant No. 1 argued that they could not have the stock of raw material to produce so called brass ingots (patra) and specifically when the department has preferred not to record any statement of the person to whom the goods have been sold under valid documents, is not tenable. It is a matter of common sense that for illicit removal, no one can find any valid documents except chits, notebooks, diaries as well as entries preserved in electronic gadgets. If valid documents were issued, they how can it be termed as clandestine removal. Therefore, said arguments are being put forth by Appellant No. 1 are of no help to them and I discard the same.

8.5 Appellant No. 1 further submitted that the lower adjudicating authority confirmed the demand without producing any evidence to prove that Appellant No. 1 had capacity to manufacture such huge quantity of brass ingots out of the sweeping scrap.

8.6.1 It is on record that Central Excise officers found furnace installed behind the godown within the premises of Appellant No. 1. The manufacturing process was also filmed by the Department by engaging a videographer. The facts deposed by the accountant and supervisor of Appellant No. 1 regarding melting of scrap in furnace installed in the premises of Appellant No. 1 and brass ingots weighing 12.5 kgs which is more than 5 kg cannot be a co-incidence. During the course of Panchnama, the supervisor of Appellant No. 1 deposed that in one cycle about 250 kilogram of brass ingots manufactured by them; that they carry out production through furnace, two to three times a day. It is undisputed fact that during the course of Panchnama 4895.650 kilogram of brass ingots (finished excisable goods) valued at Rs. 15,67,888/- were seized by the Department. These facts were also accepted by proprietor of Appellant No. 1 during the course of Panchnama. Thus, the arguments made by Appellant No. 1 are devoid of merits.

9. In view of above, I find that the demand of Central Excise duty has rightly been confirmed against Appellant No. 1. Once, the Central Excise duty is confirmed the payment of interest is mandatory consequences of Central Excise duty liability and since Central Excise duty is payable by

Appellant No. 1 under Section 11A of the Act, they need to pay interest under Section 11AA of the Act forthwith.

10. It is on record that Appellant No. 1 has suppressed the fact of production of brass ingots with intent to evade payment of duty, they are liable to pay penalty under Section 11AC of the Act and hence penalty imposed vide the impugned order is upheld.

11. Similarly, Appellant No. 2 & 3 in their statement dated 28.10.2016 and 29.10.2016, respectively, have categorically deposed purchases of Brass Ingots without bills on cash payment as per Annexure prepared on the basis of documents resumed under Panchnama and kept in made-up file as well as print outs taken from pen drives and laptop seized during the course of search under Panchnama. Both of them admitted and accepted that all the transactions reflected by the department have been made in account by their firm with regard to purchase of brass ingots without invoices. They also admitted that they used to make cash payment for purchase without bill to Appellant No. 1. Therefore, the lower adjudicating authority has rightly imposed penalty on Appellant No. 2 & 3 and accordingly, I uphold the same. The appeals of Appellant No. 2 & 3 are also required to be rejected as time barred as discussed in Para 6 above.

12. In view of above facts and detailed findings, I uphold the impugned order and reject all three appeals.

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

(कुमार संतोष)
आयुक्त (अपील)

By RPAD
To

1.	M/s. Patani Impex, Plot No. 3013/14 & 4007/08, GIDC, Phase-II, Dared, Jamnagar.	मेसर्स पतानी इंपेक्स, प्लॉट नंबर ३०१३/१४ एवं ४००७/०८, जी.आई.डी.सी. फेज-II, डेरेड, जामनगर

2	Shri Kamal Kanaiyalal Lohia, Proprietor of M/s. Jayshree Metal Corporation, Plot No. 5, Vijay Industrial Estate, Shankar Tekri Udyognagar, Jamnagar 361004.	श्री कमल कन्हैयालाल लोहिया, [illegible] मेसर्स जयश्री मेटल कॉर्पोरेशन, प्लॉट नं. ५, विजय इंडस्ट्रियल एस्टेट, शंकर टेकरी [illegible], जामनगर - ३६१००४.
3	Shri Sureshbhai Gangdasbhai Patel, Partner of M/s. Super Impex, Plot No. 248-249, GIDC-II, Dared, Jamnagar 361004.	श्री सुरेशभाई गंगदासभाई पटेल, पार्टनर, मेसर्स सुपर इंपेक्स, प्लॉट संख्या २४८-२४९, जी.आई.डी.सी. फेज II, दरेड, जामनगर - ३६१००४.

<u>Copy for information and necessary action to:</u>

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3) The Additional Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot
4) The Assistant Commissioner, GST & Central Excise Division, Jamnagar.
5) The Superintendent, GST & Central Excise, Range, Jamnagar.
6) Guard File.
7) F. No. V2/258/RAJ/2017 (8) F. No. V2/260/RAJ/2017