



::आयुक्त (अपील्स) का कार्यालय, वस्तु एवं सेवा कर और केन्द्रीय उत्पाद शुल्क::  
O/O THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,

द्वितीय तल, जी एस टी भवन / 2<sup>nd</sup> Floor, GST Bhavan,  
रेस कोर्स रिंग रोड, / Race Course Ring Road,

राजकोट / Rajkot - 360 001

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सत्यमेव जयते

**रजिस्टर्ड डाक ए. डी. द्वारा :-**

क	अपील / फाइल संख्या / Appeal / File No.	मूल आदेश सं / O.I.O. No.	दिनांक / Date
	V2/291, 293 to 296/RAJ/2017	22/D/2016-17	30.03.2017

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

**RAJ-EXCUS-000-APP-015-TO-019-2018-19**

आदेश का दिनांक / Date of Order:	<b>09.04.2018</b>	जारी करने की तारीख / Date of issue:	<b>11.04.2018</b>
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**कुमार संतोष, आयुक्त (अपील्स), राजकोट द्वारा पारित /  
Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot**

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/Join/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. Sunlex Ceramic P. Ltd., Survey No. 826/1, NH- 8-A Lakhdhirpur Road Morbi 363 642 ,
2. Shri Hiteshbhai C. Detroja, Director, M/s. Sunlex Ceramic P Ltd. Morbi
3. Shri Shaifesh Savsani, Prop., M/s. Priya Tiles, Vadodara
4. Shri Mansukhbhai Detroja, Prop., M/s. Priya Sanitary, Bharuch
5. Shri Manharbhai Gadhiya, Partner, M/s. Yash Enterprise, Morbi

इस आदेश(अपील) से व्यक्ति 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 गुल्यांकन 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 अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असारवा अहमदाबाद- 380016 को की जानी चाहिए। /

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2<sup>nd</sup> 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) नियमवाली, 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 मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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 अंतर्गत 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 मांग, ब्याज की मांग 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 क्रमशः 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 सार्वजनिक 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, बशर्त 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" में 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  
- बशर्त 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 होगा।  
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, केन्द्रीय उत्पाद शुल्क अधिनियम, 1994 की धारा 35EE के प्रथम परंतक के अंतर्गत अवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई, 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 क्रेडिट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं. 2), 1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायाविधि पर या बाद में पारित किए गए हैं। /  
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 संश्लेषण 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 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 आदेशों 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 न्यायाधिकरण को एक अपील या केन्द्रीय 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-1 के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकट 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 आकषित 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](http://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](http://www.cbec.gov.in)

**:: ORDER IN APPEAL ::**

The present five appeals have been filed by the Appellants (*herein after referred to as* "Appellant No.1 to Appellants No.5) as detailed in the Table below against Order-in-Original No. 22/D/2016-17 dated 24/30.03.2017 (hereinafter referred to as the 'impugned order') passed by the Deputy Commissioner of Central Excise Division, Morbi (hereinafter referred to as the 'lower adjudicating authority'):-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V2/291/RAJ/ 2017	Appellant No.1	M/s. Sunlex Ceramic Pvt. Ltd., Survey No. 826/1, N.H. 8-A, Lakhdirpur Road, Morbi-363 642.
2	V2/293/RAJ/2017	Appellant No.2	Shri Hiteshbhai Chhaganbhai Detroja, Director of M/s. Sunlex Ceramic Pvt. Ltd., Survey No. 826/1, N.H. 8-A, Lakhdirpur Road, Morbi-363 642.
3	V2/294/RAJ/2017	Appellant No.3	Shri Shailesh Savsani, Proprietor of M/s. Priya Tiles, Sant Kabeer Road, Gendi Gate, Vadodara.
4	V2/295/RAJ/2017	Appellant No.4	Shri Mansukhbhai Detroja, Proprietor of M/s. Priya Sanitary, Alfa Society, Opp.: Unnati Vidyalaya, Link Road, Bharuch.
5	V2/296/RAJ/2017	Appellant No. 5	Shri Manharbhai Gadhiya, Partner of M/s. Yash Enterprise, Real Plaza, N. H. 8-A, Morbi.

2. Brief facts of the case are that acting on intelligence regarding clandestine manufacture and clearance by Appellant No. 1, a search was carried out by the Officers of the Central Excise, Rajkot and various incriminating documents were resumed under Panchnama dated 03/04.04.2016, which revealed that Appellant No. 1 was indulging in clandestine removal of their finished excisable goods i.e. Ceramic Digital Wall Tiles by showing less production in their Daily Stock Account and thereby removing their manufactured excisable goods clandestinely by suppressing the actual production. During the search operation, verification of physical stock lying in the factory with the closing balance of Daily Stock Account of 02.04.2016 was carried out and a shortage of 1032 boxes of ceramic digital wall tiles were found. Statements of Appellants revealed that Appellant No.1 was engaged in clandestine removal of Excisable goods by removing the excisable goods under chits named 'ESTIMATE' having details viz. city, name of party, bill no., date, item description, size, grade, quantity, rate, amount, bill amount & cash amount, total, transport, truck no., duty, tax, amount, remark etc. The Appellant No. 2, during the course

of Panchnama admitted that these 'estimates' are nothing but the sales details of digital wall tiles which have been manufactured and sold by the Appellant No. 1 by way of under grading/ invoicing and/or without invoice to their customers. The Appellant No. 2 further deposed that wherever bill no. is available in the said 'ESTIMATE' are pertaining to their sales of digital wall tiles by way of under grading/invoicing to their buyers on the strength of invoice number mentioned against bill no., whereas the details of bill no. is not mentioned in the said 'ESTIMATE' are pertaining to clearance of digital wall tiles without invoice. The investigation culminated into issuance of Show Cause Notices No. IV/3-8/D/2016-17 dated 20.10.2016 issued by the Assistant Commissioner, Central Excise & Service Tax, HQ, Rajkot to the Appellant No. 1 to 5 proposing to (i) confiscate ceramic digital wall tiles valued at Rs. 3,47,18,203/- under Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as 'the Rules') and proposed to impose find in lieu of confiscation as the said goods have already been cleared clandestinely and/or by suppressing the quantity/grade/size/rate/value etc. and not available for confiscation (ii) demand Central Excise duty of Rs. 43,19,015/- under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') by invoking extended period of limitation alongwith interest under Section 11AA of the Act, penalty under Section 11AC of the Act upon Appellant No. 1 and penalty under Rule 26 of the Rules upon Appellant No. 2 to 5. The Show Cause Notice was decided by the lower adjudicating authority wherein he (i) refrain from passing any order regarding redemption fine under Section 34 of the Act since the goods are not available for confiscation (ii) ordered to confirm and demand Central Excise duty of Rs. 43,19,015/- under Section 11A(4) of the Act by invoking extended period of limitation (iii) ordered to appropriate amount of Rs. 25,00,000/- paid by the Appellant No. 1 against their Central Excise duty liability (iv) imposed penalty of of Rs. 43,19,015/- under Section 11AC(1)(c) of the Act by giving option of reduced penalty of 25% of duty (v) imposed penalty of Rs. 8,00,000/- upon Appellant No. 2 under Rule 26 of the Rules, penalty of Rs. 5,000/- upon Appellant No. 3 under Rule 26 of the Rules, penalty of Rs. 10,000/- upon Appellant No. 4 under Rule 26 of the Rules and penalty of Rs. 50,000/- upon Appellant No. 5 under Rule 26 of the Rules. *(Signature)*

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 ground as mentioned in the order and observation made by the lower adjudicating authority without considering the submission made alongwith relevant decisions.
- (ii) The lower adjudicating authority rejected request for cross examination of the witnesses by violating principles of natural justice as the issue has been settled by various appellate authority including Hon'ble High Court and Hon'ble Supreme Court.
- (iii) The lower adjudicating authority ignored the submission made that the duty demanded under the provisions of Section 4 of the Act is bad in law as the goods under consideration are chargeable to duty under the provisions of Section 4A of the Act.
- (iv) The lower adjudicating authority while confirming and demanding the duty, ignored the fact that the department has not produced any positive evidence to prove that the applicant has evaded the payment of duty and has clandestinely cleared excisable goods; that the allegation of clandestine removal cannot be sustained on the basis of statement only unless proved on the basis of cogent evidence.
- (v) The lower adjudicating authority erred in imposing equal penalty and interest for the grounds mentioned hereinabove.

3.1 Appellant No. 1 vide letter dated 24.01.2018 filed another reply wherein they stated that the impugned order is bad in law as the goods under consideration are liable to be assessed under the provisions of Section 4A of the Act and hence duty demanded by invoking the provisions of Section 4 of the Act cannot be sustained; that the department has not proposed to modify or re-determine the MRP and proposed to recover duty and hence the proceedings initiated is liable to be dropped; that they rely on the following decisions:

1. Gwalior Leather & Tent Factory reported as 2009-243-ELT-386 (Tri. Del.)
2. Liberty Shoes Ltd reported as 2015-326-ELT-SC
3. Bajaj Electricals Ltd reported as 2017-352-ELT-90 (Tri.-Mum.)

3.2 Appellant No. 1 submitted that the denial of request for cross

examination during the course of personal hearing is improper as the documents supplied and relied upon do not reflect the allegations contained in the Show Cause Notice and thus examination of various witnesses was unavoidable and statement of witness cannot be relied upon for so called removal of excisable goods; that they rely on the decision in the case of Mahek Glazes Pvt. Ltd. 2014 (300) ELT 25 (Guj.) wherein it has been held that the lower adjudicating authority should clarify the reason for non accepting the request of cross examination; that they also rely on the case law of Jindal Drugs Pvt. Ltd. reported as 2016-340-ELT-67, Kuber Tobacco India Ltd. reported as 2016-338-ELT-113; that the statement of directors are not properly interpreted and are not properly appreciated while demanding the duty and hence merely because partners have accepted so called clandestine removal cannot be made basis for denial of cross examination; that the statements of witnesses are not in conformity with the allegations contained; that the clandestine removal cannot be sustained on the basis of statements recorded; that the basis of Show Cause Notice is nothing but so called documents titled as "ESTIMATE" referred at Sr. No. 7 of the Annexure-A to the Show Cause Notice; that the said documents do not represent the actual clearance value; that one entry dated 31.10.2014 in the name of Priya Sanitary refers to item 12 X 18 digital grade | quantity | Rate 1,40,000/- clarifies that the Appellant No. 1 cleared one box at the rate of Rs. 1,40,000/- which could never be price of the goods; that Annexure-B to Show Cause Notice is prepared on the basis of 'ESTIMATE' clarifies that the duty is demanded on differential value under the provisions of Section 4 and without re-determining or proposing re-determination of MRP and invoking the provisions of Section 4A of the Act and thus proceedings liable to be set aside; that it is well settled proposition of law that unless the co-relation of production and clearance with the raw materials purchased is arrived at, the allegation of clandestine production and clearance cannot be sustained and they rely on the following decisions:

1. Durga Trading Company reported as 2002 (148) ELT 967 (Tri.-Del.)
2. Emtex Synthetics Ltd reported as 2003 (151) ELT 170 (Tri.-Del.)
3. Utkal Galvanizers Ltd reported as 2003 (158) ELT 42 (Tri.-Kolkata)
4. Rishi Packers Ltd reported as 2003 (161) ELT 449 (Tri.-Mum)

5. Murugan Enterprises reported as 2003 (162) ELT 233 (Tri.-Chennai)
6. Shree Shyam Pipes Pvt. Ltd. - 2006 (201) ELT 34 (Tri.-Del.)
7. Resha Wires Pvt Ltd - 2006 (202) ELT 332 (Tri.-Bang.) affirmed in 2003 (157) ELT A-315
8. Paras Laminates P Ltd - 2005 (180) ELT 73 (Tri.-Del.) affirmed in 2006 (199) ELT A-182.
9. Prem Industries - 2009 (234) ELT 178 (Tri.-Ahd.)
10. Utility Alloys Pvt Ltd - 2005 (184) ELT 80 affirmed in 2009 (236) ELT A19
11. Ganga Parameswari Spinners Pvt Ltd - 2009 (239) ELT 196
12. Sharadha Forge Pvt Ltd - 2005 (174) ELT 336 (Tri.-Mum.)
13. Baroda Rolling Works - 2009 (238) ELT 495
14. Kothari Pouches Ltd - 2001-135-ELT-531
15. Indigo Green Textile Pvt. Ltd. - 2007-212-ELT-343

3.3 Appellant No. 1 further stated that unless the goods are seized and provisionally released on bond, neither the goods can be confiscated nor any fine can be imposed; that the Principal Commissioner of Central Excise, Rajkot has dropped many proceedings and refrain from imposition of redemption fine; that they refer the decision in the case of Atul Kaushik reported as 2015 (330) ELT 417 (Tri.-Del.) which was affirmed decision of Oracle India Pvt. Ltd. reported as 2016 (339) ELT A136 (S.C.) and maintained in Commissioner Vs Oracle India Pvt. Ltd. reported in 2016 (342) ELT A40 (S.C.); that the department has not clarified the relevant clause under which penalty under Rule 26 of the Rules is imposed on one of the directors and they rely on the decision in the case of Amrit Foods reported as 2005 (190) ELT 433 (S.C.); that under Rule 26, the physical involvement of the person is an important criteria for imposition of penalty and they rely on the decision in the case of Man Industries (India) Ltd reported as 2004 (175) ELT 435 (Tri.-Del.); that in this case, the department has not produced any positive evidence of the knowledge and therefore, no penalty is liable to be imposed; that penalty under the provisions of Rule 26 can be imposed not exceeding the amount of duty involved in the goods dealt with by the Appellant, in the manner as prescribed under the provisions of Rule 26 of the Rules and since the department has not clarified the quantity or the duty amount involved in the goods dealt with by the Appellant No. 1, no

penalty can be imposed; that the penalty under Rule 26 clarifies that the penalty is linked with the duty leviable on the goods dealt with by any person in the manner as prescribed under the Rule and department has not clarified the amount of duty that could be leviable on the goods dealt with by the applicant; that they rely on the decision in case of Steel Tubes of India Ltd reported as 2007 (217) ELT 506.

4. Appellant No.2, 3, 4 and 5 have filed the appeal on the grounds that the observations made is improper as the department has relied upon the documents and statements, which are not related to the business of Appellant No. 1; that the lower adjudicating authority erred in imposing penalty as the value worked out is not justified and by ignoring the fact that the duty demanded under the provisions of Section 4 was not valid in as much as the product under consideration is chargeable to duty under the provisions of Section 4A; that the lower adjudicating authority while imposing penalty, ignored the fact that the department has not produced any positive evidence to prove that the Appellant No. 2 has actively involved in so called clandestine removal of the excisable goods.

5. Personal Hearing in the matter was attended by Shri Paresh Sheth, Advocate on behalf of Appellant No. 1 to 4 and reiterated grounds of appeals and submitted written submission dated 24.01.2018; contended that they have not been allowed cross-examination of witnesses and hence case should be remanded back to lower adjudicating authority for proper adjudication; that the goods are covered under Section 4A for assessment and hence duty can't be demanded under Section 4 of the Act; that department failed to produce any evidence of purchase of raw materials etc.; that many case laws are there to support their arguments and submitted bunch of case laws; that appeal should be allowed in view of their detailed submission and legally backed grounds of appeals.

5.1 Personal hearing in the matter was attended by Shri Paresh Sheth, Advocate on behalf of Appellant No. 5 also and reiterated grounds of appeal; submitted that this appeal is connected with Appeal No. V2/291, 293 to 295/RAJ/2017; that this appeal needs to be tagged with those appeals and may be decided as per grounds of appeal and submissions made therein.



**Findings:**

6. 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 are liable to confiscation or not and whether redemption fine imposed is justified or not;

(ii) whether Appellant No. 1 is liable to pay Central Excise duty of Rs. 43,19,015/- alongwith interest and whether equal mandatory penalty under Section 11AC of the Act is imposable on them

(iii) whether penalty imposed on Appellant No. 2 to 5 is justified.

**APPELLANT NO. 1:**

7. I find that search of factory premises of Appellant No. 1 on 03/04.04.2016 and verification of physical stock lying in the factory with the closing balance of Daily Stock Account as on 02.04.2016 revealed shortage of 1032 boxes of ceramic digital wall tiles. Statements of responsible persons of Appellant No. 1 including Director revealed that Appellant No.1 was engaged in clandestine removal of Excisable goods by removing the excisable goods under chits named 'ESTIMATE' having details viz. city, name of party, bill no., date, item description, size, grade, quantity, rate, amount, bill amount & cash amount, total, transport, truck no., duty, tax, amount, remark etc. Appellant No. 2, during the course of Panchnama admitted that these 'estimates' are nothing but the sales details of digital wall tiles, which have been manufactured and sold by Appellant No. 1 by way of under grading/ under invoicing and/or without invoice to their customers. The Appellant No. 2 further deposed that wherever bill no. is available in the said 'ESTIMATE' are pertaining to their sales of digital wall tiles by way of under grading/ under invoicing to their buyers on the strength of invoice number mentioned against bill no., whereas the details of bill no. is not mentioned in the said 'ESTIMATE' are pertaining to clearances of digital wall tiles without invoice. The Appellant No. 2 in his statement dated 04.04.2016 admitted the modus operandi adopted by Appellant No. 1. The Appellant No. 2 in his statement dated 04.04.2016 also admitted that they have cleared ceramic digital wall tiles of various grade to their different buyers under the guise of 'Estimate(s)' during the period from 2014-15 to 2015-16 and the said Estimates were kept

for record/ accounting purpose. The Appellant No. 2 agreed the correctness of Annexure-S prepared on the basis of 'Estimates' resulting into clearance of excisable goods valued at Rs. 3,47,18,203/- during the period from 2014-15 to 2015-16 by suppressing actual grading and or actual quantity in respective invoices and also without invoices resulting into evasion of Central Excise duty; that they have received the amount of sales proceeds without bill as well as differential amount of goods cleared under invoice by under invoicing/ under valuation in cash only and therefore the said differential amount of such sales proceeds was mentioned as 'Cash Amt.' in the said 'Estimate' slips; that Appellant No. 2 also accepted the duty liability of Rs. 43,19,037/- and paid Rs. 25,00,000/- towards their duty liability.

7.1 Appellant No. 2 in his statement dated 24.09.2016 accepted that they have cleared excisable goods to various customers with invoice(s)/ Bill(s) as well as on the basis of the 'Estimate(s)' prepared simultaneously; that for such clearance of finished goods, they used to issue bill(s)/invoice(s) to their customers by mentioning less sales value/ less rate/ less quantity/ under grading/ suppressed size etc. and simultaneously issue the 'Estimate(s)' to their customers by mentioning actual grade, actual rate, actual size and actual amount of clearance for the period from April-2014 to March-2016; that they have also mentioned the invoice(s)/bill(s) amount and actual amount in aforesaid 'Estimate(s)' and used to receive sales process/ payment in cash or through angadiya against excisable goods cleared by them without bill(s)/ invoice(s) and they used to receive payment through cheque/RTGS from their customers against the value mentioned in invoice(s)/bill(s) and used to receive differential amount in cash or through angadiya from their customers.

7.2 Appellant No. 1 has vehemently argued that the goods under consideration are liable to be assessed under the provisions of Section 4A of the Act and duty demanded by invoking the provisions of Section 4 of the Act is bad in law and relied upon certain case laws. I find that this submission of Appellant No. 1 is misplaced and misconceived in as much as the case on hand is not for assessment of Central Excise duty on ceramic digital wall tiles but of clandestine clearances effected by Appellant No. 1, which is based on incriminating documents, namely, 'Estimate(s)' seized

during search carried out at the premises of Appellant No. 1 on 03/04.04.2016. On verification of Show Cause Notice, I find that it is nowhere proposed to assess the goods in question under Section 4 of the Act but proposed to recover and demand Central Excise duty under Section 11A(4) of the Act. I also find that Central Excise duty calculation made in Annexures to the Show Cause Notice is based on the cash amount recovered by Appellant No. 1 over and above the invoiced value. The verification of Annexure-B to Show Cause Notice clearly reveals that Column "C" specifically mentions the actual clearance value as per documents with heading ESTIMATE (goods cleared by suppressing size, grade, rate, quantity, value etc. of ceramic digital wall tiles) resumed and enlisted at Sr. No. 1 of Annexure-A to the Panchnama dated 03/04.04.2016. The Column "D" mentions clearance value as per simultaneous copies of invoices (goods cleared by Appellant No. 1 by suppressing size, grade, rate, quantity, value etc of ceramic digital wall tiles). The Column "E" denotes difference between Column "C" and "D", which is nothing but the amount collected by the Appellant No. 1 over and above the invoiced value by suppressing size, grade, rate, quantity and value of ceramic digital wall tiles based on incriminating documents resumed as per Annexure-A to Panchnama dated 03/04.04.2016. The Column "F" denotes value of ceramic digital wall tiles cleared by Appellant No. 1 clandestinely as per copies of printed paper with heading "ESTIMATE" resumed & enlisted at Sr. No. 1 of Annexure-A to Panchnama dated 03/04.04.2016. Since the incriminating documents indicating collection of clandestine sales proceeds were found and such sales proceeds as explained by Appellant No. 2 during investigation was pertaining to under grading, under invoicing and also without invoice. It is on record that they have mentioned number of box as 1 and value thereof has been mentioned as Rs. 1,40,000/-. Thus, the incriminating documents recovered during the course of investigation reveal that Appellant No. 1 has tactfully not mentioned the number of boxes and had mentioned imaginary number of boxes of ceramic digital wall tiles cleared by them only to misguide the department, if caught.

7.2.1 During the course of Panchnama proceedings, Appellant No. 2 deposed that *"During the search in presence of we Panchas and Shri Hiteshbhai, the officers found one file containing some loose papers with the heading "ESTIMATE" having details viz. city, name of Party, bill no.,*

*date, item description, size, grade, quantity, rate, amount, Bill Amt. & Cash Amt., total, transport, truck no., duty, tax, amt. remark etc. On being asked about the said loose papers with the heading "ESTIMATE", Shri Hiteshbhai informs that these "Estimates" are nothing but the sales details of digital wall tiles which have been manufactured and sold by their company by way of under grading/invoicing and/or without invoice to their buyers/ customers. Shri Hitehsbhai further informs that where the details of Bill No. is available in the said "ESTIMATE" are pertaining to their sales of digital wall tiles by way of under grading/invoicing to their buyers on the strength of invoice no. mentioned against 'Bill No.', whereas the details of Bill No. is not mentioned in the said "ESTIMATE" are pertaining to their sales of digital wall tiles without issuance of invoice. The difference amount so arrived against such transaction mentioned against "Cash Amt." reflected in the "ESTIMATE" is the differential amount which they had recovered from their buyers towards unaccounted sales proceeds in respect of their sale of digital wall tiles by way of under grading/invoicing and/or without invoice to their buyers/customers."*

7.2.2 It is on record that based on the above facts, the officers prepared Annexure-B from the details available in the aforesaid "ESTIMATES" which comprised total differential sales amount of Rs. 3,47,18,203/- as mentioned against the details of "Cash Amt." containing details of digital wall tiles manufactured and sold their different grades of digital wall tiles by way of under grading/invoicing and/or without issuance of invoices to their buyers/customers during the period from April-2014 to March-2016. Appellant No. 2 also deposed during the course of Panchnama that they had received the differential amount as reflected against "Cash Amt." in cash in addition to the billed/invoiced amount as reflected against "Bill Amt." as mentioned in the said "ESTIMATES". Therefore, the investigation was left with no option but to demand Central Excise duty based on value recovered by Appellant No. 1 over and above invoice value keeping aside the number of boxes cleared by Appellant No. 1 which they have not mentioned anywhere. Further, demand of Central Excise duty based on excess value recovered by Appellant No.1 does not mean that the Department has assessed the goods under Section 4 of Act but has only demanded duty as value of the goods was available. Therefore, the arguments put forth by Appellant No. 1 are without proper application of mind and without going

into the facts properly narrated in Show Cause Notices as well as the impugned order and therefore, the same is not tenable.

7.3 The next argument made by the Appellant No. 1 is of cross examination of witnesses made by them was denied by the adjudicating authority which is not proper and submitted that the documents supplied and relied upon by the department suggested that they do not reflect the allegations contained in the Show Cause Notice. They also argued that the statement recorded during the course of investigation cannot be relied upon unless it passes through test of Section 9D of the Act and for this they relied upon various case laws in support of their argument.

7.3.1 I find that vide reply dated 20.03.2017 to Show Cause Notice dated 30.12.2015, Appellant No. 1 made request for cross examination of the respective witnesses but they have not given name of witnesses to be cross examined and for what reason they actually need to be cross examined. It is on record that Appellant no. 2 is the Director of Appellant no. 1 and Appellant no. 3, 4 and 5 are the buyers of Appellant no. 1. It is also on record that none of the Appellants retracted their statement or challenged the validity of statements recorded by the Central Excise officers.

7.4 I also find that Appellants remained silent on vital evidences available in the case and use of 'Estimate(s)' to maintain records of actual transactions, outstanding payment details, productions and generation of invoices and hence I find that records pertaining to production, clearance, transportation, payments and purchase of raw material on cash basis for illicit removal of excisable goods corroborated to establish clandestine manufacture of finished products and clearance thereof. Appellant No.2 in their various statements has accepted the facts of clandestine removal and also narrated the modus operandi adopted for clandestine removal of the excisable goods by the Appellant No. 1.

7.5 The statements of Appellant No. 2 corroborated by the statements of Appellant No. 3, 4 and 5 with incriminating documents viz. 'Estimate(s)' with actual invoices clearly establish the clandestine removal made by the Appellant No. 1. I also find that various statements recorded during investigation establish allegation made in the Show Cause Notice and proved in the impugned order. The details of production, dispatch and

transactions containing in the incriminating documents viz. 'Estimate(s)' cannot be dictated by any person in an imaginary way. Therefore, I am of the considered view that the facts deposed by Appellant No. 2 in their statements have to be granted due evidentiary value. Therefore, the arguments made by Appellant No. 1 are not genuine at all and are bald submissions to contest the duty liability only. The confessional statements along with corroborative facts available in the case are credible, voluntary and hence, admissible as has been held in the below cases:

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

*"7. Having heard learned counsel for the assessee-Appellant at length we are of the considered view that the instant appeal is devoid of any 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 offered by proprietor of the assessee-Appellant. Even the learned counsel has not been able to point out anything from the record that the alleged labourers were ever produced for examination in support of the retracted statement. The case of the Revenue is well supported that there was excess of 31.331 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 gray market and the same was not accounted for. Had there been no detection, the finished goods would have been certainly 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 admission".*

(b) *M/s. Surei Engg. Works V/s CCE, New Delhi- 2004 (167) ELT 195 (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 extracted from him under coercion, duress, threat, etc. This being the position in law, in my view, the admission made by Shri Aaloke Surie, the proprietor of the Appellant's firm which he never retracted by alleging to have been taken out from him, by beating, coercion, provided substantial piece of evidence for proving the allegations against him, as contained, in the SCN. He even deposited the duty amount without any protest. Therefore, the non-preparation of the Panchnama and joining of the independent witnesses, under these circumstances, has got no bearing on the merit of the case."*

7.6 I am 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 on the basis of 'Estimate(s)' cannot be made applicable in light of the positive evidences available in the case as discussed in the findings of the impugned order.

7.7 I am also of the view that once there is existence of ingredients substantiating manipulation and deception on the part of Appellant No. 1, then submissions of those would not vitiate the entire 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), (ii) D. Bhoormull reported as 1983 (13) E.L.T. 1631 (S.C.), (iii) Shah Guman Mal reported as 1983 (13) E.L.T. 1546 (S.C.).

7.8 Hon'ble CESTAT in the case of M/s. Surya Cotspin Ltd reported as 2015 (328) 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 conduit 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 when 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 inferior at all. That directly brought out nexus of the respondent to the evasion committed. When the respondent failed to rebut on other evidence adduced by investigation, those equally became vital to appreciate the case of Revenue.*

*18. There is no difference to the proposition in Apex Court decisions cited by respondents. But the probative value of other evidences could not*

be ruled out by them. That leads to the conclusion that those were not stranger to the case but are intimately attached and speak for themselves. Therefore, the respondent fails to get any benefit out of those Judgments. When the document examiner found that the signature contained in the photocopy was of the directors, issuance of such invoices by the respondent manufacturer cannot be ruled out. Accordingly, stand of the respondent that photocopies are inadmissible in evidence in the present case fails to sustain.

19. For the clear case of evasion based by cogent and credible evidence came to record, dealing with the other citations made by respondents is considered to be mere academic exercise. It may be stated that fruits of a forbidden tree is always forbidden.”

**(Emphasis supplied)**

7.9 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:-

“10.1 Recovery of the loose sheets and pencil written ledger from the premises of the Appellant in the course of search proved the entries therein as representative of the clandestinely removed goods which were well within the knowledge of the Appellant. Active involvement of Appellant in that regard came to record since those materials were in the custody of the Appellant. It is common sense that the materials having utility to the possessor thereof are only possessed by him. He proves ownership thereof and is answerable to the contents therein. Entries on such incriminating materials demonstrated clandestine clearance of 562.130 MT of Sponge Iron and 887.560 MT of such goods respectively well explained by Appellant. That also proved clandestine removal of 81.010 MT of Dolochar by the Appellant. Such removals were further proved from the records seized from the transporters M/s. Purwanchal Road Carriers and M/s. Giriraj Roadlines. The materials recovered from transporters brought out the evidence of clandestine removal of 69.180 MT of Sponge Iron and 55.855 MT of such goods respectively. Those clearances were not substantiated by Excise invoices. When certain entries in the pencil handwritten ledger matched with the Central Excise invoices and other entries did not match, the unmatched entries, became testimony of clandestine removals not supported by invoices. Accordingly, such clearances became subject-matter of allegation in respect of removal of 887.560 MT of Sponge Iron without payment of Excise duty. Similarly, the loose sheets when evaluated, that proved removal of excisable goods without payment of duty to the extent of aforesaid quantity of goods.

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

10.3 Added to the above, the director admitted clandestine removal of the goods not supported by Excise invoices. That resulted in loss of



revenue. He therefore, admitted to make payment of the duty evaded without controverting the Revenue implication of the entries in pencil handwritten ledger and chits recovered from possession of Appellant during search. Entire pleading of the Appellant therefore, failed to sustain when mala fide of the Appellant came to record. Clandestine removal was well within the knowledge of the shift supervisors, accountant, Director, transporters and commission agent. Each other's evidence corroborated all of them and established unaccounted goods cleared without payment of duty. The most lively evidence of Kailash Agarwal brought the Appellant-company to the root of allegation. All of them established inextricable link of evasion. Shri Agarwal by his evidence attached all the persons involved in the chain of clandestine clearance without their detachment.

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

10.5 It is not only one evidence, but multiple echoed evidence demonstrated oblique motive of the Appellant and proved its mala fide. Therefore, Appellant fails on all counts. Revenue's investigating was successful and its suffering was established.

(Emphasis supplied)

7.10 I further find that the Hon'ble CESTAT in the case of M/s. Praveen Kumar & Co reported as 2015(328) ELT 220 (Tri-Del) has held as under:-

"23. Voluntary confessional statement which is retracted after two years without any basis, has no legs to stand. No new facts have come on record to justify retraction short levy was paid consequent upon confession not once but twice. Further confessional statement rendered by Shri Praveen Kumar was also satisfied by Shri Rajender Kumar authorised signatory. Contentions that resumed records were only referring to pouches and lime tubes and not to filled pouches of tobacco is clearly afterthought as pointing out to the fact that seized record are having reference to the pouches, etc. has no force as those facts were on record and were not challenged and actually admitted. Also duties on evaded tobacco were paid in two instalment (2nd instalment being after a gap of four months). Once evasion is accepted and documents are confronted manifesting fraudulent intentions to defraud, there is no force in learned Member (Judicial)'s contention that there were no investigations relating to procurement of raw materials and manufacture of huge quantity of final goods and transportation of goods. I feel once an evasion is clearly admitted and these activities are undertaken in the darkness of night, no evader shall leave proof of these activities. Once fraudulent intent to evade is manifested and later confessed, proving such evasion by other activities which are not recorded, will be giving a bonus to the evader. As per Supreme Court's judgment in D. Bhoormull - 1983 (13) E.L.T. 1546 (S.C.) case, Department is not required to prove its case with mathematical precision, but what is required is the establishment of such a degree of probability that a prudent man may on its basis believe in the existence of facts in the issue."

7.11 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 in his statements. It is not a case that a single statement has been recorded and relied upon but various statements of Appellant No. 2, 3, 4 and 5 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 of 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 03/04.04.2016 recorded at the time of search. 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 413 (Bom) wherein it has been held that where 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 Ramdas 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 11.13 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. Shaikh Mushtaq Gulab 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 the fact is not disputed, cross-examination of the party is not necessary. The Hon'ble Apex Court in the case of Kanungo Company - 1983 (13) E.L.T. 1486 (S.C.) and the Hon'ble High Court of Andhra Pradesh in the case of Shalini Steels Pvt. Ltd. [supra] have held that there is no absolute right for cross examination and : if sufficient corroborative evidences exist,*

*cross-examination of the deponent of the statement is not necessary. In view of the above we hold that the denial of cross-examination of Shri Thorve 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, the statements recorded were not retracted or disputed. 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 cross-examination of witnesses caused any prejudice to the Appellant?"*

*We are not inclined to accept this submission at all. In these appeals, there was no question of cross-examination, and therefore, denial of 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."*

7.12 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. Therefore, for denial of opportunity of the Cross Examination, this case is fit for the same. I find that the lower authority has not find it fit to accord the opportunity of cross examination to the Appellant no. 1. While denying the request of cross examination made by the Appellant No. 1, the adjudicating authority has discussed the issue at length and relied upon the various judicial case-laws as is seen from para 9 to 9.10 of the impugned order. In this regard, I find that it is prerogative of the adjudicating authority to grant or decline this opportunity, depending of the exigencies of the facts and circumstance of the case. Here, since this being a case of clandestine removal, ably supported by the host of oral and documentary evidences, if the lower authority has found it fit to deny this opportunity, I find that interest of the Appellant no. 1 does not seems be compromised. Further, the most crucial fact here is that none of the deponents have retracted their statement. Therefore, the provisions of Section 9D of the Act is not relevant in this case as the same dealt with prosecution for an offence case. Therefore, I do not see any infirmity in the decision of the lower authority in denying the cross examination to the Appellants, especially when not specific reason for seeking cross examination has been set out by the Appellants.

8. The Appellant No. 1 further argued that allegation of clandestine removal cannot be sustained only on the basis of the statement recorded by the Central Excise officers; that the base of the Show Cause Notice is nothing but the so called documents impounded during the course of investigation and referred in Annexures to the Show Cause Notice; that without any independent corroborative evidence, the clandestine removal cannot be alleged and they rely upon various decisions of higher appellate forum.

8.1 I find that department has carried out detailed investigation. During the course of search on 03/04.04.2016, a physical shortage of 1032 boxes was noticed with compared to stock mentioned in the Daily Stock Account. The data of illicit removal was kept the form of 'Estimate(s)' which are nothing but documentary evidences supporting clandestine removal made by the Appellant No. 1. Further Appellant No. 2 in his statement dated 04.04.2016 and 24.09.2016 accepted the act of clandestine removal and also narrated the modus operandi adopted by them in support of illicit removal of excisable goods by the Appellant No. 1. The Appellant No.2 has deposed and script out the modus operandi adopted by them to keep unaccounted sales without bill on cash payment basis through 'Estimate(s)'. These documentary evidences vis-à-vis confessionary statements made by the Appellant No. 2, 3, 4 and 5 supports the claim of clandestine removal made by the Appellant No. 1 without bill and without payment of Central Excise duty by receiving the payment in cash or through Angadiyas from their buyers. Therefore, I hold that the clandestine clearances effected by Appellant No. 1 is proved and arguments advanced by Appellant No. 1 are devoid of any merits.

8.2 With regard to contention of Appellant No. 1 that unless the correlation of production and clearance with the raw material purchased is arrived at, the allegation of clandestine production and clearance cannot be sustained and they relied upon plethora of judgments. I find that the main raw material for production of tiles is clay which is freely available in the market. Therefore, the arguments of the Appellant No. 1 are devoid of any merits.

8.3 The Appellant further argued that the 'Estimate' does not represent actual clearance value and argued that for 1 quantity of goods,

the value has been show as Rs. 1,40,000/-. I find that it proves beyond doubt that the Appellant has also tried to suppress the actual quantity not only from the department but also from their employee. The actual quantity for amount of Rs. 1,40,000/- is best known to the Appellant No. 1 and 2 only and n one, except Appellant No. 1, 2 and the buyer of the goods, can guess what this '1' denotes to. On the contrary this modus operandi of mentioning 1 quantity in 'Estimate' prepared and maintained by them proves the wrong doing by the Appellant No. 1 with the help of all other Appellants. It is well settled that no one will pay Rs. 1,40,000/- for one box of the goods, therefore, the quantity mentioned by the Appellant No. 1 could be more than that and the same has been mentioned in code manner so that no one can know it. It is pertinent to note here that the final duty calculation has been made as per Annexure-B to Show Cause Notice which covers the data of Annexure-S also. Therefore, the Appellant No. 2 has deposed not only the cash sales of clandestinely removed goods as per Annexure-S but also its accepted its correctness and confirmed that the Appellant No. 1 cleared the goods of Rs. 3,47,18,203/-clandestinely by under valuing/ under invoicing as well as without bill and also accepted the Central Excise duty liability of Rs. 43,19,037/-. Thus, I hold that the Appellant has made wrong argument without going into the facts of the case, therefore, the same is required to be discarded and I do accordingly.

8.4 On going through the grounds of appeal as well as additional written submission, I find that the Appellant No. 1 has not disputed the act of their wrong doing i.e. goods cleared clandestinely by them. In view of above, once duty demanded is confirmed involving suppression of material facts from the department with an intent to evade payment of Central Excise duty in terms of goods clandestinely cleared by the Appellant No. 1, the demand of duty as well as extended period has rightly confirmed alongwith interest and penalty on Appellant No. 1 and accordingly, I uphold the impugned order.

#### APPELLANT NO. 2:

9. With regard to penalty imposed upon the Appellant No. 2 being Director of Appellant No. 1, under Rule 26 of the Rules, they have categorically accepted their wrong doings, elaborated the modus operandi at length by confirming the facts from documents i.e. 'Estimate(s)' seized

during the course of Panchnama dated 03/04.04.2016. He also deposed that they have cleared excisable goods to various customers with invoice(s)/ Bill(s) as well as on the basis of the 'Estimate(s)' prepared simultaneously; that for such clearance of finished goods, they used to issue bill(s)/invoice(s) to their customers by mentioning less sales value/ less rate/ less quantity/ under grading/ suppressed size etc. and simultaneously issue the 'Estimate(s)' to their customers by mentioning actual grade, actual rate, actual size and actual amount of clearance for the period from April-2014 to March-2016; that they have also mentioned the invoice(s)/bill(s) amount and actual amount in aforesaid 'Estimate(s)' and used to receive sales process/ payment in cash or through angadiya against excisable goods cleared by them without bill(s)/ invoice(s) and they used to receive payment through cheque/RTGS from their customers against the value mentioned in invoice(s)/bill(s) and used to receive differential amount in cash or through angadiya from their customers. Therefore, penalty imposed upon Appellant No. 2 by the lower adjudicating authority is correct and needs no interference, thus, I uphold the same.

*[Handwritten signature]*

APPELLANT NO. 3 TO 5:


9.1 Similarly, Appellant No. 3, 4 & 5 in their respective statements have categorically deposed the purchase of goods without bill on cash payment based on the 'Estimate(s)' in their name and for which the bill(s)/ invoice(s) were not found. They also deposed that for purchase of goods, the Appellant No. 1 issued bill(s)/ invoice(s) mentioning suppressed size/ less rate/ less value/ less quantity etc. and Appellant No. 1 had also issued 'Estimate(s)' simultaneously on the same date by mentioning actual grade, size, rate and amount payable by them. They used to pay the amount in cash to the Appellant No. 1 against goods purchased by them without cover of bill(s)/ invoice(s) and they used to pay through cheque/RTGS against the value mentioned in invoice(s)/bill(s) and used to pay differential amount between invoice(s)/bill(s) and 'Estimate(s)' in cash. They also accepted the correctness Annexure-A1, A2 and A3 prepared on the basis of entries showing their name in 'Estimate(s)', respectively. Therefore, the lower adjudicating authority has rightly imposed penalty on Appellant No. 4 & 5 and accordingly, I uphold the same.

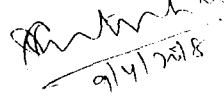
10. In view of above, I uphold the impugned order and reject the appeals

filed by all five Appellants.

११. अपीलकर्ताओ द्वारा दर्ज की गई अपीलो का निपटारा उपरोक्त तरीके से किया जाता है।

11. The appeals filed by all five Appellants stand disposed off in above terms.

सत्यापित,  
  
 अर. एस. बोरीचा  
 अधीक्षक (अपील्स)

  
 9/11/2018  
 (कुमार संतोष)  
 आयुक्त (अपील्स)

By RPAD  
 To

1.	M/s. Sunlex Ceramic Pvt. Ltd., Survey No. 826/1, N.H. 8-A, Lakhdirpur Road, Morbi-363 642.	मेसर्स सनलेक्स सिरमीक प्राइवेट लिमिटेड, सर्वे नंबर ८२६/१, नेशनल हाइवे ८ ए, लखधीरपुर रोड, मोरबी-३६३ ६४२.
2.	Shri Hiteshbhai Chhaganbhai Detroja, Director of M/s. Sunlex Ceramic Pvt. Ltd., Survey No. 826/1, N.H. 8-A, Lakhdirpur Road, Morbi-363 642.	श्री हितेशभाई छगनभाई देत्रोजा, डाइरेक्टर, मेसर्स सनलेक्स सिरमीक प्राइवेट लिमिटेड, सर्वे नंबर ८२६/१, नेशनल हाइवे ८ ए, लखधीरपुर रोड, मोरबी-३६३ ६४२.
3	Shri Shailesh Savsani, Proprietor of M/s. Priya Tiles, Sant Kabeer Road, Gendi Gate, Vadodara.	श्री शैलेशभाई सवसानी, मालिक, मेसर्स प्रिया टाइल्स, संत कबीर रोड, गेंडी दरवाजा, वडोदरा.
4	Shri Mansukhbhai Detroja, Proprietor of M/s. Priya Sanitary, Alfa Society, Opp.: Unnati Vidyalaya, Link Road, Bharuch.	श्री मनसुखभाई देत्रोजा, मालिक, मेसर्स प्रिया सैनिटरी, आल्फा सोसाइटी, उन्नति विद्यालय के सामने, लिंक रोड, भरुच.
5	Shri Manharbhai Gadhiya, Partner of M/s. Yash Enterprise, Real Plaza, N. H. 8-A, Morbi.	श्री मनहरभाई गढ़िया, भागीदार, मेसर्स यश एंटरप्राइज़, रियल प्लाज़ा, नेशनल हाइवे ८-ए, मोरबी.

**Copy for information and necessary action to:**

- 1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
- 2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
- 3) The Additional Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot
- 4) The Assistant Commissioner, GST & Central Excise Division, Morbi.
- 5) Guard File.
- 6) F No. V2/293/RAJ/2017 (7) F. No. V2/294/RAJ/2017 (8) F. No. V2/295/RAJ/2017 (9) V2/296/RAJ/2017

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