



आयुक्त (अपील्स) का कार्यालय, नक्सु एवं सेना कर और केन्द्रीय उत्पाद शुल्क:-
 (NO) THE COMMISSIONER (APPEALS), GST & CENTRAL EXCISE,



ऑफिस ब्ला. सी 20 वी एम / 17 फ्लोर, एन.एस.सी.
 राजकोट रोड, राजकोट - 360 006
 राजकोट / Rajkot - 360 001

Tax No. 2381 247255344, 142 Email: rajappodasaket@nmt.com

संश्लेषण टाक ए. डी. द्वारा :-

क्र.	संश्लेषण क्रमांक Appellate No.	आयुक्त का संश्लेषण क्रमांक Appellate No.	दिनांक Date
क	1335101567147311	1051009000016-17	10.03.2018

अपील अटोमैट संख्या (Auto in Appeal No.):

RAJ-EXCLS-000-APP-032-TCI-035-2018-19

प्राप्त का दिनांक: 18.04.2018 जारी करने की तिथि: 29.04.2018
 Date of Order Date of Issue

कुमार संतोष आयुक्त (अपील्स), राजकोट द्वारा पारित।
 Passed by Shri Kumar Santosh, Commissioner (Appeals), Rajkot

क. अपीलकर्ता का पता (आयुक्त के कार्यालय के लिए) :-
 Name of the appellant (For the Commissioner's Office) :-

श्री. बी.एस. कंसुला ए. लॉ, नार्वेय प्रो. 226752, नार्वेय हाइवे 8 व 12, डी.डी. रोड, राजकोट, गुजरात - 362 042

अपीलकर्ता & पक्षियों का नाम एवं पता (Name & Address of the Appellants & Respondents) :-

1. Shri. B.S. Kansula E. Law, Narway Pro. 226752, Narway Highway 8 & 12, D.D. Road, Rajkot, Gujarat - 362 042
2. Shri. Dhanraj B. Kothaga, Director, M/s. Beate Concrete E. Ltd.
3. Shri. Jayendra C. Desaiya, Prop. M/s. Narway Marketing, Narway
4. Shri. Dharmendra R. Bhalaga, Prop. M/s. D.K. Enterprises, Narway

आयुक्त (अपील्स) द्वारा जारी की गई है। (Issued by the Commissioner (Appeals))

101. अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

102. अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

103. अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

104. अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

105. अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

अपीलकर्ता द्वारा जारी की गई है। (Issued by the appellant) :-
 The appellant has issued the following order :-

ORDERs IN APPEAL

The appeals detailed below have been filed by the Appellants (below after referred to as 'Appellant No.1 to Appellant No.4) against Order-in-Original No. 53/ ADC/ RKO/ 2016-17 dated 21.03.2017 (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Centra. Excise & Service Tax, Rajkot (hereinafter referred to as 'the lower adjudicating authority').-

Sr. No.	Appeal No.	Appellant No.	Name of the Appellant
1	V20253/RAJ/2017	Appellant No.1	M/s. Benito Ceramics P. Ltd, Survey No. B56/F-2, S-A, National Highway, Lakhthour Road, AF-GHJNTU MORBI 363847
2	V20254/RAJ/2017	Appellant No.2	Shri Kamlesh D Kengga, Director of Appellant No.1
3	V20255/RAJ/2017	Appellant No.3	Shri Jayendra Chandulal Kalaria, Proprietor, M/s Raciney Marketing Shakti Chamber 1, Opp. Adarsh Hotel, S-1 National Highway, Morbi. Shri Bhaveshbhai R. Rankja, Partner, M/s R. K. Enterprise Parwanath Chamber, S A National Highway, Morbi.
4	V20256/RAJ/2017	Appellant No.4	

2. Brief facts of the case are that search was carried out by the Officers of Rajkot Centra Excise Commissionerate under Panchnama Proceedings dated 19/03/2015 and several incriminating documents including 'Order Status' documents Dispatch

slips, production register, etc. were recorded and shortage of finished goods were recorded under Panchnama Proceedings. Statements of Appellant No 2 and buyers of their finished goods were recorded which revealed that Appellant No 1 was engaged in clandestine manufacture and removal of "Wall Paper" in the guise of "ORDER STATUS" forms. Show Cause Notice dated 30.03.2010 was served to Appellant No 1 demanding Central Excise duty of Rs.1,75,83,016/- under Section 11A and related Section 11AA of the Central Excise Act, 1944 (hereinafter referred to as 'the Act') and to Appellant No.2, Appellant No.3 and Appellant No.4 proposing imposition of Penalty under Rule 28 of Central Excise Rules, 2002 (hereinafter referred to as 'the Rules'). The SCN was adjudicated by the lower adjudicating authority vide impugned order confirming demand of Rs. 1,75,83,016/- under Section 11A of the Act along with interest under Section 11 of the Act, imposing penalty of Rs.1,75,83,016/- upon Appellant No 1 under Section 11AC of the Act read with Rule 25 of the Rules, imposed penalty of Rs.44,00,000/- upon Appellant No.2, Rs.1,50,000/- upon Appellant No.3 and Rs.66,000/- upon Appellant No.4 under Rule 26 of the Rules, and approximately Rs.80,00,000/- deposited by Appellant No 1 against duty confirmed above.

2/2/2015

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

Appellant No.1

(i) Demand confirmed in the impugned order and affirmation of all allegations are merely based on alleged confessions recorded in statements of its director, employees and two customers: none with documents seized during search on 15/20/03/2015. Appellant had requested for cross examination of these persons whose statements were relied upon in the case. It had also requested to permit cross

examination of two panch witnesses as it was noticed that both of them were in fact drivers of two vehicles brought by the officers at the time of search of appellant's premises, hence not independent witnesses. Adjudicating authority has not allowed their request of cross examination even though request was supported by provisions of Section 8D of the Act and Section 30 of the Evidence Act and judicial citations.

(ii) Appellant pointed out that during the search operation immediately on entering into the premises, the officers had directed to close all CCTVs of the unit at the time of search, Cell phones of the Directors and the employees were forced to confess clandestine manufacture and clearances on the basis of Order Status forms; that physical stock taking of the finished goods was not done and shortage of 05,010 boxes of varities of premium grade were considered and shortage of goods has been alleged without undertaking physical verification of the stock.

(iii) Panchas were called after completion of search and were directed to put their signatures on said documents; that both Panchas were in fact drivers of two vehicles brought by the officers and not panch witnesses from the local area; that during the course of search operation, both these witnesses (drivers) were either sitting in the vehicles brought by the team of officers or were roosting in the premises of appellant that signature of both witnesses in 5 pages and signature of one witness in two pages were missing; that Panchas were dillete and it is not possible to believe that what has been recorded in the panchnama was witnessed by said witnesses and is recorded as per their version though mentioned in the Panchnama; that adjudicating authority was failed to judge that entire search operation was vitiated and consequently no adverse inference can be drawn from said panchnama unless its truthfulness was proved by

cross examination of other witnesses.

(iv) Statements dated on 10.05.2015 were recorded before completion of search on 20.05.2015 and no statement given was allowed to read contents typed in their statements but were forced to sign it. That Appellant No.2 was unlawfully coerced to admit evasion of duty and to present post dated cheques towards central excise duty alleged to have been evaded by appellant and was forced to put his signature on statements of the employees without reading the same. Shri Kamleshilini G. Koringa, and Bharat B. Rajkotiya, Directors in the Affidavits dated 28.08.2015 filed by them have affirmed these facts, that Shri Hardik K. Jagodara, Billing clerk, Shri Jayant D. Odakya, Leading Supervisor and Shri Anish N. Marvaniya, Marketing Manager had also stated in their respective Affidavits dated 09.07.2015 that they were tortured and forced by the officers to sign statements without allowing to read the same, but copies of the said Affidavits were submitted along with reply to the notice.

(Signature)

(v) Appellant No.2 was called out and summoned Central Excise office on 07.03.2015 who was accompanied by other Director, Shri Bharabhai Rajkotiya, and they were verbally directed to admit the offence and deposit post dated cheques in absence of which they would be arrested that succumbing to such undue and illegal pressure, they had handed over 25 post dated cheques of collective sum of Rs.98,00,000/- to the officers on 27.08.2015, that since the said cheques were not voluntarily tendered by appellant or its Director they had not issued any forwarding letter and these facts were affirmed in Affidavits filed by Appellant No.2 and Shri Bharat B. Rajkotiya, Director, that Appellant No.2 and Shri Bharabhai Rajkotiya, accompanied directors were directed to put his dated signature on proposed statements dated 27.03.2015 after obtaining the statement that this facts can be verified that name of Shri Bharabhai was typed down

before the signing of Appellant No 2., that first two statements of Appellant No2 were typed in Gujarati and subsequent statement were deliberately recorded in English when he was unaware of the contents typed in English as he is graduated in Gujarati that it has been erroneously recorded in the statement dated 19.11.2015 that Shri Navinchandra B. Kothari, who had accompanied Shri Kamleshbhai, had explained contents of the statement in Gujarati. Similarly, it has been erroneously recorded in his statements dated 25.04.2016 and 24.09.2015 that contents of the statements were explained in Gujarati to Shri Kamleshbhai by Shri Pankaj M. Kavar. In fact, these persons were also not allowed to read the said statements or its enclosures but were allowed to copy few lines from draft copy prepared by the officers, as they had accompanied him to control excise office that act of payments by Appellant was only due to threat of arrest coming over the directors still the notice was issued on 30.09.2016.

(vi) Statements dated 20.11.2015 of two small Commission Agents engaged in trading of ceramic tiles viz. Shri Bhavesh R. Rana - Proprietor of M/s. R.K. Enterprises Morbi and Shri Jaynodrabhai C. Kalaniya - Proprietor of M/s. Ravishy Marketing, Mumbai reveal that both have given verbatim the same answers except change in their personal details and figures typed in last answer and they were neither allowed to read the said statements nor were shown physical copy of any of the DS forms referred in their statements and hence statements of both these customers of appellant are dubious and cannot be relied upon to sustain allegation of huge evasion of duty especially where no statements of any other customers out of 300 customers.

(vii) Letter dated 09.05.2016 was got printed by the officers in the office by obtaining blank letter head from the directors that no copies of Order Status Forms and earlier statements were available with the

Appellant and . was not possible for Appellant to give such outright admission that too with calculation of Central Excise duty payable by it with exact number of boxes, differential stated value and Central Excise Duty, that investigator has not prepared any annexure to the show cause notice for computing duty of Rs 1,75,03,016/- on 10,57,215 Boxes valued at Rs 14,14,70,378/- but taken the figures mentioned in the said letter for the purpose of calculation/demand etc. of duty in the impugned show cause notice; that printout of one letter on three pages in Gujarati with the same facts like other statements in Gujarati and also number of pages as Annexure in the said letter, that no work sheet/ Annexure similar to what is produced in the is letter were produced earlier as against what is claimed in the said letter dated 09.05.2016 establishing that signatures were obtained; that entire investigation including documents, letter etc. said to have been produced by one of the directors are fabricated by the officers and prejudicial; that Month wise Duty Work Sheet prepared by the officer with statement dated 20.08.2015 and signatures of Appellant No.2 were taken in the facts and circumstances that there is no mention in the statement about preparation of work sheet, and obtaining signature on it, that worksheet produced with the said letter dated 09.05.2016 is also not exactly same especially entry of August, 2016 in the worksheet prepared with statement dated 20.08.2015 that director cannot go to file affidavit for each and every event that happened during investigation and adjudicating authority has erred in holding that no affidavit was filed in respect of said letter dated 09.05.2016.

(viii) Appellant had requested for cross examination of eight persons in terms of Section 8D (2) of the Act ibid under letter dated 22.02.2017 that request was referred vide letter dated 04.05.2017 and subsequently, it had added names of two panel witnesses for cross examination that adjudicating authority is first of all required to summon the person and examine him before admitting his statement

time of quality test in every tile manufacturing plant and there is no reason to allege that appellant is an exception. That stock of refined grade wall tiles at the time of search is not in dispute as much as it has not been alleged that entire stock lying in the premises was of premium grade. That it cannot be presumed and alleged on the basis of oral evidence that invoices were fabricated to lower grades of finished goods to evade payment of central excise duty and without physical stock verification it cannot be held that shortage of wall tiles was of premium grade, that these OS forms were maintained just for internal purpose and the same cannot be compared with quantity and quality referred in tax invoices and it can not be said that quantity shown in OS forms were actually cleared by it in absence of any supporting documentary evidence.

(x) Statement of Loading Supervisor recorded on 20.08.2015 is not reliable in the reason that certain unlawful admissions were obtained from him under duress and coercion by the officers and he was never allowed to go through contents typed thereon. He has also admitted this fact in oath in his Affidavit as discussed supra; that it is evident from his statement that he had joined stock and before few days of the search in August, 2015 that he cannot verify authenticity of OS forms of earlier period; that Loading Supervisor has nowhere deposed in his statement that tiles loaded under his supervision were of premium grade only, that it is simply stated that he arranged loading of the tiles mentioned in the OS forms and that the same were manufactured by appellant; that statement of the said Loading Supervisor cannot be admitted as evidence since the procedure mandated under Section 3D of the Central Excise Act, 1944 was not followed and his cross examination was disallowed; that confirmation of contents of by Shri Hardik Jagodara, Billing clerk and Annexure I No 2 was not real good as much as they had also filed affidavits contesting that their respective statements were recorded under threat and coercion on 20.08.2015.

(xi) Appellant submitted that when they receive order on telephone, such order status forms are prepared and simultaneously check about availability of truck for the particular area, truck driver name, mobile number and write down on such OS; that when the buyer arrange to deposit money in their bank account, then and then goods were loaded in the truck as per the description mentioned in such OS and prepared Central Excise Invoice for such OS form. If the buyer don't arrange payment, they never load the goods in the trucks and such orders are cancelled. Buyers inquire about the rate and availability of goods of particular design, colour etc and order for tentative quantity. Since, in the area of Morbi and Wankaner more than 500 units approximately are engaged in manufacture of various tiles, buyers inquire from number of units and place order to the manufacturer who offer most competitive rates. Therefore such OS cannot be considered as proof of clearance in absence of other corroborative evidence like actual transportation of finished goods, receipt of payment for sale of finished goods, purchase of raw materials, payment for raw materials, transportation of raw materials, actual manufacture, use of electricity/gas etc.

(10) 15/11/17

(xii) Department has never verified about procurement of raw materials, power consumption, use of manpower, transportation of raw materials, payment to raw material suppliers and clearance of such goods by them. The department has presumed that figures mentioned in the OS form and the said Annexure attached with letter dated 09.05.2016 were manufactured and cleared by appellant; that Appellant does not have capacity to manufacture that much goods in its manufacturing plant and department has never verified about the installed capacity, required machineries etc. Similarly, department has never verified about actual clearance of the goods to the persons, receipt of payment etc for the goods shown in the said Annexure.

attached to the letter dated 09.05.2016 that production register withdrawn during the period of demand but only for short period and therefore, no adverse inference can be drawn from it for entire period covered under the notice.

(xii) Appellant contested Para 35.16 of the impugned order wherein it is held that actual production during the period from 01.07.2015 to 19.08.2015 was 3,30,157 boxes and only 1,24,617 boxes were reported in DSA. Appellant submitted that average comes to reporting of 37% of production and remaining 63% of production was suppressed by appellant which clearly shows the quantum of production suppressed by appellant in preceding period and that actual production clearance of excisable goods cannot be gauged on the basis of specifications or comparison of figures of alleged excess production covering period of merely 50 days. In absence of credible evidence that department has not verified capacity to manufacture, procurement of required raw materials, use of manpower, use of electricity, payment to raw material suppliers, receipt of sale proceeds etc. that it is settled position of law that without corroborative evidence, demand cannot be raised on the basis of private records and relied upon following decisions in support of their claim.

- Bulckhara Steels P Ltd - 2011 (273) E.L.T. 140 (Tri. - Ahmed.)
- Indo Green Textile P Ltd - 2007 (212) E.L.T. 343 (Tri. - Mumbai)
- K. Harinath Gupta - 1994(71) E.L.T. 980(T-RR)
- Krishna & Co. - 1998(97) E.L.T. 71(Tribunal)
- Ganga Rubber Ind. - 1989(39) E.L.T. 650, 655(T-NRR)
- Gargreet Rubber Ind. - 1996(52) T.L.T. 247(Tribunal)
- Kashmir Vanaspati (P) Ltd. - 1989(39) E.L.T. 653(T)
- Ashwin Vanaspati Ind P. Ltd. - 1992(59) E.L.T. 175(Tribunal)
- K. G. Electronics- 1992(60) E.L.T.121 (T-RR)

(xiv) Appellant also argued that going by the alleged clandestine clearances in the show cause notice, the production of 21,72,359

(recorded quantities of 11,03,308 box alleged purchase clearance of 10,13,050 box) is exceeds production capacity of around 12,00,500 box during the disputed period as per their production capacity of 4000 to 4500 box of wa tiles per day excluding days of closure of the unit; that department has not discharged burden of proof on this count.

(xv) Appellant submitted that only two small local customers in terms of just 0.50% of the total sale to the customers were examined; that Appellant No.2 in his statement dated 20.06.2015 tendered names (i) Mrs. Shree Rushit Marketing, (ii) Mrs. Swami Marketing (iii) Mrs. Koyle Marketing and (iv) Mrs. Madam Tiles- all of Morar; that he was then specifically asked while recording his statement on 10.11.2015 to provide details of their major buyers (last question on page no. 3) wherein he had given details of major buyers as (i) M/s. R.K. Enterprise, (ii) M/s. Radhe Marketing, (iii) Mrs. Gopal Tiles, (iv) Mrs. Aakshata Ceramic (v) M/s. Jyagvat Enterprise, (vi) M/s. Family Quarnics and (vii) M/s. Swami Marketing. However, despite having recorded and recorded details of their 11 customers to whom wa tiles were allegedly sold in clandestine manner, investigation has collaboratively preferred not to examine any of the said customers, except the two, in support of the fallacious allegations made in the notice; that no notice is issued in the said remaining customers for the reason that there is no evidence on record to allege that the said remaining customers had acted abettor in evasion of contra- excise duty. This would also mean that whatever goods were sold to the said remaining customers by it was not removed in any clandestine manner; that out of total 329 invoices issued during the disputed period, investigation has collected evidence about sale of inferior grade of tiles under tax invoice only in respect of 10 such invoices; that even if statements of those two customers are considered to be true for sake of convenience, even in that case ratio of the said statements

cannot be applied across all other customers whose names appear in the reviewed documents viz. OS forms but were not examined during investigation, particularly when they are not issued notice in this case.. that only 72,212 Boxes valued at Rs.1,50,26,580/- alleged to have been sold without invoice to these two customers which very negligible against the total alleged clandestine clearance in the show cause notice; that even if the two statements of the buyers, though not free from doubt for the reasons discussed supra are accepted to be true for the sake of argument, even in that case department can only demand duty in respect of the goods purchased by the said buyers which has been recorded in the BUDs and the same works out to be Rs. 8,50,000/-; that mammoth duty demand cannot be raised only on the basis of statements of just two customers to whom appellant had sold goods only 10.00% to total sales; that investigation could have asked its clerks or the employees to tender names/ addresses of other customers and thereafter recorded their statements, that could have been inquired from drivers about place of delivery of goods by using the truck driver mobile numbers were available on the said OS

(xvi) No evidence is adduced to prove that any of their raw materials i.e. different types of clay, chemicals/ colours,ignite, marble slurry, frit etc. required to manufacture such huge quantity of wall tiles was actually purchased by it without accounting for the same in their accounts against cash payments; that Director's statements dated 20.08.2015 reveals that in answer to question no. 20 on page 6, it was deposed by him that they had purchased some clay without bill that no further investigation was carried out by the investigation.

(xvii) No evidence in support of transportation of the finished goods is produced and no efforts were made by investigation to interrogate any transporter and record his statement to sustain the allegation that the goods were actually removed and transported from the land of M/s.

Benin despite the fact that names of drivers and mobile phone numbers are also written in the OS forms.

(viii) It is not explained as to at what price goods were sold to the customers that Assessable value and sale price cannot be same; that even if assessable value is considered as sale value then also, evidence of huge amount of receipt of cash by is not found by the investigation during the search; that if it's allegation is believed to be true, there has to be at least some positive evidence in the notices to sustain the same particulars when such huge amount in cash transactions is involved; that none of the buyers have adduced any evidence in support of their deposition that different sale proceeds were paid in cash; that nothing on record to suggest that appellant were receiving raw materials against illicit cash payments. Appellant refers and relies upon various decisions amongst other following judgments -

Andhra Metal Works - 1994(29) RCR 549
Joyce Commercial Enterprise - 1994(09) E.L.T. 337(Tribunal)
M.S.S. Foods Products Ltd - 2011 (264) E.L.T. 165 (M.P.)
Tasmi Engineering Works- 2010 (254) E.L.T. 205 (P & II)
Shree Nathjee Industries - 2011 (267) R.L.T. 241 (Tri. - Ahmed.)
Hans Casting Pvt Ltd- 1998(102) E.L.T. 135(TRIBUNAL)
Jay Laminart Ltd 1996(103) E.L.T. 402(Tribunal) honourable
Prabhavati Sahakar Sanst Girini Ids 1990(46) E.L.T. 522(T)
Roxy Enterprise P Ltd- 1992(40) ECR 361(T-NRB)
V.K.Thampy - 1994(69) E.L.T. 300(Tribunal)
Raj Ratan Industries Ltd - 2013 (292) E.L.T. 123 (Tri. - Del.)
Rajeev Tobacco Products Ltd - 2013 (290) R.L.T. 546 (Tri. - Del.)
Hindustan Machines - 2013 (291) E.L.T. 43 (Tri. - Del.)
Ruby Chintlex (P) Ltd- 2006 (204) E.L.T. 607 (Tri. - Chennai)
R.V. Steels P Ltd 2009 (243) R.L.T. 316 (Tri. - Chennai)
Arfa Fibres Pvt.Ltd- 2014 (311) E.L.T 529 (Tri. Ahmed.)
Capta Synthetics Ltd. - 2014 (312) R.L.T 225 (Tri. Ahmed.)

as evidence in the proceedings and then to allow notice cross examination of the said person before him in terms of provisions of Section 50(1) (b); that therefore question of explaining reasons for cause examination is statutorily not warranted; that searches/seizures and arrests in Central Excise matters are required to be made in accordance provisions of Section 15 of the Central Excise Act, 1944; that raiding officer had deliberately picked up two set tax exci panchnas from different localities of Rajkot which is nearly at a distance of 70 kms from its factory premises, that too almost illiterate and were drivers of the private vehicles that panch witnesses were not selected by the officers in accordance with provisions of Section 16 of the Central Excise Act, 1944 and adjudicating authority has without mentioning those facts summarily rejected request for cross examination. Appellant's request for examination of Two persons whose statements were relied upon and includes Two Panchas were required to be allowed; that cross examination of employees Director and two customers whose statements were relied upon in the case was extremely essential before admitting their statements as evidence in the impugned proceedings; that it is settled law that any statement recorded under Section 14 of the Central Excise Act, 1944 can be admitted as evidence only when its authenticity is established under provisions of Section 50(1) of the Act. Appellant relied upon decisions of Honble High Court of Delhi in the case of M/s. J.K. Cigarettes Ltd Reported as 2009 (249) E.L.T. 159 (Del), M/s. Favel International reported as 2016 (332) E.L.T. 416 (Del.), Honble High Court of Punjab & Haryana's decisions in the case of M/s. Jindal Group P Ltd reported as 2016-TIOL-1200-IC-P&H-CX, M/s. Mrs. Anika International reported as 2016-TIOL-1238-HC-P&H-CX, M/s. G-Tech Industries, reported as 2016-TIOL-2779-HC-P&H-CX. Appellant also relied upon following case laws in support of their contentions:-

- M/s F&S International Pvt Ltd - 2014 TIOL-1663-CESTAT-DEL
- Basudras Genc - 2013 (294) E.L.T. 353 (Del)
- M/s Andaman Timber Industries - 2015-TIOL-255-SC-CX

- Rajam Industries (P) Ltd. - 2010 (255) E.L.T. 186 (Mad.)
- Farmanth Iron Ltd - 2010 (269) E.L.T. 496 (All.)
- Jayshree Vyapar Ltd - 2015 (327) E.L.T. 380 (In - Ahmed.)
- Vaseco International Ltd - 2010 (250) E.L.T. 553 (Tr. - Mumbai)
- Neco Extrusion P Ltd - 2009 (240) E.L.T. 497 (Tr. - Ahmed.)
- Sikkah Exports - 2007 (208) E.L.T. 359 (Tr. - Bang.)
- Auro Aluminium P Ltd - 2005 (190) E.L.T. 350 (Tr. - Mumbai)
- Sankar Food Products P Ltd - 2005 (188) E.L.T. 107 (Tr. - De.)
- Trinity Electric Syndicate P Ltd - 2005 (175) E.L.T. 53 (Tr. - Mumbai)
- Sai Krishna Exim (P) Ltd - 2003 (158) E.L.T. 225 (Tr. - Bang.)
- Anantbhai Vasudevtha Patel - 2003 (156) E.L.T. 222 (Tr. - Mumbai)

(ix) Appellant exhibited the pattern of Order Status forms and submitted that it contains tabulated pre-typed columns of design and four different Grade i.e. 'pre', 'Com', 'Raj', and 'Com-I' that department has not verified as to who had prepared such OS Forms and the purpose for preparing it. That when author of such documents is not known no reliance can be placed on such private unauthentic records, that presumption of quantity and quality of tiles shown in OS forms were of premium grade is erroneous and unfounded as much as many of the forms also contain hand written figures of wall tile boxes in last column i.e. 'COM-I' which are matching figures under column 'PRE'; that if these OS forms are believed to be representing true figures of clearance, in that case it can be inferred that quantity shown in many of such forms were of 'COM-I' grade resulting payment of central excise duty on higher assessable value for the goods of inferior grade by Appellant and similar is the case where no tax invoices were found against OS forms, that as regards MRP on right side corner of OS forms was written for ease of reference for the person preparing tax invoices was done with a view of facilitating ongoing process; that it is erroneous to presume that all goods referred in the OS forms/ Dispatch Slips were of premium grade only. Appellant submitted that certain goods are always found to be of second/third etc. quality at the

(xix) There is no suppression etc. on their part and hence extended period cannot be invoked in the present case; that investigation has not alleged anything about suppression etc. but mechanically reproduced the wording of proviso to Section 11A of the Central Excise Act, 1944, that proviso to Section 11A (1) of the Central Excise Act, 1944, cannot be invoked in the present case. Appellant for the above contention rely upon following decisions:-

M/s. Gudrej Foods Ltd - 1993(25) E.L.T. 28, 32(MP)

M/s. Cosmic Dye Chemicals - 1994(75) E.L.T. 721, 723(SC)

M/s. H.M.M. Limited - 1995(75) E.L.T. 497(SC)

(xx) Appellant without admitting anything further submits that the learned Additional Commissioner has held that the goods allegedly cleared in clandestine manner are liable to confiscation under Rule 25 of the Central Excise Rules, 2002, that there is no evidence of clandestine manufacture, clearance etc. and therefore, the same cannot be held liable to confiscation.

सुप्रीम कोर्ट

(xxi) No penalty can be imposed on them under Section 11AC or under Rule 25 of the Central Excise Rules, 2002; that when duty demand itself is denied of records, question of imposing penalty under Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 does not arise in this case; that the duty demand worked out in the impugned notice and contained under the impugned order is artificial and unfounded; that the evidence relied upon is not sustainable in the eyes of law and that there is no other trustworthy corroborative evidence in support of hollow allegations; that penalty imposed on it deserves to be set aside; that they rely upon decision of Hon'ble High Court of Gujarat in the case of M/s

Saurashtra Cement Ltd reported as 2010 (260) E.L.L. 117 (Guj)

Appellant No 2

3) Appellant No 2 submitted that as per Rule 25 of the Rules, it is essential to bring out specific rule played by an individual which made certain goods liable to confiscation under the Anti-rules, that the said individual should aware of the fact that the goods were liable to confiscation that in his case, no such specific admission is recorded in his statement that admission of guilt claimed to have been recorded in his statements is far from truth; that no copy of any of statements were provided at relevant time and he was not aware about so called confessions recorded there, that he also filed an affidavit inter alia affirming on oath that the officers had created hostile atmosphere during the course of search; that CCTV cameras kept for safety purposes were closed during the said search; that mobile phones of directors and employees were withdrawn by the officers, that without physical stock taking of finished goods, the officers had concluded of their own wish and will to claim huge shortage of wall tiles of premium grade; that duty liability was created unlawfully on the basis of certain loose papers; that he was compelled to sit in the office from morning to evening and informed that he will be arrested in the evening in case of non-deposition of Cheques by Assesant No 1; that cheques were given only on being threatened and not voluntarily; that subsequent statements dated 19.11.2015, 25.04.2016 and 24.06.2018 were intentionally recorded in English; that therefore he was not aware of the contents recorded in such ready made statements while he came to know only when copies of the same were received with the impugned notice; that therefore first opportunity to retract or to sow his confessions was available only at the time of filing reply to the SCN. That impugned order does not define as to how he was liable in penalty under Rule 25 (1) except para 41.1 on page 76 of the impugned order.

(ii) It is further submitted that as per findings of the impugned order Appellant is guilty of only goods cleared without payment of duty by Appellant No.1 and not found guilty of goods alleged to have been cleared at undervalued rates; that no documentary evidence to sustain the allegations; that seized documents are not at all sustainable as evidence for the reasons detailed in appeal filed by Appellant No.1; that there is no evidence about cash payments made in these supplies; that allegation of clandestine manufacture and clearance of goods itself is fallacious for the reasons discussed in detail by his company in its Appeal; that he relied upon the decisions in the case of Manoj Kumar Puri reported as 2010(260) ELT 92 (Tri-Del), M/s. Aart Steel and reported as 2010(262) ELT 452 (Tri-Mumbai) and M/s. Nirmal Industries P.L.D. reported as 2010(259) TTT 243 (Tri-Del)

Appellant No.3

Appellant demanded imposition of penalty under Rule 26(1) on the ground that he was not explained contents recorded in the statement dated 30.11.2015 and he was informed by the officer that his formal statement was required to be recorded in connection with case against Appellant No.1 and he has put his signature in pre typed statement; that details of his statement came to his knowledge only when he received copy of along with show cause notice and hence could not correct depositions recorded at the material time; that he has always received goods of the grades shown in respective tax invoices and payment were also made through banking channel; that no cash amount was paid to Appellant No.1; that he was a commission agent between the actual customer and supplier of tiles; that he has no reason for him to purchase goods either without invoice or at undervalued rates from Appellant No.1; that he could not remember each and every transaction with a particular party when such

Transactions cover a period of 12 months; that documents discussed and relied upon in the case were not recovered from his possession and seized from the 1st party and hence not binding on him; that show cause notice nowhere defines as to how he was aware that any of the goods purchased by him was liable to confiscation; that without bringing on record his specific act and omission with tangible evidence, no penalty can be imposed upon him in light of the Hon'ble CESTAT's decision in the case of Ramesh Lal Das Ashar reported as 195(ELT) 75 (Tri-Mumbai) and in the case of Manoj Kumar Pani reported as 2010(260) ELT 92 (T - Del).

Appellant No.4

Appellant contended imposition of penalty under Rule 28 (1) on the similar grounds and points raised by the Appellant No.3 as above. He submitted that he was not explained contents recorded in the statement dated 30.11.2019 and he was informed by the officer that his formal statement was required to be recorded in connection with case against Appellant No.1 and he has put his signature in pre-typed statement; that he was asked to put his dated signatures on each page of a pre-typed statement and some other papers; that he was not aware of the contents type in English, that details of his statement came to his knowledge only when he received copy of along with show cause notice and hence could not retract declarations recorded at the material time; that he has always received goods of the grades shown in respective tax invoices and payment were also made through banking channel; that no cash amount was paid to Appellant No.1; that he was a commission agent between the actual customer and supplier of tins; that he has no reason for him to purchase goods either without invoice or at undervalued rates from Appellant No.1; that he could not remember each and every transaction with a particular party when such transactions cover a period of 12 months; that documents;

discussed and relied upon - the case were not recovered from his possession and seized from their party and hence not binding on them; that show cause notice nowhere defines as to how he was aware that any of the goods purchased by him was liable to confiscation; that without bringing on record his specific act and omission with tangible evidence - no penalty can be imposed upon him in light of the Hon'ble CESTAT's decision in the case of Hamesh Handas Anwar reported as 105(ELT) 75 (Tri-Mumbai) and in the case of Manoj Kumar Pani reported as 2010(260) ELT 92 (Tri-Del);

4. Personal Hearing in the matter was attended by Shri P. D. Kachchh Advocate on behalf of Appellant No.1 and reiterated the grounds of appeal. Shri Kachchh submitted written submission supporting his contention/ grounds of appeal with case laws. He submitted that the cross examination of the witnesses should be allowed; that the total production capacity is not that much what has been basis of SCN Demand, that Technical Opinion of Manish T. Misra dated 20.08.2013 was submitted to support above contention.

b. In written submission, Appellant summarized all the points raised in their Grounds of appeal and interalia also explained the use of 'Order Status' form. Appellant submitted that such order status forms were duly prepared on computer showing name of the buyers, date, total quantity, designed. PRS, COM. REJ & 4 with sub-columns under each grade Order Godown but only in the PRS columns figures are typed and rest of the columns some have written figures etc. are written. Even dates are changed with Pen and also have written MRP, Truck Number, Module Number etc. on such pages; that in the area of factory of appellant viz. Mirbi-Warunaner there are around more than 600 units are engaged in the manufacture of tiles and it is the biggest cluster of tiles manufacturers in the world. It is practice of the industry

that goods are sold by the manufacturers at factory gate and they normally get orders over telephone or some buyers may visit to the factory premises, therefore, such papers were prepared with the details with quoted MRP and as per the request of the customers; appellant checks about availability of truck for the particular destination and notes down truck number, mobile number of driver etc. Particular customer also inquires about rate and other things with other manufacturers and place final order with the manufacturer who offered him competitive rates. Once he places the final order and makes the payment in the banks account of the appellant goods were packed in the said truck number and dispatched. Therefore, many times in absence of final order and payment of goods mentioned in such order status terms were never cleared from the factory premises. However, the officers had got confession from the staffs as well as directors of the company while recording their statements about clearance of goods mentioned therein without invoice and without payment of duty or with invoices but with inferior grade etc. The staffs and directors have reconciled their statements and affidavits are already submitted with appeal memorandum.

§ 1 'Production Register' maintained for the period 09.06.2015 to 15.08.2015 recovered from appellant's factory premises during the course of search and on comparison with the said figures with daily stock account register - HGT-1 maintained it is alleged that 2,91,255 flows were clandestinely removed or removed by under grading/under invoicing. That it does not bear any reading of grade on the columns on all the pages except on few pages. That author of the said register is not brought on records; that it is looked like rough register prepared by the production supervisor and it cannot be relied upon to fasten the duty liability upon appellant in absence of other corroborative evidence of that many quantity.

5.2 Show cause notice does not enclose any duty calculation sheet with the show cause notice but simply relying upon the one letter dated 09.05.2016 for quantification of the duty demand, that the officers had collected 3 blank letter heads duly signed by one of the directors and typed letter with the same font of statements dated 20.09.15 & 27.08.15 as it is stated in the said letter that it enclosed Annexure prepared on 06.05.2016 & 09.05.2016 according to which total evasion of duty comes to Rs.1,76,53,016/- during the period August, 2014 to August, 2015 and they admit duty liability that when the order status turns out to be seized under the Panchnama and copy of the same was made available only with the show cause notice as mentioned in Annexure – A to the SCN, how one can prepare such annexure and submit with the letter that too with confession about quantification & duty evasion by them? It shows that in absence of sufficient evidences, the officers tried to create evidence against the appellant.

5.3 Appellant reiterated points relating to examination of only two buyers, production in excess of their daily capacity of 400/500 Box and others which is covered in the Appeal memorandum

6. Shri D.S. Dhruva, Authorized representative, on behalf of the Appellant No.2, Appellant No.3 and Appellant No.4 informed vide his letter dated 21.02.2010 that their submission on respective grounds of appeal may be considered final and final and waived the opportunity of personal hearing in these three appeals.

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 issue to be decided is whether the impugned order, in the facts of this case confirming demand and imposing penalty is correct or otherwise.

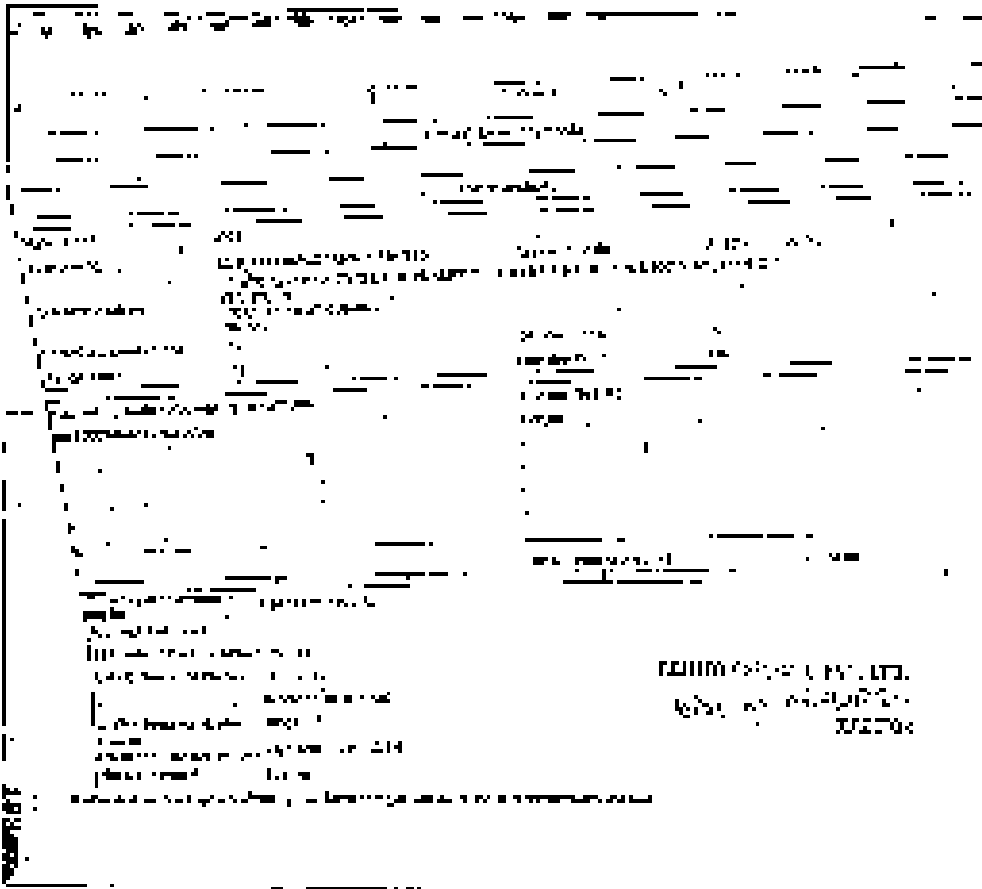
8. I find that the grounds of appeals filed by the Appellants inter-alia are that there are no corroborative evidences of purchasing of raw materials, use of power and production capacity of the unit are also not taken into consideration and cross examination of witnesses not allowed by the adjudicating authority as per Section 9D of the Act and records of "Order Status Inquiries" taken are not admissible evidences.

8.1 I find that Appellant No.1 has come up with pleas to reject each and every piece of evidence available in the case against them. Appellant No.1 has denied Panchanama witnesses, statements given by director, owners, employees and all documents seized under Panchanama proceedings. Appellant No.1 has challenged the entire investigation relying upon Affidavit filed by Appellant No.2, one of the Directors of Appellant No.1 who was present during the Search and whose confessional statements were recorded during the investigation and vehemently argued for cross examination of the persons and proceedings under Section 9D of the Act by the Adjudicating authority.

8.2 It is on record that a search was carried out at the premises of Appellant No.1 on 15/20.05.2015 under Panchanama proceedings and statements of Loading Supervisor, Billing Clerk and Director of Appellant No.1 (who is also Appellant No.2) were recorded. Further statement of Appellant No.2 was recorded on 27.8.2015 and Appellant No.2 admitted clandestine manufacture of tiles and clearances thereof and submitted post dated cheques towards duty liability. I find that these cheques were materialized spanning the period from 20.05.2015 to 16.06.2016. In addition to that a payment of Rs.5,00,000/- is also made by the Appellant No.1 electronically on 21.01.2016 after initial payment of Rs.40,00,000/- and Rs.10,00,000/- on 28.05.2016. Subsequently, payments of Rs.25 lakh were materialized through 5 cheques each month from Feb, 2016 to June 2016 making total sum of Rs.20,00,000/- prior to issuance of show cause notice. Copy of

electronic transfer dated 21.01.2018 is reproduced as under (Image-1)

(Image-1)



8.2.1 Thus, all payments were deposited after the said affidavit of 28.08.2015 including voluntary payment through electronic mode. In view of these facts that such huge payments through banking channel in long span of time which included electronic transfer from Appellant's own end, I am unable to accept Appellant's plea that those cheques were obtained forcefully especially considering an electronic transfer which department can not force such payment. The appellant's argument cannot be believed, especially because no efforts were made to stop payment contesting the proceedings and appellant wants to rely on affidavit filed to that effect way back on 28.8.2015. It is also on record that appellant did not stopped the payment and also not submitted copy of affidavit before the department for investigation. A question arises that how entire management of the Appellant be forced

Handwritten note: 28/8/15

by the department, had there been no evasion!

B.3 Appellant contested the profession of Panchas and were not from the nearby area. I find that Appellant in his affidavit accepted that Central Excise Officers had visited their factory, employees who made affidavit also stated that Officers introduced them as central excise officers. Secondly, it is recorded fact in the Panchanama that Panchas were called for and started from Rajkot. Thus, Panchas were present at the time of entering in the factory premises. Thirdly, Appellant No.1 in appeal memorandum, at Para 10.2.4 also stated that Panchas were standing in the premises of Appellant. All these facts prove that proceedings were carried out in cordial and transparent manner and Panchas were present there right from the beginning of the proceedings. I find no merit in Appellant's argument that Panchas were directed to put signatures and their argument about profession of Panchas is not acceptable as witness has no connection in his profession. There is no allegation that Panchas were benefited because of proceedings initiated against the Appellant No.1. I find that Appellant No.2 had perused Panchanama and accepted its contents and truthfulness on 20/08/2015, 27/02/2015, 06/05/2016, 06/05/2016. I also find that in the statement dated 24.05.2016 Appellant No.2 has stated that he has visited the Central Excise office on 08/05/2016 & 09/05/2016 and gone through the company's records seized on 19/02-00-2015 and this statement was recorded in presence of Shri Pankaj Patel, in his own hand, who stated that the statement was recorded in his presence and explained to Appellant No.2. Copies of relevant portion are reproduced below; Image-2 & Image-3:-

B.3.1 Further find that another two statements of Appellant No.2 dated 19.11.2015 and dated 26.04.2016 were recorded in presence of Sri Hinkaj Kavar and Sri Navinchandra Koringa who were known to him and both not a departmental person. His own hand writing acknowledged the recording of statements as per his say and understanding of Appellant No.2. Copies are reproduced herebelow as Image 4 & Image-5:-

Image-4

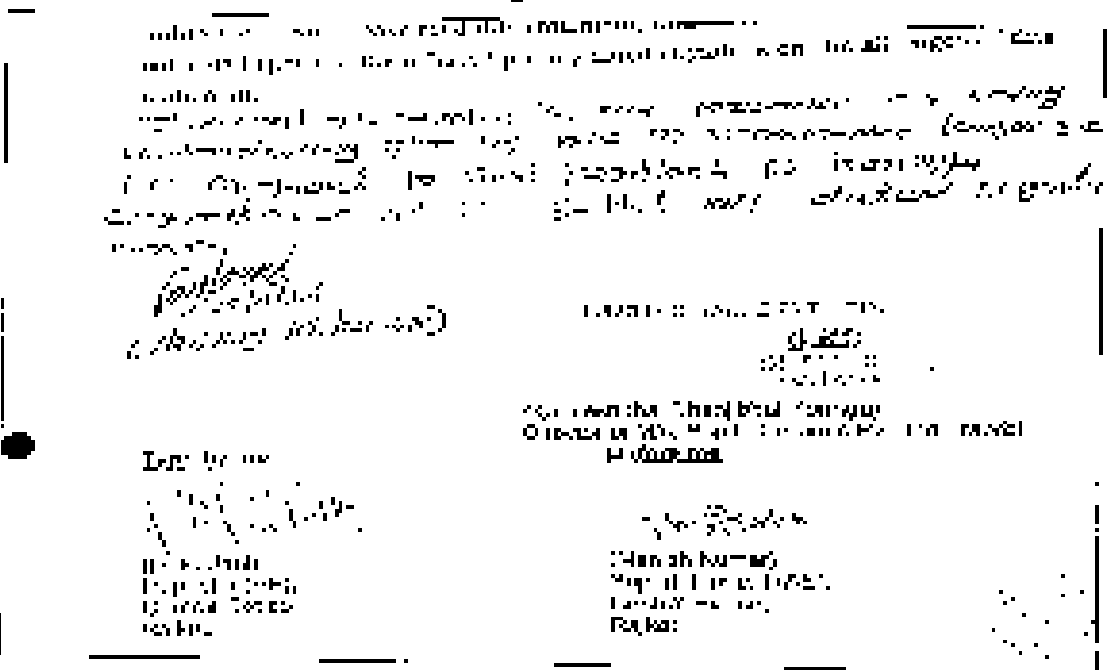
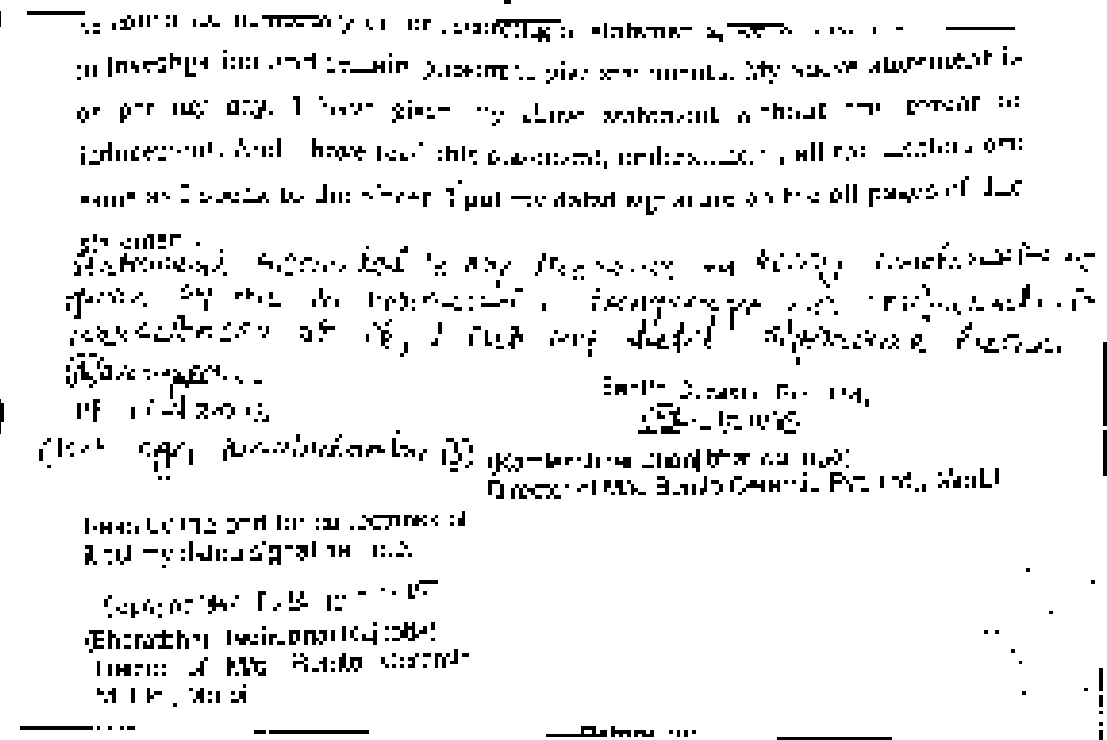
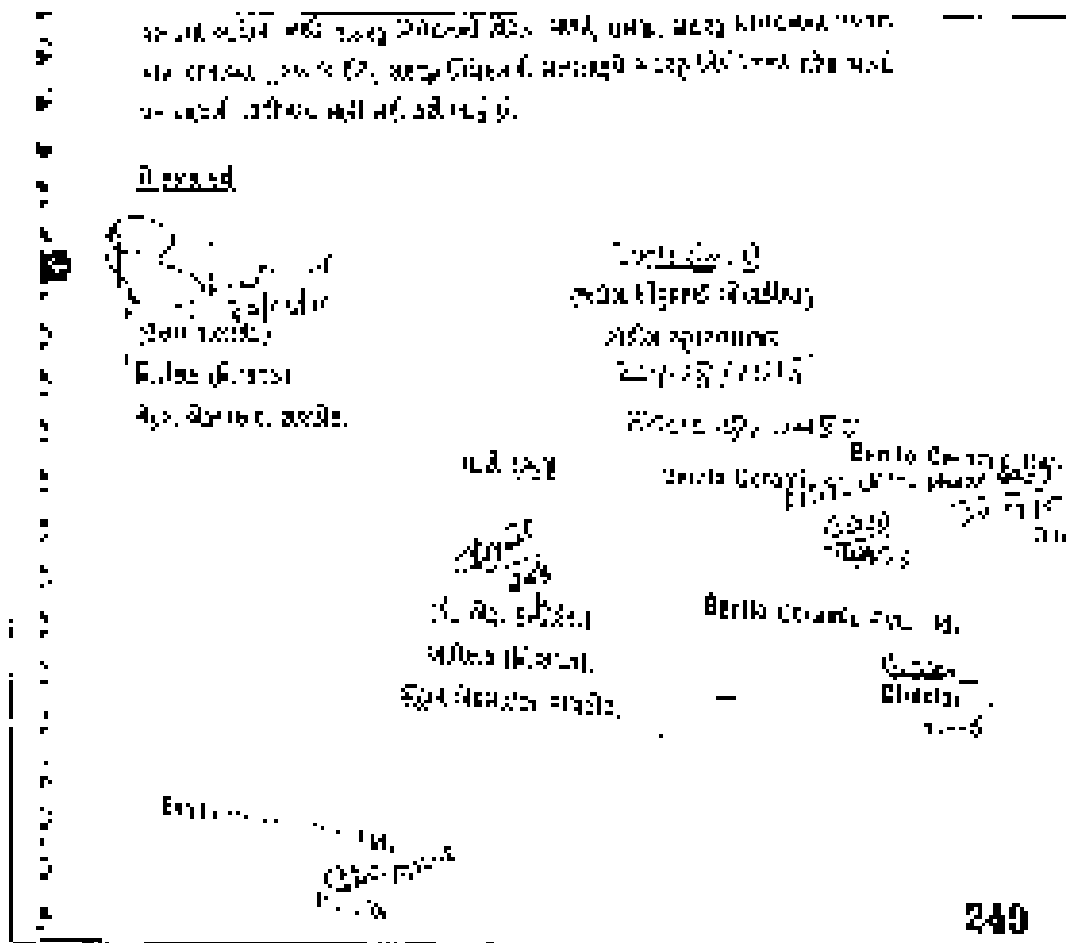


Image-5



Statement dated 20.08.15 of Loading Supervisor perused on 20/08/15, 27/8/15 and 19/11/15 also.



8.4 I also find that Appellant No.2 and other director registered their affidavit before Notary on 25.8.2015 and other staff of Appellant registered their affidavit on 7.7.2016. I also find that no affidavit was submitted before any of the investigating officers of the department or before the investigation by any of above persons. Thus, affidavits made and registered before the Notary are not the affidavits filed with the department and hence of no legal significance and appear to have been made only to be utilized during adjudication/ appellate proceedings. I find that Loading Supervisor and Billing Clerk in their affidavit dated 07.07.2016 say that a mob was rushed into the factory and introduced themselves as central excise officers. I find that this

amply clears that officers had explained their status even to employees of the Appellant. I also find that affidavits were not produced before the Senior officer of the department nor before any civil authority to initiate action against the investigators, if any. If it was a case as stated in Affidavits, then why no complaint was not lodged? It is also evident that Affidavit by both the persons were made and registered only on 07.07.2016 i.e. after the gap of one year post their confessional statement dated 20.08.2015. These affidavits were also not filed with the department until the Show Cause Notice was issued. In view of all above facts, I hold that there is no truth in affidavits filed and it is only an after thought on part of Appellant No 1 to get rid of clutches of law and duly liability.

8.4.1 I also find that Appellant No 2 in his affidavit stated that officers had searched loose papers from them and confession was obtained on that basis. I further find that in the said affidavit Appellant No 2 claimed that they were threatened to be arrested and asked to give post dated cheques for different months for total sum of Rs.50,00,000/- on 20.08.2015. Appellant in the same affidavit states that they have given cheques of Rs.40 lakhs, Rs.10 Lakhs dated 20/8/2015 and also post dated cheques for Rs.22 Lakhs and eight teen cheques each of Rs.6 lakhs were given. Thus, the contention raised in the affidavits, is nothing but an afterthought since they tendered cheques of huge sum and this contention also lost merit as much as cheques got materialized over period of ten months including a voluntary e payment made by them as discussed in foregoing para. Similarly, loose paper referred by the Appellant has nothing to do with the Order Status forme discussed and explained in the Show Cause Notice as well as Appellant's explanation in the statements.

8.4.2 Therefore, I am of the considered view that these affidavits are nothing but an after thought, far from the facts can only be viewed

as tactics for getting out of central excise duty liability arising due to overwhelming evidences gathered by the department against the appellants.

8.4.3 It is also important to note that the appellants not only accepted the Panchnama proceedings and earlier statements, but also managed to deposit huge sum of Rs.20 Lakhs to the govt. exchequer, that too without protest and even prior to issuance of the show cause notice.

8.5 I find that the statements of the persons dated 19.08.2015, dated 20.08.2015, dated 27.08.2015, dated 10.11.2015, dated 25.01.2016 and dated 24.05.2016 have been recorded at different time and by different five officers. Therefore, allegations of threat and coercion made by the Appellant No.1 is misleading and not supported by facts.

8.6 I find that it is not a case that a single statement has been recorded and relied upon but series of statements of Appellant No.2 and co-appellants over a period of days and months. I am of the considered view that the statements recorded at different time over such a long period of time and of different persons by different officers have not been recorded under duress or threat as is being alleged by the Appellants only to get out of clutches of law and to avoid fastening of duty liability and consequences thereof. Facts of the statements have been independently corroborated by the facts and contents of Panchnama dated 20.8.2015 recorded at the time of search. I find that appellant in his statement dated 24.05.2016 recorded in question answer form and in presence of independent person, Smt. Pankaj Patel. Therefore, I am of the considered view that all statements are correctly relied upon with due evidential value.

8.7 Appellant No.1 also contended that statements relied upon in show cause notice are not admissible evidences because procedure stipulated under sub-section 1 of Section 8D of the Act had not been followed by the Adjudicating Authority. Appellant relied upon Hon'ble High Court's decision in the case of *M/s. J. K. Cigarettes Ltd* reported as 2009 (242) E.L.T. 159 (Del); and several other decisions in the matter to find that in the case on hand, facts remain that Appellant No.2, Partner of Appellant No.1, has himself given the name of the persons and details against Appellant No.1 in his statement dated 19.11.2015 and subsequently deposed and accepted the correctness and genuineness of the facts recorded in it. Thus statements are not recorded at the back of Appellant No.1. The correctness and genuineness of the facts are accepted by the person against whom the said statements were directed and hence cross examination of Appellant No.2 by Appellant No.1 is not required at all under Section 8D as much as evidentiary value is accepted by the person against whom it is used. I find that adjudicating authority at Para 36.14 gives specific finding that Appellant No. 2 (on behalf of Appellant No.1) has signed and requested for cross examination of Appellant No.2 in person seeking cross examination of himself which is a stretched action to drag the adjudication proceedings in limbo. I find that Appellant No. 2 in his statements, has accepted the correctness of the statements relied upon, who also deposed categorically that his statements would be utilized as an evidence against him and his company. As discussed in foregoing Para's, Appellant No.1 and others contentions are held to be misleading and after thought. The truthfulness of the statements of the witnesses and proceedings of investigation are not discredited in this case. Thus, I find that correctness of the statements is established and it is not the case that adjudicating authority was deciding the allegations set out in the show cause notice only on the basis of the statements but it includes other evidences corroborating the facts of the case coupled with voluntary payments

towards respective duty liability that too during the period of Ten months. In the facts of this case, case laws relied upon by the Appellant can not be made applicable in this case. I find that the ratio of the judgment of Hon'ble Supreme Court in the case of CC= Mumbai vs. M/s. Kaveri Funds India Pvt. Ltd reported as [2017-TIOL-76-SC-00], is applicable in the present case, wherein it is held that-

14. During the course of arguments learned counsel appearing for the respondent submitted before us that although the affidavit statements of Managing Director of the Company and other persons were recorded during the course of judicial proceedings but the same were reduced statements and therefore may cannot be relied upon. However, the statements were recorded by the Court's Trial Officer and just after the recording of the statements, such statements made by the Managing Director of the Company and other persons regarding the details about the functioning of the company which could be made only with personal knowledge of the respondents and therefore such statements cannot be regarded as false or untrue statements. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered as true and relied upon.

(Signature)

15. The view of the learned judge (J) is established from the reason that the affidavit statements were given by the concerned persons out of their free will and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which are true and correct. Further, the Managing Director of the Company on 05.08.2018 withdrew the amount of Rs. 13 lakhs, towards share 10% and therefore in the facts and circumstances of the present case, the aforesaid judgment of the learned Judge (J) is correct and cannot be quashed. This fact clearly shows the conclusion that the statements of the concerned persons made by them with a true and sincere of any duress.

(Signature)

8.7.1 I find that the Hon'ble High Court of Allahabad in the case of Zaki Isharti reported as 2013 (229) E.L.T. 161 (All) held that objection not addressed to the officer when the statement was given can not take away the effect of statement. Relevant portion is reproduced below for ease of reference:

23. The LACIAI found that the statement of Shri Faraz Ahmad was clearly incriminating in nature. He gave testimony in the form of affidavit and also in the form of affidavit filed in person before the Magistrate, and sent it to Collector of Central Excise, Kalyan. In the overall context including the circumstances in which the gold was seized, the subsequent reliance was not deemed to have taken away his affidavit statement as the objection was not addressed in the affidavit to which the statement was given. At the same time, objection could be raised as representation or a complaint to the Collector of Central Excise, Kalyan. Shri Faraz Ahmad was examined and produced before the Magistrate. No objection was made to the Magistrate of his form of record, to the involuntary nature of the statement.

26. We do not find any other evidence recorded by the CESTAI that the appellant had given the statement recorded on 10.2.1994 under Section 152 of the Customs Act under any officer. The statements recorded under Section 105 were therefore rightly accepted for evidentiary purposes of seizure.

(Emphasis supplied)

8.7.2 Hon'ble CESTAT in the case of M/s. J.K. Processors reported as 2016 (338) ELT 416 (11 Mumbai) has held as under:-

1. We find that the duty demand has been confirmed on the basis of documentary evidence in the form of 11 loose sheets, which has been admitted by the proprietor of the appellants and by the Senior Supervisor, Dyeing Master and Export Clerk to represent production records. Shri Ramul Patil, employed as Dyeing Master has also stated that the loose sheets were production for each day. These sheets show the date, name of the party in case, where processing was done and date of processing etc. and the details contained therein have been clearly reported by the proprietor and others in their statements.

4. It is further noted that part duty was also paid by the appellants. The plea of the proprietor that his statement was recorded under illegal and unauthorised and not he released his statement at the nearest quantity has also been rejected will by the Commissioner, who has noted that the goods also has paid some duty after 28.2.1990 when he is stated to have filed affidavit before the Magistrate. In these circumstances, he holds that no prohibition can be attracted to the off duty.

6. The evidence on record amply establishes that the appellants had manufactured and subsequently cleared processed fabrics during the period above-mentioned. Therefore, we hold that the duty confirmed against the appellants cannot be set aside.

(Emphasis supplied)

8.8. Thus, I am of the considered view that statements stand not retracted, as discussed above. I find that Hon'ble Bombay High Court in the case of *M/s. Sharad Ramdas Sangli* reported as 2017 (347) EIT 413 (Bom) has also held that where directors have themselves admitted the guilt, there is no question of cross examination and denial of same does not give rise to any substantial question of law. Relevant portion of the judgment is reproduced below:-

"3. The Tribunal recorded following cases -

"51. As regards the issue of cross-examination of *Sita Devi* and *Shri Ashok Kumar Yadav* and whether the said denial has been sufficient, payable to the Appellants, it is seen from the records that the entries made in the credit records were corroborated by *Sri Gannan Shastri Sangli*, Director of the Appellant firm and *Sri Shyam Shankar Sangli*, Director of *M/s. Anand Group* through whom the merchandise received goods, were sold whereas they had admitted that the said merchandise was sold and carried and certain to the unrecorded production purchase of raw materials without recording and sale of the finished goods in cash without payment of duty. Further from the records it is seen that about sixteen orders placed for in para 11.73 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 issue of proper export documentation and without payment of duty. Further the cargo suppliers *Mr. Ramji Ashokrao Shinde* and *Mr. Shashi Gaurang Gode* have also admitted that they have supplied the MS group which is the raw material for the manufacture of these goods without the issue of documents and they have received export bills for sale of such cargo in cash. Considering these evidence available on record, we find that the denial of cross examination of the officers of the trusts trustee has not caused any prejudice to the Appellants in fact none of the statements recorded have been retracted or disputed. In such a situation, when the fact is not disputed, cross-examination of the party is not necessary. The Hon'ble Apex Court in the case of *Harvard Corporation - 1962 103 I.T. 168 (S.C.)* and the Hon'ble High Court of Andhra Pradesh in the case of *Shri G. S. Reddy & Co. (P) Ltd. (1997) 228 ITR 100 (A.P.)* have held that there is no absolute right to cross examination and, if sufficient corroborative evidence exists, cross-examination of the deponent or the statement is not necessary. In view of the above we find that the denial of cross examination of *Sita Devi* and

San. Ashok Kumar would have established the private records that not cause any prejudice to the Appellants.

From the above submissions, we are of the view that this was not a case which required cross-examination. The Director, Excise has examined the said Sri. Ashok Kumar and his statement is recorded.

8. I also find that the Hon'ble High Court of Andhra Pradesh in the case of Mrs. Shalini Steel P Ltd reported as 2011 (258) E.L.T. 545 (T. - Bang.) has held that evidentiary value of the documents could not be lost in absence of cross examination of an employee.

11. In the case on hand the statement of Sri Om Prakash Sharma was relied upon, by the Commissioner of Customs and Central Excise, in demanding payment of cess duty by, and in levying penalty on, the appellant. The statement of Sri Om Prakash Sharma, who was an employee of the Appellant company, was accepted to be true by none other than the Managing Director of the Appellant company. It is evident from the fact that no objection was raised to the appellant on their part during the opportunity of cross-examining Sri Om Prakash Sharma when the Managing Director had himself accepted the said statement to be true. Even otherwise nothing prevented the Appellant company, if they so chose, from producing Sri Om Prakash Sharma, who was their employee, as a witness in their defence and to examine him on their behalf. It is evident from the fact that this plea of denial of opportunity to cross examine Sri Om Prakash Sharma is an afterthought and was raised only to mitigate out of the demand of cess duty and the penalty levied on them.

(Emphasis supplied)

[Handwritten signature]

9. I find that Order Status Forms were seized from the factory and the A/c books filed by Appellant No.2 and other director of the company also state that these documents were seized from the factory premises and hence Order Status Forms seized from the factory is not in dispute. I find that all details of Order Status Forms were explained by Appellant No.2, Working Supervisor and Billing Clerk of the Appellant No.1 in various statements recorded during the investigation, which describe the modus operandi adopted by Appellant No.1 with active help of Appellant No.2. Appellant No.2 explained that details of finished goods i.e. wall tiles including MRP.

design, grade and also details of vehicle number, names of the buyers were recorded in the said form and goods were loaded in the vehicles mentioned therein. I find that loading supervisor has also confirmed that loading of tiles was done as per these forms and hence manufacture of tiles and clearance/dispatch of manufactured tiles are established. I also find that demand was made by comparing the order status form with that of invoices recorded in the books of account of Appellant No.1 which further established that the finished goods mentioned in the said Order Status forms were being used by Appellant No.1 and as such Order Status forms were their own documents for the purpose of representing actual clearances. I further find that all Order Status forms were found from the Loading Section of factory of Appellant No.1 and were kept in files and were part of the records of the manufacturing unit. I find that Appellant No.2 confessed during the course of recording of Panchnama, after perusal of these records in presence of Panchas that these Order Status forms contain details of clearances made with invoices and without invoices and also in subsequent statements that clearance without payment of Central Excise duty was effected where invoices were not issued against the clearances made as per Order Status forms. I find that amount and work sheet of missing invoices were prepared during Panchnama proceedings and hence working of clandestine clearances were arrived at by due process prescribed under the law. I therefore hold that order status forms seized under Panchnama proceedings and relied upon for quantification of duty liability are proper, fair and justified.

9.1 I find that the content of above 'order status forms' are accepted before Panchas and well explained by the creator inasmuch as the loading supervisor has categorically explained the pre-printed details i.e. Name of the buyer, date, design, grade, quantity of tiles being cleared etc. He also explained 'hand written' details of vehicle

number, price received by him, and identified his own hand written details of Box loaded, Driver's Mobile number and finally deposed that it also contained actual number of boxes dispatched in the vehicle. Appellant No.2 also explained modus operandi adopted by Appellant No.1, which confirmed that details of dispatch and clearances in this pattern cannot be dictated by any person in an imaginary way. I further find that in statement dated 20.08.2015 Appellant No.2 also explained that worksheet was prepared comparing Invoice Via & via Green Status forms and details were included in respect of clearances made under invoices. Therefore, I am of the considered view that the facts explained and deposed by Appellant No. 2 in his statements have to be granted due evidentiary value. Therefore, so called requirements of statement under threat are not genuine and are in fact only submissions to wriggle out of duty liability.

9.2 I find that Appellant No.2 in his statement dated 19.11.2015 i.e. even after registering affidavit on 28.08.2015, has given names and details of customers to whom they had sold wall tiles along with address and mobile number of the persons in whom Appellant No.1 has sold the wall tiles. The statements of two buyers out of many named by Appellant No.2 were recorded during investigation, perused and correctness of the content under his statement dated 25.04.2010. Therefore, it is not the case that the statements were taken behind the back of Appellant No.1. Therefore, challenging these statements after issuance of Show Cause Notice is nothing but afterthought to contest the matter to get out of duty liability. Statements of Loading supervisor, Billing Clerk and Marketing Manager relied upon by the department establish the methodology adopted by Appellant No.1 and they give sufficient evidences about the modus operandi adopted by Appellant No.1 and executed by Appellant No.2. I find that the said statements were perused by Appellant No.2 and correctness of the statements was accepted by

Appellant No.7

9.3 The statements of Appellant No.7 explaining records, modus operandi and identification of records duly recorded in Panchanama proceedings dated 20.08.2015 are the facts on record and establish charges made in the SCN and proved in the impugned order. 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. Radliffa Steel Industries Vs. CCE, Chandigarh* (2014 (208) L.T.J. 189 (P & H))

"It is a well settled principle of law that the accused (applicant of length we are of the concerned Act) has the right to explain in detail all the facts and circumstances of his case. There is no legal principle in the order passed by the Tribunal. There are several and probable reasons assigned by the Tribunal in rejecting the submitted statement given by petitioner of the deceased Appellant. Even the learned counsel has not been able to point out anything from any record and the alleged evidence was not analysed or examined in support of the impugned statement. The case of the Revenue is not supported that there was removal of 27.81 MT of finished goods, which were not declared for clearance as per the rules prescribed by the respective department. The original beneficiary of the goods was the deceased Appellant. It is a fact that the raw material of the goods in question was purchased from the very market and the same was not reported for. That there were no detection, the finished goods would have been sometime cleared without payment of duty and would require of any manner. The statement submitted by the deceased is false and of offence only. Thus, the Appellant has not proved that he has not committed any offence."

(b) *M/s. Suresh Engg. Works Vs. CCE, New Delhi* - 2004 (167) L.T. 495 (Tri. Del):

"It is well settled that admissions made by the maker can be accepted as a substantial piece of evidence unless they are proved to be false. In the present case, the petitioner has submitted a statement and also that he withdrew from the voluntary unless he is able to establish that the admissions were obtained from him under coercion, threat, force, etc. and being the petitioner in the duty of the Appellant, he is not bound to do so. The petitioner of the Appellant's firm who is the owner withdrew by stating he had been asked and forced him to submit a statement, provided substantial piece of evidence for proving the allegations against him as mentioned in the SCN. He has been charged the duty was not without any record. Therefore, the mere declaration of the Appellant and joining in the voluntary withdrawal under these circumstances, is a very weak ground of defence."

9.4 I am also of the view that admitted facts need not be proved as has been held by CESTAT in the cases of *M/s. Industries* reported as 2008 (229) L.T. 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 in search for evidences in this case. Hon'ble CESTAT in the case of M/s. Karor Engg. Works reported as 2004 (169) 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 view of the positive and overwhelming evidences available in this case as discussed above and as discussed in the findings of the impugned order.

9.5 It is also of the view that there is existence of ingredients substantiating manipulation and deception on part of Appellant No.1 in this case. 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 *Azfaat Textiles (India) Pvt. Ltd.* reported as 2000 (235) E.L.T. 557 (SC), and *Shah G. Mani Mal* reported as 1883 (13) F.T.R. 1546 (S.C.).

9.6 The Hon'ble CESTAT in the case of *M/s. Surya Cotton Ltd* reported as 2015 (325) ELT 950 (Tri-Del.) has held that it is established principle of law that fraud and futility are sworn enemies as under:

"15. Evidence gathered by Revenue authorities proved that the above respondents' officers were caught in some manner of Customs duty evaded by respondents' manufacturers. It is established principle of law that fraud and futility are sworn enemies. Therefore, revenue deserves commendation and it should be allowed to proceed further."

16. It is settled law that Revenue need not prove its case with mathematical precision. Since the evidence gathered by respondents' through their possession of credibly and nexus between the make operator or the respondent with the goods dealt and movement of goods from origin to destination, respectively, is established, it cannot be taken out just because of evidences which play a role. In the present case, it is not only the photograph that was used against the respondents, there are other credible and proper corroborative evidences.

documented evidence including oral evidence as well as reports from well known and reputed persons for which stands of evidence cannot be criticized. The best evidence which discloses the nature of work carried out, finding of unaccounted goods in the factory, finding of allegedly required goods and also their use on the attention behind suppression of production which was established and corroborated by recording of higher quality after search, are respectively made in the evidence in material form.

17. Apart from the contents of the memo the other evidence gathered by investigation was not inferior at all, that directly brought out results of the complaint to the revenue authorities. It is not possible to say that the other evidence adduced by appellants, though stated, amounts to a rebuttal of the case of Revenue.

(Emphasis supplied)

18.7. Appellant has contested the production capacity of the unit and examination of only 10% of the buyers. I find that adjudicatory authority at Para 26.18 and 26.27 has also discussed and held that appellants were using Cassier Plant and presumptive quantification can not be done. I find that Appellant No.2 in his statement dated 20.08.2015 in answer to Question No.20 deposed that they had purchased the basic raw material 'Clay' without duty to be used for sandstone manufacture of their finished goods. I also find that production register was seized during the search and authenticity of hand written figures by the Production supervisor explaining proper details were accepted by the author of that register. I further find that Production Supervisor has stated that 90 to 95% tiles of premium grade were manufactured in the unit. Similarly, during the course of Pandhama it was stated by Appellant No 2 that invoices were raised lowering down grade of tiles and they paid lesser excise duty by down grading actual grade/ quantity of wa tiles. All these evidences go against Appellant's argument with regard to production and differential duty confirmed in the impugned order. I find that the Hon'ble CESTAT in the case of M/s. N R Sponge P Ltd reported as 2016 (320) ELT 453 (Tri-Del) has held that when preponderance of probability was against the Appellant then pleas of no statements received from all buyers, no raw material purchases found unaccounted and no input-output ratio prescribed by law are of no use. The relevant portion of the order is reproduced below:-

10.1 Recovery of the above sheets and loose notes ledger from the possession of the Appellant in the course of search proved the entries therein as representative of the contingently retained goods which were not within the knowledge of the Appellant. After examination of Appellant's own ledger came to record some more entries were in the custody of the Appellant. It is common sense that the entries being entry to the possession thereof are only controlled by him. The entries covering thereof and is inseparable in his custody therein. Entries on such accounting material accompanied Commission certificate of 22,220 MT of Sponge Iron and 227,555 MT of iron goods respectively was explained by Appellant. The other mixed descriptive number of 21,220 MT of Iron Ore by the Appellant. Such records were further proved from the records seized from the manufacturer Mrs. Harvachal Steel Casters and MS. Gajji Industries. The material recovered from the premises is 100% but the evidence of classification amount of 50,140 MT of Sponge Iron and 22,220 MT of iron goods respectively. These evidences were not substantiated by the entries which certain entries in the general bookkeeping ledger matched with the General Ledger entries and other entries do not match the considered entries. Because matching of classification entries not supported by evidence. Accordingly, such entries became subject matter of litigation in respect of amount of 227,555 MT of Sponge Iron various amount of Panna day. Finding, the loose sheets which contained the general ledger of excisable goods various amount of duty in the value of all items quantity of goods.

10.2 The statement recording from shift supervisors during investigation cannot be trusted since they were the persons with access to excisable goods were manufacturer and several. Best evidence are laboratory report and analysis to this extent that they were supplied methodology of production.

10.3 Access to the above the entries admitted was below amount of the goods not supported by the evidence. The evidence in case of revenue, he therefore admitted to such payment of the duty equal amount contributing the Revenue. Examination of the entries in general bookkeeping ledger and the material from possession of Appellant during search. Fully covering of the Appellant's records, failed to furnish when made use of the Appellant came to record. Classification number was not within the knowledge of the shift supervisors, mechanical Division, transporters and commission agent. Some others evidence considered all of them, and established manufacturing goods record with the payment of duty and used these facilities of Kalsari Agency through the Appellant's company to the name of Appellant. All of them established manufacturing unit of excise. Such findings by the evidence collected all the persons involved in the trade or commercial activities without their detachment.

10.4 Representation of credibility and Appellant the Appellant. Discharge of no significant evidence from investigation evidence generally representative items to the material numbers. General manufacturing and no entry subject note presented by the Appellant to it. Revenue discharged the issue of proof of duty and the Appellant in the show cause notice accordingly. But, the Appellant's material failed to discharge its burden of proof. It is not taken into consideration.

10.5 It is not only one evidence, but multiple copies evidence demonstrated various nature of the Appellant and proved its main idea. Therefore, Appellant failed all goods. Revenue's investigation was successful and its findings were established.

(Emphasis supplied)

9.0 : find that Appellant's is attempting to improve now in Appeal, what have already been proved during investigation and an

impression is being created that facts revealed by good investigation were all fabricated but Appellant No.1 did not succeed due to overwhelming evidences available in the case against them. Thus in absence of any evidence favouring Appellant No.1, I have no option but to hold that duty liability as confirmed in the impugned order is correct, legal and proper.

9.9 The liability of interest is natural legal consequence of duty liability and hence interest as ordered in the impugned order is upheld and Appellant No.1 should pay interest forthwith.

9.10 In view of the evidences available in the case and discussed above and in the impugned order I find that equal penalty has to be imposed under Rule 25 of the Rules read with Section 11AC of the Act in cases like this where goods have been manufactured, not accounted for and cleared without payment of duty. Therefore, I hold equal mandatory penalty on Appellant No.1 is imposeable as per Section 11AC (1) (c) of the Act read with Rule 25 of the Rules which is legal and proper.

10 Appellant No.2 has preferred appeal on the ground that he was not aware about so called confessions recorded in his statements and relied upon affidavit wherein he affirmed that officers had created hostile atmosphere; that three statements were recorded in English and he was not aware of the contents of those statements. As already held in forgoing paras while discussing the argument of Appellant No.1 that affidavits were not filed before the investigating officers and was mere a record created at his own end. Also, all three statements recorded in English were in presence of an individual known to Appellant No.2 and on all three occasions when statements of Appellant No.2 were recorded, the same individual known to Appellant No.2 were present. I also find that Appellant No.2 has signed each and

every document in English and not in Gujarati. All three individuals known to Appellant No.2 also put their signature in English only. Therefore, I do not find merit in Appellant No.2's argument that he was not concerned with the goods liable for confiscation. I find that the appellant being active and responsible Director of Appellant No.1 was fully aware of the fact that the goods manufactured in the unit were not being accounted for properly and being cleared without contra. excise invoice and without payment of duty and hence actively involved in evasion of central excise duty being done. Thus, he is the person concerned in dealing with such excisable goods and had every reason to believe that the goods were liable to confiscation. I find that Appellant No.2 was actively involved in large scale duty evasion and that adjudicating authority has imposed penalty of Rs.44 lakhs upon Appellant No.2 for confirmed duty demand of Rs 1.75 Crores. I, therefore, find no infirmity in the impugned order imposing penalty of Rs.44 Lakhs upon Appellant No.2 and hence I uphold the order and reject the Appeal.

W. S. G. ...

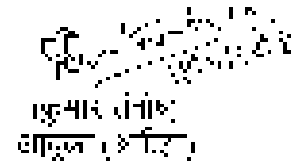
10.1 Appellant No.3 and Appellant No. 4 have contested imposition of penalty under Rule 26 of the Rules on the ground that they were not aware of the contents of the statements recorded by the officers. I find that statements of both the appellants were in question answer form and also included a detailed work sheet showing date wise information of finished goods purchased by them. The appellants have put their signature in English with their own name and name of the firm in English in their own hand writing. Therefore, I find no merit that they were unaware about the contents of the statements and worksheets. In light of the above facts, the imposition of penalty on Appellant No. 3 and Appellant No.4 under Rule 28 of the Rules is justified, legal and proper. I, therefore uphold penalty of Rs.1,50,000/- and Rs.60,000/- imposed upon Appellant No. 3 & Appellant No.4 respectively and reject the 2 appeals also.

In view of above discussion and findings, I reject the appeals filed by all 4 Appellants and uphold the impugned order.

अपीलकर्ताओं द्वारा तर्क की गई अपील का निपटारा उपरोक्त तरीके से किया जात है।

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




 दिग्गज कोरिंगा
 डायरेक्टर (अपील)

By/BROAD

M/s. Benilo Ceramics P. Ltd, Survey No. 838/P-2, 8-A National Highway, Lakhdhapur Road, AT- CHUNTU MORBI- 363642	मोरबी बेनिलो सिरेमिक्स प्रा. लि. सर्वे नं. 838/P-2, नेशनल हाईवे के ए. लखडिपुर रोड एट - चंटु मोरबी 363642
Shri Kamlesh J Korringa, Director, M/s Benilo Ceramics P. Ltd, Survey No. 838/P-2, 8-A National Highway, Lakhdhapur Road, AT- CHUNTU MORBI 363642	श्री कमलेश जी कोरिंगा डायरेक्टर मेसर्स बेनिलो सिरेमिक्स प्रा. लि. सर्वे नं. 838/P-2, नेशनल हाईवे के ए. लखडिपुर रोड एट - चंटु मोरबी 363642
Shri Jayendra Chandulal Kalariya, Proprietor, M/s Radhey Marketing Shakti Chamber-1, Opp Adarsh Hotel 8-1 National Highway, Morbi	श्री जयेंद्र चंदुलाल कलारिया प्रोप्रायटर मिस रेडही मार्केटिंग शक्ति चेंबर-1 आदर्श होटल के सामने, नेशनल हाईवे के ए. मोरबी

ॐ Dharamsinhji Kharaja Partner M/s. R. K. Enterprise Parshwanath Chamber, B-A, National Highway Morbi	કોમ્પોઝિટીવ્સ પ્રાઇવેટ લિમિટેડ મોરબી ટ્રેડિંગ ઓફ રિસાયક્લેડ પેપર-કેન્ડા વેબસાઇટ: www.rk.com મોરબી
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