



::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 / 2nd 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
	V2/300 to 304/RAJ/2017	57/ADC/RKC/2016-17	31.03.2017

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

RAJ-EXCUS-000-APP-047-TO-051-2018-19

आदेश का दिनांक / Date of Order:	24.04.2018	जारी करने की तारीख / Date of issue:	27.04.2018
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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/Joint/Deputy/Assistant Commissioner, Central Excise / Service Tax, Rajkot / Jamnagar / Gandhidham :

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

1. M/s. Delton Ceramic P. Ltd., Near Octiva Ceramic Lakhdirpur Road, NH 8-A Lalpar, Morbi,
2. Shri Sanjay D. Kotadiya, Director, M/s. Delton Ceramic P. Ltd.
3. Shri Manojbhai V Sariya, Director, M/s. Delton Ceramic P. Ltd.
4. Shri Bipinkumar R. Panara, Prop., M/s. Rangoli Marketing Morbi
5. Shri Rajesh G. Makadiya, Auth. Signy of M/s. A.M. Corporation, Morbi.

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

(A) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील, केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखित जगह की जा सकती है। /

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर. के. पुरम, नई दिल्ली, को की जानी चाहिए। /

The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification and valuation.

(ii) उपरोक्त परिच्छेद 1(a) में बताए गए अपीलों के अलावा शेष सभी अपीलों सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, , द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- 380016 को की जानी चाहिए। /

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) 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, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" 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
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं 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 ईकाई, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। / A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:
(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में। / In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse
(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के लुट (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 (न. 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 संप्रेषण के 3 माह के अंतर्गत की जानी चाहिए। उपरोक्त आवेदन के साथ मूल आदेश व अपील आदेश की दो प्रतियां संलग्न की जानी चाहिए। साथ ही केन्द्रीय उत्पाद शुल्क अधिनियम, 1944 की धारा 35-EE के तहत निर्धारित शुल्क की अदायगी के साक्ष्य के तौर पर TR-6 की प्रति संलग्न की जानी चाहिए। / The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.
(vi) पुनरीक्षण आवेदन के साथ निम्नलिखित निर्धारित शुल्क की अदायगी की जानी चाहिए। / जहाँ संलग्न रकम एक लाख 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 चाहिए। इस तथ्य के होते हुए भी की लिखा पदों 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, notwithstanding the fact that the one appeal to the Appellate 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 टिकिट लगा होना चाहिए। / One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs. 6.50 as prescribed under Schedule-I in terms of the Court Fee Act, 1975, as amended.
(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबंधित मामलों को सम्मिलित करने वाले नियमों की और भी ध्यान आकर्षित किया जाता है। / Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.
(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते हैं। / For the elaborate, detailed and latest provisions relating to filing of appeal to the higher appellate authority, the appellant may refer to the Departmental website www.cbec.gov.in

:: ORDER IN APPEAL ::

The appeals detailed below have been filed by 5 Appellants (hereinafter referred to as Appellant No. 1 to Appellant No. 5) against Order-In-Original No. 57/ADC/RKC/2016-17 dated 31.03.2017 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner, Central Excise & Service Tax, Rajkot (hereinafter referred to as "the lower adjudicating authority"):-

Sr. No.	Name of the Appellant	Appeal File No.	Appellant No.
01.	M/s. Delton Ceramic Pvt. Ltd., Near Octiva Ceramic, Lakhdirpur Road, 8-A National Highway, Lalpar, Morbi	V2/300/RAJ/2017	1
02.	Shri Sanjay D. Kotadiya, Director of M/s. Delton Ceramic Pvt. Ltd., Near Octiva Ceramic, Lakhdirpur Road, 8-A National Highway, Lalpar, Morbi	V2/301/RAJ/2017	2
03.	Shri Manojbhai V. Sariya, Director of M/s. Delton Ceramic Pvt. Ltd., Near Octiva Ceramic, Lakhdirpur Road, 8-A National Highway, Lalpar, Morbi	V2/302/RAJ/2017	3
04.	Shri Bipinkumar R. Panara, Proprietor of M/s. Rangoli Marketing, Ceramic Plaza-2, National Highway, Morbi	V2/303/RAJ/2017	4
05.	Shri Rajesh G. Makadiya, Authorized Signatory of M/s. A.M. Corporation, Parshwanath Complex, Opp. Kuber Cinema, National Highway, Morbi	V2/304/RAJ/2017	5

2. The brief facts of the case are that Show Cause Notice F.No.V.69/AR-MRB/Pr.Commr./126/2015-16 dated 08.01.2016 (hereinafter referred to as "the impugned SCN") was issued to Appellant No.1 to Appellant No. 5 demanding Central Excise duty on clandestine manufacture of Ceramic Wall Tiles and clearances thereof by Appellant No. 1 to various customers, alleging as under: -

- (a) Appellant No.1 had clandestinely manufactured and cleared their finished excisable goods, namely, Ceramic Wall Tiles involving Central Excise duty of Rs. 1,71,43,642/-- to various customers including Appellant No.4 and Appellant No. 5 on the strength of dispatch advices and without issuing central excise invoices and without payment of Central Excise duty.
- (b) Appellant No. 2 and Appellant No. 3 (Directors of Appellant No. 1) had concerned themselves in manufacturing, storing, removing, and selling of the excisable finished goods which they knew and had reason to believe that the same were liable to confiscation, made them liable for penal action under Rule 26 of the Rules.

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- (c) Appellant No. 4 and Appellant No. 5 had concerned themselves in purchasing of the excisable finished goods from Appellant No. 1 without central excise invoices and without payment of Central Excise duty, which they knew and had reason to believe that the same were liable to confiscation and liable to penalty under Rule 26 of the Central Excise Rules, 2002 (hereinafter referred to as the "Rules").

The above SCN was adjudicated by the lower adjudicating authority vide the impugned order, which confirmed demand of Central Excise duty of Rs. 1,71,43,642/- upon Appellant No.1 under Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as the "Act") and appropriated Rs.30,00,000/- deposited during investigation vide Challan No. 319 dated 15.01.2013 and Challan No. 194 dated 15.02.2013 and Rs. 30,00,000/- paid vide Entry No. 230 dated 01.01.2016 from cenvat credit account; ordered to pay interest on the confirmed demand under 11AA of the Act and imposed penalty of Rs. 1,71,43,642/- upon Appellant No.1 under Section 11 AC of the Act with option to pay reduced penalty @ 25% of duty confirmed and also imposed penalty upon Appellant No. 2 to Appellant No. 5 under Rule 26 of the Rules.

Being aggrieved with the impugned order, Appellant No. 1 preferred present appeal, *inter-alia*, on the following grounds: -

i) The lower adjudicating authority has confirmed the duty demand which is based on allegation of clandestine removal mainly on dispatch advices retrieved from pen drives and on the basis of statements of Directors of Appellant No. 1 and few buyers alleged to have purchased the finished goods without payment of duty without appreciating the facts that whether data retrieved from pen drive is admissible evidence under the Act; whether so called dispatch advice is statutory and legal document for dispatch of goods manufactured and cleared by Appellant No. 1; that what is the authenticity of private chits/details and whether these private chits/records which do not prove beyond doubt the alleged clandestine manufacture and dispatch of all goods mentioned therein; that whether Appellant No. 1 has dispatched all goods mentioned in dispatch advices without preparation of invoices even when the department during investigation and adjudication agreed to the fact that there are some invoices prepared and duty paid by Appellant No. 1 against dispatch advices; that when there are invoices prepared against dispatch advice, how can it be denied that goods not dispatched against balance dispatch advices due to various reasons like non-availability of particular Grade, non-availability of particular size, cancellation of order by buyer, non-availability of transportation, damage of consignment, change in order by buyer etc.

ii) Cross-examination of the persons whose statements were relied upon in the impugned SCN was denied by the lower adjudicating authority violating the principles of

natural justice. As held in various judgments, the statements which are stating half truth or taken under pressure must be allowed for cross-examination particularly when the entire case is based on the statements. The so-called statements of Directors of Appellant No. 1 were retracted on the ground of being recorded under pressure and stating that details which are not true but the same were not considered by the lower adjudicating authority; that whether Appellant No. 1 had purchased raw materials only from one buyer whose statement relied upon in the impugned SCN? No statements of suppliers of other raw materials which were used to manufacture tiles were recorded to prove the clandestine manufacture and clearances thereof by Appellant No. 1; that SCN issued only to two buyers whereas statement of five buyers were recorded, which prove the lack of reliability and not fair investigation by the department.

(iii) What is other corroborative and reliable proof to make such serious allegation of clandestine manufacture and removal of goods? As held in various judgments, the charge of clandestine manufacture and removal thereof must be proved with evidences beyond doubt but the department failed to do so in the present case. There should be tangible evidence of clandestine manufacture and clandestine clearances of such manufactured goods and not merely inferences or unwarranted assumptions. Evidences in support of, purchase of excess raw materials, actual removal of unaccounted finished goods from the factory without payment of duty, discovery of such finished goods outside the factory, sale of such goods to identified parties, receipt of sale proceeds, whether by cheque or by cash, of such goods by the manufacturers or persons authorized by him, use of electricity in excess of what is necessary for manufacture of goods otherwise manufactured and validly cleared on payment of duty, statements of buyers with some details of illicit manufacture and clearances, actual transportation of goods cleared without payment of duty, links between the documents recovered during the search and activities being carried on in the factory of production, etc. are not available in this case. No shortage/excess stock found during search or investigation to prove the activity of clandestine manufacture and removal of finished goods.

(iv) The lower adjudicating authority has erred in failing to take into consideration contention of the appellant while giving his findings at Para No. 38 of the impugned order that it is a settled legal position that a serious charge of clandestine manufacture and illicit removal of excisable goods cannot be considered only on the basis of statements of directors or employees associated with a manufacturer as held by Hon'ble CESTAT, Ahmedabad in the case of Arya Fibres Pvt. Ltd. reported as 2014 (311) ELT 529 (Tri. Ahmd.) and as held by Hon'ble CESTAT, Chennai in the case of Poshak Corporation reported as 2002 (140) ELT 187 (Tri. Chennai).

v) The statements were not recorded in free and fair manner and also that the statements contained only half truth whereas true and full facts were not taken on record though the persons concerned desired to clarify serious facts and also the method of business. The request for cross examination of the witness was really necessary to test the veracity, authenticity and reliability of such statements which was denied by the lower adjudicating authority. In view of decision in the case of Arya Fibres Pvt. Ltd. *supra* and other relevant case laws, the appellant submitted that the impugned order passed without allowing opportunity of cross examination of persons whose statements are relied upon is void because such an order is in gross violation of the principles of natural justice.

vi) The burden to prove clandestine removal of excisable goods without payment of duty is on the Revenue and hence department must adduce evidences regarding procurement of raw materials, actual production of goods in the factory, removal of goods by adducing evidence of various agencies involved in delivering goods to customers like transporters and the customers to whom clandestinely removed goods have been delivered and also payments that a manufacturer is expected to receive from the customers for selling and delivering such clandestinely removed goods. It is settled position that on the basis of documents like challans, books or papers containing some entries and details, the Revenue cannot make out a case of clandestine manufacture and illicit removal of goods. Except five, no buyers could be revealed by the department. There is no evidence of payments of such cash sales having been actually received. There is no evidence of cash payments received by them for purchasing and procuring required raw materials for manufacturing Ceramic Vitrified Tiles. The Revenue is also required to establish consumption of electricity etc. for manufacturing of Ceramic Vitrified Tiles are alleged to have been received by them from the buyers. The appellant relied on the following decisions in this respect: -

- Vishwa Traders Pvt. Ltd. – 2012 (278) ELT 362 (Tri. Ahmd.)
- Saakeen Alloys Pvt. Ltd. – 2014 (308) ELT 655 (Guj.) maintained in 2015 (319) ELT A117 (SC)
- Flevel International – 2016 (332) ELT 416 (Del.)
- Surya Alloy Industries Ltd. – 2014 (305) ELT 340 (Cal.)
- Chemco Steels Pvt. Ltd. – 2005 (191) ELT 856
- K. Rajagopal – 2002 (142) ELT 128
- Ambika Chemicals – 2002 (148) ELT 101
- Shree Renuka Sugars Ltd. – 2007 (210) ELT 385
- Sangamitra Cotton Mills (P) Ltd. – 2004 (163) ELT 472 (T)

(vii) The deposit of Rs. 30,00,000/- during investigation vide Challan No. 319 dated 15.01.2013 and Challan No. 194 dated 15.02.2013 and Rs. 30,00,000/- paid vide Entry No. 230 dated 01.01.2016 from cenvat credit account prior to issuance of impugned SCN dated 08.01.2016, were made only as a law abiding assessee to show our bonafide and may not be considered as an evidence of accepting these liabilities. The appellant relied upon decisions of the Hon'ble Gujarat High Court in the case of Parle International Limited reported as 2001 (127) ELT 329 and Hon'ble CESTAT in the case of Shakti Chemical Industries reported as 1995 (76) ELT 410.

(viii) There is no cogent and reliable evidence in support of the charges levelled in the impugned order and therefore, no penalty is justified on the basis of charges so levelled merely on assumptions and presumptions. Penalty is quasi-criminal in nature and therefore it cannot be imposed on mere assumptions and presumptions. The appellant had not acted dishonestly or contumaciously and therefore, not even a token penalty would be justified upon them as well as their Director (Appellant No. 2). The appellant relied on the decision of Hon'ble Supreme Court in the case of Hindustan Steel Limited reported as 1978 (2) ELT J159 (SC).

(ix) In the instant case, there is no short levy or short payment or non-payment of any Central Excise duty. Therefore, proposal to charge interest under Section 11AA of the Act is not maintainable.

4.1 Appellant No.2 and Appellant No. 3 filed appeals on almost same grounds as contended by Appellant No.1 and as mentioned from (i) to (vi) above.

4.2 Appellant No. 4 and Appellant No. 5 preferred appeals, *inter-alia*, on the grounds that they had not made any payment to Appellant No.1 in cash for any purchases of ceramic wall tiles without central excise invoices from them and therefore, the whole basis for imposing penalty on them under Rule 26 of the Rules is illegal and unauthorized. The case of the Revenue is neither substantiated nor proved by any acceptable evidence. It is not even alleged in the impugned order that they had any reason to believe or any knowledge that any goods were liable to confiscation and yet they were held as concerned in dealing with such goods. The appellants relied upon decision of Hon'ble CESTAT in the case of Standard Pencil reported as 1996 (86) ELT 245.

5. Personal Hearing in the matter was attended to by Shri Chetan Dethariya, C.A., on behalf of all Appellants, who reiterated the grounds of all appeals and also submitted additional written submissions pointing out discrepancies in the statements taken from the Directors of Appellant No. 1 as well as statements of buyers and brokers as detailed from Page II to Page XII; that SCN and impugned order held clandestine clearances of

1,09,012 Boxes on clandestine production of 7,72,553 Boxes only! that the department could get statement of only 1,30,821 Boxes of clandestine clearances, which is less than 15% of total clandestine clearances and the statements were pre-planned by the department; that the statements were not true and forced to be written by the investigating officers; that in such case, their request to cross-examine the makers of the statements should be allowed by remanding the matter back to the adjudicating authority as the impugned order carry many mistakes as detailed in their appeals and additional written submissions; that their appeals should be allowed by setting aside the impugned order.

1 They submitted additional written submissions reiterating the grounds of appeals and arguments made in their appeal memorandum and stating that dispatch slips are not cogent and prudent evidence to prove the allegation of clandestine removal; that statements are not valid in the eye of law as taken forcibly; that denial of cross-examination of persons whose statements were relied upon in SCN is in violation of principles of natural justice; that department relied on statement dated 24.08.2015 of Appellant No. 3 admitting clandestine production of 7,72,553 Boxes of Ceramic wall tiles as per Annexure-P2 to this statement, against which SCN alleged clandestine removal of 11,09,012 boxes of Ceramic Wall Tiles as per Annexure-B1 to SCN which is not logical and justifiable at all; that how can clandestine removal can be more than the clandestine production! that some entries of Annexure P2 of statement is less than production recorded by the appellant in Daily Stock Account and department took differential production as negative which further questions to the fairness of the statement and therefore, cross-examination is necessary; that they submitted exhibits I to VIII stating that appellant had cleared the excisable goods shown in the corresponding dispatch slips under central excise invoices on payment of central excise duty totally of Rs. 43,34,769/-; that SCN alleged clandestine removal from 01.04.2011 as mentioned in Annexure-B to SCN, however, the appellant had commenced their production from 29.09.2011 only as revealed from SSI certificate, therefore, dispatch slips cannot be considered as authentic documents; that they relied on the following case-laws:-

- Oudh Sugar Mills Ltd. – 1978 (2) ELT (J 172) (SC)
- Lord Chloro Alkali Ltd. – 2013 (293) ELT 68 (Tri. – Del.)
- Shree Nakoda Ispat Ltd. – 2017 (348) ELT 313 (Tri. – Del.)
- Gupta Synthetics Ltd. – 2014 (312) ELT 225 (Tri. – Ahmd.)
- Nabha Steels Ltd. – 2016 (344) ELT 561 (Tri. – Chan.)
- Continental Cement Company – 2014 (309) ELT 411 (All.)
- Rajputana Steel Casting P. Ltd. – 2017 (346) ELT 491 (Tri. – Ahmd.)

FINDINGS: -

6. I have carefully gone through the facts of the case, the impugned order, the appeal memoranda and written as well as oral submissions made during the personal hearing. The issue to be decided is whether the impugned order, in the facts of this case, confirming demand on Appellant No. 1 and imposing penalty on Appellant No. 1 to Appellant No. 5 is correct, legal and proper or otherwise.

7. I find that the lower adjudicating authority has confirmed demand of central excise duty of Rs. 1,71,43,642/- on the basis of dispatch slips indicating clandestine removal of Ceramic Wall Tiles and relied on the statements of Appellant No. 2 and Appellant No. 3 (Directors of Appellant No. 1) and their buyers of the goods and Shri Ketanbhai Mavjibhai Kamaria, supplier of clay (raw material for Ceramic Wall Tiles). Appellant No. 1 has questioned the authenticity and evidentiary value of data/details retrieved from pen drives and reliability of the statements of their Directors, buyers and raw material supplier and contended that clandestine manufacture and illicit removal of excisable goods cannot be considered only on the basis of statements of directors or employees associated with a manufacturer. I find that facts on records revealed that Central Excise Officers of Rajkot Commissionerate had searched the factory premises of Appellant No. 1 on 03.01.2013 in presence of Appellant No. 2 (Director of Appellant No. 1) during which two pen drives and incriminating documents containing details of actual production details and print out of dispatch advices were resumed indicating illicit clearances of ceramic wall tiles. Statement of Shri Jayesh I. Matariya, Office Clerk of Appellant No. 1 recorded on 03.01.2013 wherein he deposed that he was preparing invoices and also looking after accounting work, data entry of daily production, taking printout of sales invoices from the system, filing of purchase bills, etc. ; that daily production figure was being entered by him as per the direction of Shri Manojbhai, Appellant No. 3 and Director of Appellant No. 1; that he was entering data in the computer software "ceramic stock" on the basis of dispatch advices received from Shri Bhaveshbhai, Office Clerk, which were prepared after loading of the goods as per direction of Shri Manojbhai; that he was dispatching the goods by preparing invoices or without invoices as per instructions of Shri Manojbhai; that many times he was preparing invoices of less quantity or showing inferior grade in the invoices as per instructions of Shri Manojbhai; that the production details shown in the documents resumed under Panchnama dated 03.01.2013 was actual and they were showing less production in Daily Stock Account so as to clear differential quantity of finished goods without payment of duty. Shri Bhavesh P. Vadaviya, Office Clerk under his statement dated 03.01.2013 inter-alia stated that he was entering production details in the computer system on the basis of sorting report handed over to him by Shri Prakashbhai and it was actual. The statements of both these office clerks were perused by Shri

Sanjaybhai D. Kotadiya, Appellant No. 2 & Director of Appellant No. 1 under his statement dated 03.01.2013 and he agreed with the contents mentioned therein and admitted that they had cleared their manufactured goods under dispatch advices from January, 2012 without central excise invoices to evade payment of central excise duty and that the proceeds thereof were received in cash; that they were showing less production in Daily Stock Account instead of actual production to clear the finished goods clandestinely without preparation of central excise invoices and without payment of central excise duty; that many often they were preparing central excise invoices showing less quantity or showing inferior grade of ceramic wall tiles in the invoices to evade payment of central excise duty; that whatever goods were cleared by them without invoices were cleared after adjusting stock mentioned in their Daily Stock Account so that physical stock lying in the factory and stock shown in Daily Stock Account remained same; that daily production capacity of Appellant No. 1 was to manufacture 12000 to 13000 Boxes of Ceramic Wall Tiles against which their average production was of 5000 to 6000 Boxes of Ceramic Wall Tiles; that he declared MRP of each grade and each size of Box of Ceramic Wall Tiles.

1 The printouts of documents/details contained in two seized pen drives were taken out under regular Panchnama dated 24.08.2015 in presence of Appellant No. 2 and Appellant No. 3. Both these appellants confirmed that the said pen drives were kept intact in the envelope. During recording of Panchnama, both the Directors of Appellant No. 1 clarified that printouts obtained from first pen drive of Black colour contained production recorded in Daily Production Account for the year 2011-12, printouts obtained from another pen drive of black and red colour contained details of goods produced during 17.10.2012 to 02.01.2013 and that both these pen drives were used by them and the data/details entered by them contained their day to day transaction and belonged to their factory only. Shri Manoj V. Soriya, Director (Appellant No. 3) under his statement dated 24.08.2015 admitted clandestine clearances made by Appellant No. 1. He perused Panchnamas dated 03.01.2013 and dated 24.08.2015 and statements of both of their office clerks and statement of Appellant No. 2 and admitted that he was giving instructions to their office clerks for clearance of their finished goods with or without Central Excise invoices and preparing invoices of less quantity or for inferior grade of Ceramic Wall Tiles; that they had cleared their finished goods under dispatch advices without preparation of central excise invoices and without payment of central excise duty; that they were showing less production instead of actual production or showing production of inferior grade in Daily Stock Account; that they received payments in cash in person from concerned buyers for the goods sold without invoices or under invoices showing less quantity of goods or inferior quality of goods; that they made payment in cash to their raw material suppliers for the goods purchased without

invoices; that arrangements of transportation were made by concerned buyers and they have not kept any details thereof and hence the same cannot be produced. Statements of five buyers were also recorded wherein the concerned buyer has admitted purchase of finished goods from Appellant No. 1 without central excise invoices and without payment of Central Excise duty and also raw material supplier under his statement admitted that they have supplied clay (raw material of Ceramic Wall Tiles) to Appellant No. 1 without invoices. Based upon documentary and oral evidences so resumed, the department issued impugned SCN demanding central excise duty of Rs. 1,71,43,642/- as summarized in Annexure B to SCN.

7.2 I find that incriminating documents recovered from the premises of Appellant No. 1 are corroborated with the statements of Appellant No. 2 and Appellant No. 3, who were Directors of Appellant No.1 and statements of buyers and raw material supplier. These are substantial evidences in the form of documentary and oral evidences on record and cannot be ignored. I find that the investigation has corroborated various evidences of evasion of Central Excise duty by Appellant No. 1.

7.3 Appellant No. 1 has contended that dispatch advices retrieved from pen drives is not admissible evidence as per Central Excise Act; that the private chits/details are not authenticated and does not prove beyond doubt the alleged clandestine manufacture and dispatch of all goods mentioned therein. Having regard to facts of the case, I find that Appellant No. 3, who was active Director of Appellant No. 1, categorically deposed that he was instructing his employees to enter details of less production or production of inferior quality of their finished goods in these pen drives after adjustment of their finished goods cleared without central excise invoices and without payment of central excise duty and recorded less production in their Daily Stock Account as compared to actual production recorded in Note Books/sorting reports. The dispatch advices recovered from the factory premises of Appellant No. 1 clearly established that goods described in many of such dispatch advices did not correspond to the details described in central excise invoices. Appellant No. 2 and Appellant No. 3 agreed to clandestine production of their finished goods and clearances thereof under such dispatch advices. Hence, I find that dispatch advices retrieved from pen drive in respect of which no corresponding central excise invoices were prepared can be considered as substantial evidences under Section 36B of the Act. I also find that Appellant No. 2 and Appellant No. 3 under their respective statements recorded before Central Excise officer admitted clandestine manufacture of finished goods and clearances thereof which were never retracted by them. Therefore, confession made by these appellants can be considered as admissible evidence which can be used against Appellant No. 1 for demanding central excise duty.

4 Appellant No. 1, in their additional written submissions pointed out discrepancies in the statement dated 24.08.2015 of Appellant No. 3 stating clandestine production of 72,553 Boxes of Ceramic wall tiles as per Annexure-P2 to the statement which is less than the alleged clandestine removal of 11,09,012 Boxes of Ceramic Wall Tiles as per Annexure-B1 to SCN, which is not logical and justifiable as clandestine removal cannot be more than the clandestine production; that some entries of Annexure P2 of the statement are less than production recorded in Daily Stock Account and department book differential production as negative which questions fairness of the statement and therefore, in my view cross-examination of maker of statement is required; that Appellant has cleared the finished goods under central excise invoices on payment of C.E duty of Rs. 43,34,769/- but even then the SCN has demanded duty on these finished goods again treating these under corresponding dispatch slips; that SCN alleged clandestine removal by Appellant No. 1 from 01.04.2011 as mentioned in very first entry of Annexure-B to SCN, however, the appellant had commenced their commercial production from 29.09.2011 only as has also been revealed from SSI certificate, which is about 5 months after; that the cross examination of the witnesses, in view of above facts, was required to test the veracity, authenticity and reliability of their statements which was denied by the lower adjudicating authority. I find that the copy of dispatch slips recovered from the factory premises of Appellant No. 1 and corresponding central excise invoices are required to be verified thoroughly and demand of central excise duty can be confirmed only for those quantities of goods, which were cleared without preparation of central excise invoices and without payment of central excise duty. Therefore, I am of the considered view that it is proper to remand this case back to the lower adjudicating authority for proper scrutiny of the documents and for passing of speaking and reasoned order after verifying dispatch slips under Central Excise invoices involving duty of Rs. 43,34,769/-, as stated by the Appellant No. 1 and after allowing cross-examination of buyers of finished goods and supplier of raw material/clay, whose statements have been relied upon in the SCN/impugned order.

5 The Commissioner (Appeals) has power to remand as has been decided by the Hon'ble CESTAT in the case of CCE, Meerut Vs. Singh Alloys (P) Ltd. reported as 2012(284) ELT 97 (Tri-Del). I also rely upon decision of the Hon'ble Tribunal in the case of CCE, Meerut-II Vs. Honda Seil Power Products Ltd. reported in 2013 (287) ELT 353 (Tri-Del) wherein the similar views have been expressed in respect of inherent power of Commissioner (Appeals) to remand a case under the provisions of Section 35A of the Act. The Hon'ble Gujarat High Court in Tax Appeal No. 276 of 2014 in respect of Associated Hotels Ltd. has also held that even after the amendment in Section 35A (3) of the Central Excise Act, 1944 after 11.05.2011, the Commissioner (Appeals) would retain the power to remand.

9. In view of above, I set aside the impugned order and allow all appeals by way of remand to be decided by the lower adjudicating authority in terms of Para 7.4 and all relevant facts in this regard.

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

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

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29/4/18

[Handwritten signature]
29/4/2018
(कुमार संतोष)
आयुक्त (अपील्स)

By RPAD

To,

1.	M/s. Delton Ceramic Pvt. Ltd., Near Octiva Ceramic, Lakhdirpur Road, 8-A National Highway, Lalpar, Morbi	मे. डेल्टोन सेरामिक प्रा. लिमिटेड, ओक्टीवा सेरामिक के पास, लखधीरपुर रोड, ८-अ नेशनल हाइवे, लालपर, मोरबी
2.	Shri Sanjay D. Kotadiya, Director of M/s. Delton Ceramic Pvt. Ltd., Near Octiva Ceramic, Lakhdirpur Road, 8-A National Highway, Lalpar, Morbi	श्री संजय डी. कोटदिया, डाइरेक्टर, मे. डेल्टोन सेरामिक प्रा. लिमिटेड, ओक्टीवा सेरामिक के पास, लखधीरपुर रोड, ८-अ नेशनल हाइवे, लालपर, मोरबी
3	Shri Manojbhai V. Sariya, Director of M/s. Delton Ceramic Pvt. Ltd., Near Octiva Ceramic, Lakhdirpur Road, 8-A National Highway, Lalpar, Morbi	श्री मनोजभाइ वी. सरिया, डाइरेक्टर, मे. डेल्टोन सेरामिक प्रा. लिमिटेड, ओक्टीवा सेरामिक के पास, लखधीरपुर रोड, ८-अ नेशनल हाइवे, लालपर, मोरबी
4	Shri Bipinkumar R. Panara, Proprietor of M/s. Rangoli Marketing, Ceramic Plaza-2, National Highway, Morbi	श्री बीपीनकुमार आर. पनारा, प्रोप्राइटर, रंगोली मार्केटिंग, सेरामिक प्लाज़ा-२, नेशनल हाइवे, मोरबी
5	Shri Rajesh G. Makadiya, Authorized Signatory of M/s. A.M. Corporation, Parshwanath Complex, Opp. Kuber Cinema, National Highway, Morbi	श्री राजेश जी. माकड़िया, औथोराइज़्ड सिग्नटोरी, मे. ए. एम. कॉर्पोरेशन, पार्श्वनाथ कॉम्प्लेक्स, कुबेर सिनेमा के सामने, नेशनल हाइवे, 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 Deputy Commissioner, GST & Central Excise Division, Morbi.
- 4) Guard File.