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

RAJ-EXCUS-000-APP-063-TO-064-2018-19

Date of Order: 01.05.2018

Date of issue: 02.05.2018

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

Name & Address of the Appellants & Respondent :

1. Global Coke Ltd. Unit - I, Village Khiri, Taluka Jodia, Jamnagar,
2. Shri Sujit Kumar Bhattacharya, General Manager, Global Coke Ltd., Unit-I

[illegible]

(i) [illegible] 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) [illegible] the CESTAT under Section 35F of the Central Excise Act [illegible] Finance Act [illegible] Central Credit Rules [illegible] commencement of the Finance (No.2) Act, 2014.

(iii) [illegible]

(iv) [illegible]

(v) [illegible]

(vi) [illegible]

(vii) [illegible]

(viii) [illegible] CIC and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee [illegible]

(ix) [illegible] the amount involved is Rupees One Lakh or less and Rs.1000/- where the amount involved is more than Rupees One Lac.

(x) [illegible]

(xi) [illegible] Court Fee Act, 1975, as amended.

(xii) [illegible] contained in the Customs, Excise and Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(xiii) [illegible] relating to filing of appeal to the higher appellate authority [illegible] www.cbec.gov.in

## :: ORDER IN APPEAL ::

The below mentioned two appeals have been filed by the Appellants (hereinafter referred to as "Appellant No.1 & Appellant No.2) as detailed in the Table against Order-in-Original No. 137/ADC/PV/2016-17 dated 20.03.2017 (hereinafter referred to as "the impugned order") passed by the Additional Commissioner of Central Excise & Service Tax, Rajkot (hereinafter referred to as "the lower adjudicating authority"):-

| Sr. No. | Appeal No. | Appellant No. | Name of the Appellant |
|---|---|---|---|
| 1 | V2/229/RAJ/2017 | Appellant No.1 | M/s. Global Coke Ltd., Unit I, Village: Khiri, Taluka: Jodiya, Dist. Jamnagar. |
| 2 | V2/230/RAJ/2017 | Appellant No.2 | Shri Sujit Kumar Bhattacharya, General Manager (Marketing) of M/s. Global Coke Ltd., Unit I, Village Khiri, Taluka Jodiya, Dist. Jamnagar |

2. The officers of Central Excise, Rajkot Commissionerate conducted search at the premises of Appellant No. 1 and recovered several incriminating documents, substantiating duty evasion by Appellant No. 1 from the office premises, weighbridge and security cabin of Appellant No. 1 as well as office chamber of Appellant No. 2. Printouts were taken from the weighbridge machine and documents relating to dispatch and sales order revealed that Appellant No. 2 with the help of other office staff used to maintain data of illicit removal of excisable goods in a computer folder named "daily workinggg" and MS Excel files viz. DEEPAK 1, Himmat, deepak1314, Good Luck NEW, Himmat lal, HL Coal, Hi, SMS Tradelink stored in the computer available in factory and used by Shri Abhishek Mishra, Accountant of Appellant No. 1.

2.1 On completion of investigation, Show Cause Notice No. V.27/AR-JMR/ADC(BKS)/209-2015-16 dated 31.03.2016 was issued proposing to (i) confiscation 3085.310 MT of Metallurgical Coke valued at Rs. 5,00,82,930/- under Rule 25 of the Central Excise Rules, 2002 (hereinafter referred to as "the Rules") and imposition of fine in lieu of confiscation, (ii) demand of recovery of Central Excise duty of Rs.49,93,070/- under proviso to Section 11A(4) of the Central Excise Act, 1944 (hereinafter referred to as "the Act") alongwith interest under Section 11AA of the Act, (iii) imposition of penalty on Appellant No. 1 under Section 11AC of the Act read with Rule 25 of the Rules (iv) Appropriation of Rs. 10,00,000/- paid by Appellant No. 1 against

Central Excise duty demanded (v) imposition of penalty on Appellant No. 2 under Rule 26 of the Rules.

2.2 The said Show Cause Notice was adjudicated by the lower adjudicating authority vide the impugned order wherein he ordered to (i) confiscate 3085.570 MT of Metallurgical Coke valued at Rs. 5,00,67,940/- under Rule 25 of the Rules and imposed fine of Rs. 50,00,000/- in lieu of confiscation upon Appellant No. 1 (ii) confirmed demand of Central Excise duty of Rs. 46,95,070/- under Section 11A(4) of the Act alongwith interest and also appropriated Rs. 10,00,000/- paid by Appellant No. 1 (iii) impose penalty of Rs. 46,95,070/- under Section 11AC of the Act upon Appellant No. 1 and (iv) imposed penalty of Rs. 5,00,000/- under Rule 26 of the Rules upon Appellant No. 2.

3. Being aggrieved with the impugned order, the Appellant No. 1 and 2 have preferred the appeals on various grounds as detailed below:

<u>Appellant No. 1:</u>

(i) The lower adjudicating authority erred in imposing redemption fine by holding that 406.510 MT of LAM Coke are liable to be confiscated but since the said goods having already been removed from the factory, are not physically available; that they had not removed LAM Coke without payment of duty; that the lower adjudicating authority mis-interpreted the provisions of Rule 25(1) of the Rules and wrongly held that Appellant had misplaced reliance upon CBEC Circular No. 5/89-C.E. dated 19.01.1989; that no tangible, direct or corroborative evidence, such as challan or invoice or transportation document or raw material or shortage or excess quantity of finished goods in inventory etc. has been brought on record; that clandestine removal has been confirmed by recovering the computer printouts, gate register and statement of factory employees; that the lower adjudicating authority shifted the burden to disprove the allegation of clandestine removal to the Appellant; that they rely on Manmohan Tex Print & Processors P. Ltd. - 2012 (281) ELT 505, Nutan Polymer Ltd - A116-117, Vol. 246 E.L.T. (Part 4), Shree Ji Aluminium Pvt. Ltd. - 2012 (282) ELT 294 (Tri.-Ahmd.), Lord's Chemicals Ltd. - 2010 (259) ELT 48 (Cal.), K. V. Textile Pvt. Ltd. - 2009 (240) ELT 397 (Tri. Chennai); that no investigation at the end of buyers and transporters has been pursued despite of the names have been

shown in Annexure-B1 to Show Cause Notice; that they had demonstrated document-wise entry-wise details as to how the documents and the entries of the Annexure to Show Cause Notice were faulty and incorrect; that they had pointed out that out of 174 entries of Annexure-B1, 11 entries relate to clearances of goods from the sister unit at Sindhudurg under Central Excise invoices and 2 entries have been wrongly repeated; that findings recorded by the lower adjudicating authority are conflicting against each other and hence invalid; that not a single copy of duplicate invoice purported to have been prepared in excel format and not any other type of duplicate invoice has been found or brought on record by the department; that they demonstrated by documentary evidences that the serial number of the purported duplicate bills are absurd as the sale numbers of purported duplicate bills are largely higher than the last number of actual invoice issued during the material period and in other cases, considerably ahead of the date mentioned in the actual invoice;

(ii) It was submitted that the consignments figuring at Sr. No. 162-164, 166 and 167 of Annexure-B1, they had claimed by submitting documents like copies of invoices and ARE-1s that the name of buyer as "TARIQ" in said annexure represents M/s. Tariq Trading Corporation, Pakistan to whom the goods have been exported; that the print outs relied upon in the Show Cause Notice do not qualify as evidences in terms of Section 36B of the Act; that the lower adjudicating authority wrongly found the statement of Appellant No. 2 as a valid evidence of clandestine removal, despite submission with documentary evidences that Appellant No. 2 has deposed so when he is in a mind to leave the company with discontent and also that it is quite unnatural that a person or a company would request the Department not to carry out any further investigation and would prematurely accept the allegation while the investigation is going on; that as the Appellant in the Show Cause Notice has been wrongly called upon to show cause to the same authority who has supervised investigation of the case, the Show Cause Notice is not maintainable in law.

(iii) The Appellant No. 1 elaborately described the deficient/faulty/erroneous/repeated particulars of Annexure "B1" which were submitted at the time of reply to Show Cause Notice also and already mentioned in the impugned order, therefore, the same are not detailed here for sake of

brevity.

(iv) They further submitted that in the Show Cause Notice, 5 (five) seized documents have been made basis of the allegation of clandestine removal of 2085.5 10 M.T. of Metallurgical Coke clandestinely from the factory are:

| | | |
|---|---|---|
| (i) | Print-outs of "daily workinggg" folder | - Sl. No.1 of Panchanama, |
| (ii) | Register of in-out movement of trucks | - Sl. No.24 of Panchanama, |
| (iii) | Print-outs of Weigh Bridge Machines | - Sl. No. 33 of Panchanama, |
| (iv) | Register of Despatch | - Sl. No. 39 of Panchanama, |
| (v) | Daily Despatch Register | -Sl. No.342 of Panchanama |

(v) The 'daily workinggg' folder is alleged to have been maintained on daily basis by Shri Abhishek Mishra, Accountant of Appellant No. 1 for separately recording of the clearances of Metallurgical Cokes from the factory under 'fake/ duplicate invoices and such serial numbers were repeated by preparing same numbered invoices'; but out of 173 consignments of Metallurgical Coke alleged to have been cleared under fake/duplicate invoices during the material period, the said "daily workinggg" folder shows only purported dispatches of 4 (four) consignments at Serial Nos. 17, 18, 19 and 29, dated 15-11-2013, 16-11-2013, 17-11-2013 and 21-11-2013 of Annexure-"01" to the Notice.

(vi) Appellant No. 1 further stated that the register of in-out movement of trucks does not qualify as an evidence for clandestine removal on the basis of the reasons that the said Register has been maintained by the Security Guards who was not regular and / or casual workers of Appellant No. 1, but they were workers of an independent Security Service Provider, namely DURGESH SECURITY SERVICES, engaged by the company, who engaged his men shift-wise but the statement of only Shri Sarvesh Ramchandra, Security Guard, was by the Department and he had not stated that the said register was maintained at the direction of Appellant No. 1; the entries of the said register denote movement of Pet Coke, Coking Coal and other materials, and by the reason of sizes it was taken that those sizes represent Metallurgical Coke, it was an assumption since marketability of other materials like Pet Coke and/or Coking

Coal belonging to the same product group requires mentioning of size-specifications; that Shri Sarvesh Ramchandra in his said statement, dated 04-02-2014 stated that he had made entries in column 'Material' of Register, which were of size and quantity of the finished goods dispatched, which were written on the basis of dispatch slips', but no dispatch slip were found by the officers during the search nor has been relied upon in Show Cause Notice; that the said Register stated to have been maintained on daily basis and consignment-wise, but out of 173 consignments of Metallurgical Coke alleged, only clearances of 52 consignments were recorded, and that too, without the name of Metallurgical Coke in the said Register;

(vii) Shri Binod Kumar Tiwari, Weigh Bridge Operator cum clerk in his statement dated 04.02.2014 has stated that Print-Out of Weigh Bridge Machines, stored in Computer contains the data of coke (finished goods) manufactured and dispatched by the company of different sizes; but, out of 173 consignments of Metallurgical Coke alleged to have been removed clandestinely, only clearances of 113 consignments are mentioned in the said Print-Out of Weigh Bridge Machines and that too, without the name of Metallurgical Coke; that the 'Register of dispatched goods' seized from Weigh Bridge Room in the factory of Appellant No. 1, is the print-out from computer. Shri Binod Kumar Tiwari, Weigh Bridge Operator cum clerk has stated in his said statement dated 04.02.2014 that the dispatches of the finished goods made during the material period were detailed in the Dispatch Register, but out of 173 consignments of Metallurgical Coke alleged to have been removed clandestinely, clearances of 9 consignments only are mentioned in the said Print-Out and that too, without the name of Metallurgical Coke.

(viii) The 'Daily Dispatch Register' seized from the office of Appellant No. 1, is also a print-out of computer, but out of 173 consignments of Metallurgical Coke removed clandestinely, only 48 consignments are mentioned in the said Print-Out of 'Register of dispatched goods', and that too, without the name of Metallurgical Coke.

(ix) As mentioned above five documents are not the records of actual dispatches. The particulars of documents indicate that those are

not correct and complete records for the purpose those are stated to have been maintained, otherwise, each of the said documents would have reflected all dispatches of clandestine removal since all the records were maintained regularly. There are several instances that dispatches of a particular date included in one such record but these are not included in other records, if the said records were correct and complete in all respects, the 77 nos. of such dispatches that have been shown in Print-outs of Weigh Bridge Machines would have also been simultaneously included in the print-outs of 'Daily Working(rogg)' Folder, Register of In-Out Movement of Trucks, Register of Dispatches and Daily Dispatch register, but that has not been there. The same thing repeats in Daily Dispatch Register wherein 42 nos. of such clandestine dispatches are included but those are not included in other documents. Similarly, 35 nos. of such dispatches are shown as included in Print-outs of Weigh Bridge Machines and Register of In-Out Movements of Trucks but those are not included in other documents. Again, 8 dispatches have been shown in Register of In-Out Movement of Trucks and Register of Dispatches but those are not included in other documents.

(x) The Appellant No. 1 stated that it would be an absurd proposition to treat the said documents as legally valid evidences of clandestine removal under duplicate/fake invoices and they referred the Section 36B(1)(c) read with section 36B(2) of the Central Excise Act, 1944 that the condition of clause (a) is not satisfied and they rely on case of M/s Copier Force India Ltd. v. CCE, Chennai, reported in 2008 (231) E.L.T. 224 (Tri.).

(xi) As regards statement dated 04-02-2014 of Shri Abhishek Mishra, Appellant No. 1 stated that he was not an 'Accountant' but he was transferred from Dodamarg Unit (Maharashtra) to Jamnagar Unit to work there without being designated to any post. The accounts of the company were maintained in the H.O. of Company at Kolkata. Therefore, to project him as an Accountant, i.e. a responsible person next in-charge below Shri S.K. Bhattacharya and Ms. Jyoti Kataria is completely a wrong contemplation. The comparison between monthly remuneration of Shri Abhishek Mishra, Shri S.K. Bhattacharya and Ms. Jyoti Kataria would demonstrate difference in area of work. It has been alleged in SCN that he

had maintained 'Daily Workings' Folder on Computer to store clandestine clearances made by fake invoices to Traders and undervalued clearances on day-to-day basis during material period but it would be found that out of 173 such dispatches, only particulars of 4 (four) alleged clandestine dispatches under duplicate/fake invoices are there in the said Folder.

(xii) Statement dated 04-02-2014 of Shri Binod Kumar Tiwari should not be treated as a valid evidence, because:

(i) he was a Weigh Bridge Operator cum clerk and not a responsible person of Appellant No. 1;

(ii) the Dispatch Register resumed under Panchnama contains particulars of only 9 (nine) alleged dispatches of Metallurgical Coke under fake invoices and thereby by any imagination, only those 9 (nine) dispatches can be considered as removal under duplicate/ fake invoices.

(xiii) Statement dated 04-02-2014 of Shri Sarvesh Ramchandra should not be treated as valid evidence, because he has been wrongly shown as Security Guard of Appellant No. 1 whereas, he was Security Personnel of Security Service Provider, namely, Durgesh Security Services and he was not under supervision and control of Appellant No. 1; that he stated that "entries made under the column 'Material' are of size and quantity of the finished goods dispatched, which were written on the basis of dispatch slips", but neither he himself nor the department has produced such dispatch slips; further the register of in out movements of trucks contain only 44 dispatches under fake invoices, out of alleged 173 dispatches.

(xiv) Statement of Appellant No. 2 in his capacity of General Manager (Marketing), was recorded on 10-04-2014, 07-12-2015 and on 29-02-2016 wherein he admitted clandestine removal only in his last statement dated 29.02.2016 and requested the Department "to complete investigation on the basis of material available with the Department without calling their buyers and customers". This deposition was made by him without any query by enquiry officer, which is completely extraordinary, creating suspicion on such act of Appellant No. 2. The Department has also not conducted verification at the end of the buyers

and had ultimately taken recourse to the above statement. Appellant No. 2 had resigned from Appellant No. 1 but after few months he rejoined the company. On 29-01-2016, he again submitted his Resignation Letter by e-mail with request to release him from the service, which was accepted by the Management, and he was requested vide letter dated 05.05.2016 to recover the sizable dues from the parties by working from his home on payment of monthly success fees and thereafter, Appellant No. 2 has finally left the Company. They submitted that Appellant No. 2 was not a regular employee of the Company at the time of the deposition made by him in statement dated 29-02-2016. Appellant No. 1 relied upon the following cases;

(i) Shri Marshal India Ltd. reported as 2012 (281) E.L.T. 571 (Tri.-Del.).

(ii) Maruthi Tex Print & Processors P. Ltd. reported as 2012 (281) E.L.T. 569 (Mad.).

(iii) Nutech Polymer Ltd. reported as A16-117. Vol. 240 E.L.T. (Part 4).

(iv) Shreeji Aluminium Pvt. Ltd. reported as 2012 (282) E.L.T. 234 (Tri-Ahmd.).

(v) Lords Chemicals Ltd. reported as 2010 (250) E.L.T. 46 (Cal.).

(vi) K.V. Textiles Pvt. Ltd. V. C.C.E., Madurai, reported in 2009 (240) E.L.T. 397(Tri-Chennai).

(xv) As regards confiscation of 3085.510 MT Metallurgical Coke, Appellant No. 1 stated that the said coke has not been seized by department at any point of investigation. Nothing has been done by them which made the goods liable to confiscation but abruptly confiscation of the goods has been proposed. The allegation of clandestine removal of 3085.510 MT Metallurgical Coke without payment of duty is not maintainable. Further, seizure of goods that also on removal, without payment of central excise duty, is a pre-condition for confiscation of the goods as described under Rule 24 of the Central Excise Rules, 2002; that they also refer the CBEC Circular No. 5/89-C.E., dated 19-01-1989 regarding seizure and confiscation of the goods.

(xvi) The second part of the demand is that an amount of Rs.82.11,625/- has been undervalued in respect of [illegible] Metric Tons of Metallurgical Coke cleared to different buyers during the period from 0[illegible].09.2013 to 28.01.2014 under Central Excise invoices. The sole basis of

the said allegations is that the code numbers mentioned in the invoices denote higher PMT value than the value declared on the invoices. Shri Abhishek Mishra in his statement dated 14.07.2014 explained the coding system i.e. "0-01" to "0-07" denoting the size of Metallurgical Coke i.e. '10x25', '20-30', '25x40', '25x50', '30x60', '40x90' and 'Lumpy' and the rate PMT as per the code was created under suffix 'Tally' in 'Daily Workinggg' folder in the computer, and the codes have been adopted in the Central Excise invoices. The lowest price of the metallurgical coke was Rs. 7,000/- PMT for clearances of "Coal dust" and the highest price was Rs 20,000/- PMT for clearance of "Lumpy" or +100 size and that 'the prices are higher for bigger size of coke and that the clearances of finished goods lower than the above price was undervaluation; that the Show Cause Notice in Annexure B2 proposes demand of Central Excise duty on the basis of the rates as per codes declared in invoices, which is incorrect on the following grounds:

(i) computer printout cannot be considered as an evidence in terms of Section 36B(2) of the Central Excise Act, 1944 nor the statement of Shri Abhishek Mishra can be treated as a valid evidence because he has never any role in price negotiations with the buyers;

(ii) the computer print outs cannot substitute price list, which the company has never maintained;

(iii) no standard fixed sale price of Metallurgical coke can be applied for marketability because of frequent price changes of imported coking coal, variation in quality, not fully free from other sizes, moisture and varied percentage of other chemical contents in coke and sudden increase or fall of market demand, etc.

(xvii) The Appellant No. 1 while referring to provisions of Section 4(1) of Central Excise Act, 1944 stated that not a single document showing any extra realization or flow-back either in cash or kind or any consideration having money value has been brought on record and mentioned in the Show Cause Notice. Therefore, the value for the purpose of payment of duty on the impugned Metallurgical Coke shall be the transaction value in terms of section 4(1)(a) of the Central Excise Act, 1944. In absence of evidences of extra-realization over and above the value declared in invoices, from the buyers or any evidence of flow-back of money from the buyers, the allegation of undervaluation is not maintainable. They relied

upon the following cases:

(i) K.P. Khalid reported as 2011 (264) E.L.T. 408 (Tri-Bang).

(ii) Euro Decor Pvt. Ltd. - CESTAT Order No. A/10997-10404/WZB/AHD/2014.

(xvii) The third part of the demand of duty is on the basis of Annexure "B3" to the Show Cause Notice, which shows that 1242.970 M.T. Metallurgical Coke valued at Rs.2,06,51,335.00 had been cleared from the factory without payment of Central Excise duty during the period 25-11-2013 to 07.10.2014; that the Bill numbers in Col. 2 of said Annexure-'B3' bear consecutive running serial Nos. from "T/01" to "T/72" and these invoices were raised for trading sale (re-sale) of Metallurgical Coke. The allegation of clearances of the above Metallurgical Coke without payment of duty is not maintainable.

Appellant No: 2

(i) Appellant No. 2 submitted that the Show Cause Notice was issued on [illegible].2016 when he resigned from Appellant No. 1 and had not received the Show Cause Notice and hence could not file reply and thus the impugned order has been issued without following principles of natural justice and he relied upon the following decisions:

(a) Ranjit Shaw / Paresh (OAP) P. Ltd. reported as 2010 (262) ELT 93 (Cal.)

(b) Winston Tan reported as 2009 (245) ELT 97 (Kar.)

(c) Hinduja Foundries Ltd reported as 2009 (235) ELT 678 (Tri. Bang.)

(d) Uma Nath Pandey reported as 2009 (237) ELT 241

(e) Andhra Agencies reported as 2008-TIOL-220-SC-CT

(f) Measurement & Controls India Ltd reported as 2008-TIOL-1536-CESTAT-MAD

(ii) Appellant No. 2 further submitted that the statements made by him on 04.02.2014, 10.03.2014, 07.12.2015 and 29.02.2016 were not made in the right state of mind, succumbing to the mental pressure and confusion of the proceedings and hence he sought relief; that allegations of clandestine removal has been refuted by Appellant No. 1 and filed appeal before Commissioner (Appeals-I), Rajkot; that no proposal of imposing penalty under Rule 26 of the Rules on director of Appellant No. 1 but on him who was an employee of Appellant No. 1; that even if such clandestine removal

were taken place, he did not stand to be a beneficiary from the same as he was mere employee of Appellant No. 1 and rely on the following decisions:

(a) [illegible] Mao [illegible] (Firm) - 2013 (298) ELT 570 (Tri.-Chennai)
(b) Bhavani Smelters Pvt. Ltd. - 2009 (236) ELT 467 (Tri.-Ahmd.)
(c) Neptune Spin Fab Pvt. Ltd. - 2009 (247) ELT 767 (Tri.-Ahmd.)
(d) Chandresh C. Shah - 2014-(45)-taxmann.com-236 (Gujarat)
(e) Globe Rexine Pvt. Ltd. - 2006 (4) STR 340 (Tri.-Chennai)
(f) Nexo Products India - 2015-TIOL-1285-HC-P&H-CX
(g) Rajesh Singhal - 2007 (208) ELT 432 (Tri.-Del.)
(h) Shrikant Processors (P) Ltd. - 2008 (284) ELT 98 (Tri.-Del.)
(i) India Medtronics Pvt. Ltd. - 2006 (195) ELT 347 (Tri.-Mumbai)

4. Personal hearing was granted to Appellant No. 1 on 19.01.2018, 05.02.2018, 26.02.2018 and 14.03.2018 but they failed to appear on any date. Appellant No. 1 vide letter dated 20.02.2018 (received on 26.02.2018) requested to keep the hearing/case pending, for reason that they have filed the application before Hon'ble National Company Law Tribunal, Kolkata for Initiation of Corporate Insolvency Resolution Process which is yet to be heard by the Hon'ble Tribunal.

4.1 Personal hearing in case of Appellant No. 2 was held. Shri Sujit Kumar Bhattacharya appeared and reiterated his grounds of appeal; submitted that he had not done any abatement of duty evasion by the company but had to give statements during investigation by the officers due to excessive pressure of their company; that he is innocent and was not knowing Central Excise law; that he is working in a company @ 30-35 thousand per month to maintain his family; that he is in no way position to pay any penalty.

FINDINGS

5. Since four opportunities of personal hearing have already been granted to Appellant No. 1, who did not attend the same and in February, 2018 requested to keep it pending by citing vague and cryptic reasons. This case can't be kept pending indefinitely. I am left with no option but to proceed to decide the appeals on the basis of documents available with the appeal.

5.1 I have carefully gone through the facts of the case, the impugned

order, the Appeal Memorandum of the Appellants and oral submission of Appellant No. 2. The issues to be decided are:

(i) whether 4095.510 MT of 'Metallurgical Coke' valued at Rs. 5,00,82,930/- removed clandestinely by Appellant No. 1 without excisable invoices and without payment of Central Excise duty, are liable to confiscation?

(ii) If yes, whether Appellant No. 1 is liable to pay redemption fine of Rs. 50,00,000/- in lieu of confiscation or not.

(iii) whether Appellant No. 1 is liable to pay Central Excise duty of Rs. 40,90,670/- alongwith interest

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

(v) whether penalty imposed on Appellant No. 2 is correct.

6. It is on record that Appellant No. 1 had never disputed the facts of clandestine removal made by them. The only agitation by them is regarding some entries reflected in Annexures to Show Cause Notice which they had contested by submitting copy of some invoices issued by their Maharashtra Unit. It is pertinent to note that Appellant No. 1 had not contested their entries by producing evidences available in their Jamnagar unit but have tried to prove that the said entries were pertaining to their Maharashtra Unit which is far from truth as it is not the case that investigation was carried out at their Kolkata unit where records of all the branch units were available and it has been missed out at the time of search. Therefore, it can easily inferred that they have not opposed clandestine removal made by them but had pointed out some discrepancies in the entries of Annexures that too with documents of Maharashtra Unit which is not permissible.

6.1 I find that Appellant No. 1 has submitted repeated submissions, as also mentioned at Para 18.1 of the impugned order, by mentioning the entry-wise and invoice-wise details to negate the charge of clandestine removal made by them. I find that lower adjudicating authority in the impugned order as mentioned at para 24 to 26 has categorically discussed the matter and recorded his findings. The same thing has been repeated in their Appeal and written submission also. The Appellant has produced invoices of their other unit located in Maharashtra and claimed that whatever entries mentioned in Annexure to Show Cause Notices were not

pertaining to them. Instead of submitting their specific reply to each and every entry available in Annexure to Show Cause Notice which was prepared based on records resumed under Panchnama, Appellant No. 1 has try to clarify their case based on vehicle number and other various arguments. Therefore, I am of the considered view that arguments advanced by Appellant No. 1 are of no help to them and devoid of any merits.

6.2 The Department has categorically proved clandestine removal based on computer data recovered during the search operation with that of found from the computer installed at weighbridge of Appellant No. 1, its print out and in out registered maintained by Appellant No. 1 at their security cabin wherein entries had been made by the security guard on shift duty at the material time. Shri Abhishek Mishra in his statement dated 04.02.2014 deposed that the printouts of "Daily Workings" reflect the clandestine clearances and unaccounted clearances of Appellant No. 1 and hence kept separately; that data had been entered by him as per direction of Appellant No. 1; that Page No. 35 of file at Sr. No. 1 of Annexure-A to Panchnama dated 04.02.2014 indicate the words suffixes like "Excel" and "Tally" against the entries, that suffix "Excel" was used for invoices prepared in Excel format, which were fake/duplicate invoices and such serial numbers were repeated by preparing same numbered invoices, which shows the details of different party, quantity and value and those transactions were illicit one and not accounted for in the Books of Account of Appellant No. 1; that suffix "Tally" was used for legitimate clearances made on payment of Central Excise duty; he also stated the coding system adopted for such clearance of different size of finished goods during his statement. To negate the matching evidences confirming clandestine removal, Appellant No. 1 argued that Shri Abhishek Mishra is not an accountant and not appointed by Appellant No. 1 but he was transferred from [illegible] Unit (Maharashtra) to Jamnagar Unit to work there without being designated to any post; that the accounts of the company were maintained in the H.O. of Company at Kolkata; that therefore, to project him as an Accountant, i.e. a responsible person below Shri S.K. Bhattacharya and Ms. Jyoti Kataria is completely wrong contemplation; that the comparison between monthly remuneration of Shri Abhishek Mishra, Shri S.K. Bhattacharya and Ms. Jyoti Kataria would demonstrate

difference in area of work. The above arguments look foolish in nature and do not carry much importance as it was not stated so during investigation and during statements after search carried out by the Department. Hence, their argument is nothing but an after thought in attempt to save themselves from payment of Central Excise duty and wriggle out of this case of wrong doings.

6.3 Appellant No. 1 further submitted that statement dated 04-02-2014 of Shri Binod Kumar Tiwari should not be treated as a valid evidence, because:-

i) He was a Weigh Bridge Operator cum clerk and not a responsible person of Appellant No. 1;

ii) The Dispatch Register resumed under Panchnama contains particulars of only 9 (nine) alleged dispatches of Metallurgical Coke under fake invoices and thereby by only those 9 (nine) dispatches can be considered as removal under duplicate/ fake invoices.

Above contention made by Appellant No.1 shows the double standard adopted by them while defending their case. How a person appointed by them for carrying out specific work entrusted to him can be held as not a responsible person? Rather he has to be considered as responsible person for the work allotted to him. It is not the case that Shri Binod Kumar Tiwari was not on pay-roll of Appellant No. 1. Further, it is proved beyond doubt that Appellant No. 1 was indulging in clandestine removal of goods as they accepted that since Dispatch Register resumed under Panchnama contains particulars of 9 (nine) alleged dispatches of Metallurgical Coke under fake invoices and thereby by only those 9 (nine) dispatches can be considered as removal under duplicate/ fake invoices. This is nothing but confession on their part that the entries found from the computer installed at weighbridge were for clandestine removal. It is established that Appellant No. 1 cleared the goods illicitly without Central Excise invoices and without payment of Central Excise duty.

6.4 Appellant No. 1 further contested that statement dated 04-02-2014 of Shri Sarvesh Ramchandra should not be treated as valid evidence as he was wrongly shown as Security Guard of Appellant No. 1 whereas he was Security Personnel of Security Service Provider namely Durgesh Security

Services, and he was not under supervision and control of Appellant No. 1; that he stated that "entries made under the column 'Material' are of size and quantity of the finished goods dispatched, which were written on the basis of dispatch slips", but neither he himself nor the department has produced such dispatch slips; further the register of in-out movements of trucks contain only 44 dispatches under fake invoices, out of alleged 173 dispatches. I find such arguments as made by Appellant No. 1 strange and without backed by facts. It makes no difference whether the Security Guard on payroll of Appellant No. 1 or was appointed by Security Service Provider or other agency. The said agency was engaged by Appellant No. 1 their nature of duty, payment to security agency based on persons deployed by security agency etc. Though the security guards were provided by security agency, the work to be carried out by security guards was defined by Appellant No. 1 only. Therefore, whatsoever entries were made by Sarvesh Ramchandra have to be considered as per direction of Appellant No. 1 only. It is not the case that the register of in out movements of trucks was belonging to security agency and not to Appellant No. 1. In fact, in out movement register was the property of Appellant No. 1 only. Appellant No. 1 further argued that the register of in-out movements of trucks contain only 44 dispatches under false invoices, out of alleged 173 dispatches. This again concretes the illicit removal of excisable goods without invoice and without payment of Central Excise duty. Appellant No. 1, has accepted 44 dispatches under fake invoices made by them. Appellant No. 1 did not produce any cogent evidences for these 129 entries, and hence, it is established that Appellant No. 1 cleared the goods illicitly without Central Excise invoices and without payment of Central Excise duty.

6.5 Appellant No. 1 also submitted that statement of appellant No. 2 in the capacity of General Manager (Marketing), was recorded on 10.03.2014, 07-12-2015 and on 29.02.2016; that he has admitted clandestine removal only in his last statement dated 29.02.2016 and requested the Department "to complete investigation on the basis of material available with Department without calling their buyers and customers"; that this deposition was made by him without any query by enquiry officer, which is extraordinary, creating suspicion on such act of Appellant No. 2; that Appellant No. 2 had resigned from Appellant No. 1 but after few months he

rejoined the company; that on 29-04-2016, he again submitted his Resignation Letter by e-mail with request to release him from the service, which was accepted by the Management, and he was requested vide letter dated 05.05.2016 to recover the sizable dues from the parties by working from his home on payment of monthly success fees and thereafter, Appellant No. 2 has finally left the Company; that they submitted that Appellant No. 2 was not a regular employee of the Company at the time of the deposition made by him in statement dated 29-02-2016. It is on record that Appellant No. 2 has given his statements in the capacity of General Manager (Marketing) as well as authorized representative of Appellant No. 1. He has produced letter dated 05.12.2015 appointing as authorized representative by Appellant No. 1. During the statement dated 29.02.2016, Appellant No. 2 has not disclosed the matter of his resignation to the Department and presented himself as General Manager (Marketing) and Authorised Representative. It is also proved that at the time of receipt of intimation/summon to present before Central Excise officers for recording statement, neither Appellant No. 2 has not informed Appellant No. 1 or prefer to hide the latest development of resignation of Appellant No.2 with an intent to create ambiguity for a point of argument while presenting their case afterwards. To nullify the effect of appointment of Appellant No. 2 as authorized representative by Appellant No. 1, Appellant No. 1 has created an alibi of resignation of Appellant No. 2, re-appointment of Appellant No.2 to recover dues from their customers and final resignation of Appellant No. 2. Thus, this act on the part of Appellant No. 1 as well as Appellant No. 2 is nothing but an afterthought to vitiate the proceedings initiated against them. Confession of clandestine removal of excisable goods as well as its undervaluation by a rank of General Manager (Marketing) and authorized representative of Appellant No. 1 before Central Excise officers under Section 14 of the Act cannot be brushed aside by putting counter arguments as it holds evidential values flowing from the statute that too when Appellant No. 2 was the only person responsible in all respect for the entire plant of Appellant No. 1. Therefore, I find that this argument made by Appellant No. 1 is devoid of any merit.

6.6 Appellant No. 1 further argued that the computer printouts from the computer installed in the office premises as well as at weighbridge are not true evidences out of 173 number of such dispatches effected during

the period from September, 2013 to 02.12.2014 but not a single document contained particular of all such dispatches and hence the respective computers were not used to regularly store or process information and relied upon the provisions of Section 36B of the Act. It is on record that while submitting grounds of appeals which run from page number 15 to 75, Appellant No. 1 made so many arguments that out of 173 entries, only 2 dispatches, only 44 dispatches are tallied; that out of 173 entries, only 113 consignments are mentioned in the said print out of weigh bridge machines; that out of 173 consignments, only 48 consignments are mentioned in the print out of "Register of dispatched goods". Thus, it is obvious that they have not opposed all such entries of Annexures to Show Cause Notice regarding their clandestine removal of excisable goods. As far as provisions of Section 36B of the Act is concerned, it is on record that the print-outs were taken from the computers installed at the office/weigh bridge of Appellant No. 1 during the course of Panchnama. It is not the case of Appellant No. 1 that any of the computers were not working or undergone repair/replacement. Thus, it is evident that the said computers were in use by Appellant No. 1 and in absence of any contrary evidences, it cannot be argued that the said computers were not used to regularly store or process information for the purpose of activities of the dispatches pertaining to clandestine removal. The provisions of Section 36B is reproduced below for better appreciation of facts:

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

on over that period by the person having lawful control over the use of the computer;

b) during the said period, there was regularly supplied to the computer in the ordinary course of the said activities, information of the kind contained in the statement or of the kind from which the information so contained is derived;

c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of that period was not such as to affect the production of the document or the accuracy of its contents; and

d) the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the said activities.

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

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

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

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

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

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

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

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

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

(5) For the purposes of this Section,

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

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

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

Explanation. - For the purposes of this Section, -

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

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

6.7 On going through the above provisions of Section 36B of the Act, the case of Appellant No. 1 falls under Section 36B(1)(c) of the Act and the facts of this case satisfy the conditions mentioned under Section 36B(2)(3)(4) and (5) of the Act. It is not the case of Appellant No. 1 that the computers were not used by them for the period for which data have been stored by them and subsequently produced by the said computers in form of printouts from the data/software stored therein. Therefore, I have no option but to hold that the printouts taken from the computers duly passed the test of provisions of Section 36B of the Act and thus, arguments put forth by Appellant No. 1 are of no help to them being devoid of merits.

6.8 It is pertinent to note here that Appellant No. 2 in his statements had confirmed that Appellant No. 1 cleared goods clandestinely without bills and also accepted Central Excise duty liability on these goods. Accepting the duty liability, Appellant No. 1 paid Rs. 18,00,000/- during investigation to show their bonafides. Thus, I hold that Appellant No. 1 is required to pay Central Excise duty of Rs. 48,93,070/-, as confirmed in the impugned order.

6.9 I find that admitted facts need not be proved as held by the Hon'ble CESTAT in the cases of Alex Industries reported as 2000 (240) ELT (Tri.-Mumbai), M/s. Divine Solutions reported as 2006 (206) E.L.T. (Tri.-Chennai), M/s. Karori Engg. Works reported as 2004 (166) E.L.T. 373 (Tri.-Del.) wherein Hon'ble CESTAT has held that "Confession is a substantial piece of evidence which can be used against the maker."

6.10 I also find that the ratio of the judgment of the Hon'ble Supreme Court of India in the case of CCE, Mumbai Vs. M/s. Kalvert Foods India Pvt. Ltd is applicable in the present case which was reported at [2011-TIOL-76-SC-CX] has held that :-

> "18. During the course of arguments learned counsel appearing for the respondent submitted before us that although the aforesaid statements of Managing Partner of the Company and other persons were recorded during the course of judicial proceedings but the same were retracted statements, and therefore, they cannot be relied upon. However, the statements were recorded by the Central Excise Officers and they were not police officers. Therefore, <u>such statements</u> made by the Managing <u>Partner of the Company and other</u> persons containing all the <u>details about</u> the functioning of the company which could be made

*only with personal knowledge of the respondents and therefore could not have been obtained through coercion or duress or through dictation. We see no reason why the aforesaid statements made in the circumstances of the case should not be considered, looked into and relied upon.*

*19. We are of the considered opinion that it is established from the record that the aforesaid statements were given by the concerned persons out of their own volition and there is no allegation of threat, force, coercion, duress or pressure being utilized by the officers to extract the statements which corroborated each other. Besides, the Managing Partner of the Company on his own volition deposited the amount of Rs. 11 lakhs towards excise duty and therefore in the facts and circumstance of the present case, the aforesaid statement of the counsel for the respondents cannot be accepted. This fact clearly proves the conclusion that the statements of the concerned persons were of their volition and not outcome of any duress.*

[Emphasis supplied]

6.11 CCE (P) vs. Aafloat Textiles (India) Pvt. Ltd. — 2009 (235) ELT 587 (SC)

*"11. "Fraud" as is well known vitiates every solemn act. Fraud and justice never dwell together. Fraud is a conduct either by letter or words, which includes the other person or authority to take a definite determinative stand as a response to the conduct of the former either by words or letter. It is also well settled that misrepresentation itself amounts to fraud. Indeed, innocent misrepresentation may also give reason to claim relief against fraud. A fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations, which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affair tainted with fraud cannot be perpetuated or saved by the application of any equitable doctrine including res judicata. (See Ram Chandra Singh v. Savitri Devi and Ors. [2003 (8) SCC 319]."*

6.12 It is settled legal position that once the case of clandestine removals of excisable goods in the manner it has been executed in this case is established, it is not necessary to prove the same with mathematical precision. In this regard, I rely upon the following case-laws:-

(i) Shah Guman Mal Vs. State of AP - 1983 (13) E.L.T. 1546 (S.C.).

*"Department is not required to prove its case with mathematical precision to a demonstrable degree……. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof, often it is nothing more than a prudent man's estimate as to the probabilities of the case."*

(ii) Haryana Steel & Alloys Ltd. reported as 2017 (355) ELT 451 (Tri.-Del.)

wherein it has been held that notebooks (diaries) seized from the possession of appellant's employee at the time of search showing entries for accounted as well as unaccounted goods which have been explained in detail and disclosed by GM of the factory tally with investigations based is trustworthy; that statement of employee running into several pages and containing detailed knowledge to be considered reliable; that Expert opinion regarding electricity consumption only indicates average yield and not conclusive especially when electricity generated and used from DG sets not taken into account.

(iii) M/s. Surya Cotspin Ltd reported as 2015 (328) ELT 650 (Tri.-Del.)

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

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

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

*(Emphasis supplied)*

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

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

*10.3 Added to the above, the director admitted clandestine removal of the goods not supported by Excise invoices. That resulted in loss of revenue. He, therefore, admitted to make payment of the duty evaded without controverting the Revenue implication of the entries in pencil handwritten ledger and slips recovered from possession of Appellant during search. Entire pleading of the Appellant therefore, failed to sustain when mala fide of the appellant came to record. Clandestine removal was well within the knowledge of the shift supervisors, accountant, Director, transporters and commission agent. Each other's evidence corroborated all of them and established unaccounted goods cleared without payment of duty. The most likely evidence of Gautam Agarwal brought the Appellant-company to the root of allegation. All of them established inextricable link of evasion. Shri Agarwal by his evidence attracted all the persons involved in the chain of clandestine clearance without their detachment.*

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

(Emphasis supplied)

6.12 I find that no statements have been retracted by any person and facts recorded in Panchnama and contents of seized items are accepted by Appellant No. 1 & 2 in their statements. It is not a case that a single statement has been recorded and relied upon but various statements of Appellant No. 2 and the employee of Appellant No. 1 establishing clandestine removal of final products by Appellant No. 1. In the circumstances, I am of the view that the statements recorded at different time and of different persons are not recorded under duress or threat. Facts of the statements have been independently corroborated by the facts

and contents of Panchnama recorded at the time of search. Therefore, I am of the considered view that the documents recovered during search, computer print outs and various statements of employees of Appellant No. 1 and statements of Appellant No. 2 hold evidentiary value.

7 The payment of interest is mandatory consequences of Central Excise duty liability and since Central Excise duty is payable by Appellant No. 1 under Section 11A of the Act, they need to pay interest under Section 11AA of the Act forthwith.

8. I find that Appellant No. 1 has suppressed the facts of excisable goods illicitly with intent to evade payment of duty and hence they are liable to pay penalty under Section 11AC of the Act equal to duty confirmed and hence penalty imposed vide the impugned order is upheld.

9. Regarding penalty imposed upon Appellant No. 2 being General Manager (Marketing)/authorized person of Appellant No. 1, I find that he has categorically accepted his wrong doings, confirmed the modus operandi narrated by the employee of Appellant No. 1 recorded under Section 14 of the Act and duly corroborated the facts from the print outs taken from the computers; clearance of goods clandestinely without issuing Central Excise Invoices, generating duplicate invoices of the same number after the goods reached destination, deleting the details of earlier invoices and re-generating the invoices having same number and indulging into parallel invoicing for goods cleared without payment of Central Excise duty, managing details of goods cleared clandestinely in computers. All these material facts have not been denied by him at any stage beginning from search operation to issuance of Order-In-Original. Therefore, there is no ground to interfere with the penalty imposed upon Appellant No. 2 in the impugned order and hence, I have no option but to uphold the penalty imposed on him.

10. Regarding imposition of redemption fine of Rs. 50 lakhs in lieu of clandestinely removed excisable goods valued at Rs. [illegible], the Appellant has contended that as per law seizure of excisable goods is pre-requisite for confiscation of goods. I find force in the above contention of Appellant No. 1. The confiscation of the clandestinely removed goods, neither seized nor available for seizure, valued at Rs. [illegible] and

redemption fine of Rs. 50 lakhs imposed in lieu thereof is not sustainable and is, therefore, set aside. For this I rely upon the decision of the Hon'ble CESTAT in the case of M/s. Hem Chand Gupta and Sons reported as 2015 (330) E.L.T. 161 (Tri. - Del.) wherein at Para 32 it is held as under :-

> "32. Alternatively even if confiscation is held to be proper, the goods have already gone out of India and not available for confiscation. Accordingly, there cannot be imposition of redemption fine, following the decision of the Larger Bench of the Tribunal in the case of reported in Shiv Kripa Ispat Pvt. Ltd. v. C.C.E. and Cus., Nashik reported in 2009 (235) E.L.T. 623 (Tri.-LB), Chinku Exports v. C.C. Calcutta in 1999 (112) E.L.T. 400 (Tri.) affirmed by Supreme Court reported in 2005 (184) E.L.T. A36 (S.C.), C.C.E., Mumbai v. Finesse Creation Inc. reported in 2009 (248) E.L.T. 122 (Bom.) and the High Court in the case of C.C. Amritsar v. Raja Impex Pvt. Ltd. reported in 2008 (229) E.L.T. 185 (P & H)."

The above decision of the CESTAT has been affirmed by the Hon'ble Supreme Court reported as 2016 (332) E.L.T. A98 (S.C.).

11. In view of above discussion and findings, I uphold the impugned order and reject the appeals filed by the Appellants except for setting aside redemption fine of Rs. 50 lakhs on the goods neither seized nor available for seizure.

१२. अपीलकर्ताओं द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।

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

(कुमार संतोष)
आयुक्त (अपील्स)

By RPAD

To

| | | |
|---|---|---|
| 1. | M/s. Global Coke Ltd., Unit-I, Village: Khiri, Taluka: Jodiya, Dist. Jamnagar. | मेसर्स ग्लोबल कोक लिमिटेड, यूनिट I, गाँव: खीरी, तहसील: जोड़िया, जिला: जामनगर |
| 2. | Shri Sujit Kumar Bhattacharya, General Manager (Marketing) of M/s. Global Coke Ltd., Unit-I, Village: Khiri, Taluka: Jodiya, Dist. Jamnagar. | श्री सुजित कुमार भट्टाचार्य, जनरल मैनेजर (मार्केटिंग), मेसर्स ग्लोबल कोक लिमिटेड यूनिट I, गाँव: खीरी, तहसील: जोड़िया, जिला: जामनगर |

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

1) The Chief Commissioner, GST & Central Excise, Ahmedabad Zone Ahmedabad for his kind information.
2) The Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
3) The Additional Commissioner, GST & Central Excise, Rajkot Commissionerate, Rajkot.
4) The Assistant Commissioner, GST & Central Excise Division-Jamnagar.
5) The Superintendent, GST & Central Excise, Range-I Jamnagar.
6) Guard File.
7) F No. V2/354/RAJ/2017.