::आयुक्त (अपील्स) का कार्यालय,वस्तु एवं सेवा करऔर 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
Tele Fax No. 0281 – 2477952/2441142Email: commrappl3-cexamd@nic.in

सत्यमेव जयते

रजिस्टर्डडाकए.डी. द्वारा :- **DIN-20220364SX0000505075**

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIONo.	दिनांक/ Date
	V2/66/RAJ/2021	**11/D/2020-21**	**29-01-2021**
	V2/67/RAJ/2021	**11/D/2020-21**	**29-01-2021**

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

RAJ-EXCUS-000-APP-121 TO 122-2021-22

आदेश का दिनांक / Date of Order:	**25.03.2022**	जारी करने की तारीख / Date of issue:	**26.03.2022**

श्रीअखिलेश कुमार, आयुक्त (अपील्स), राजकोट द्वारा पारित/
Passed by **Shri Akhilesh Kumar**,Commissioner (Appeals),Rajkot.

ग अपर आयुक्त/ संयुक्त आयुक्त/ उपायुक्त/ सहायक आयुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर/वस्तु एवंसेवाकर, 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/ST / GST, Rajkot / Jamnagar / Gandhidham :

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

M/s Gravity Ceramic Pvt Ltd, Survey No. 286-P-2, Morbi-Jetpar Road At. Post Rangpar-363642 Taluka-Morbi, Distt: 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 निम्नलिखि+त 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 अपीलें सीमा शुल्क,केंद्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट)की पश्चिम क्षेत्रीय पीठिका,,द्वितीय तल, बहुमाली भवन असावा अहमदाबाद- ३८००१६को की जानी चाहिए।/

To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at, 2nd Floor, Bhaumali Bhawan, Asarwa Ahmedabad-380016in 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)नियमावली, 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 माँग ,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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 dutydemand/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,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में 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 माँग,ब्याज की माँग 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 क्रमश: 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 सार्वजिनक 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,1994की 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 Commissionerauthorizing 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" मे 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 होंगे।/
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 कोपुनरीक्षण आवेदन :**
Revision application to Government of India:
इस आदेश की पुनरीक्षणयाचिका निम्नलिखित मामलो में,केंद्रीय उत्पाद शुल्क अधिनियम,1994 की धारा 35EE के प्रथमपरंतुक के अंतर्गतअवर सचिव, भारत सरकार, पुनरीक्षण आवेदन इकाई,वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

(i) यदि माल के किसी नुकसान के मामले में, जहां नुकसान किसी माल को किसी कारखाने से भंडार गृह के पारगमन के दौरान या किसी अन्य कारखाने या फिर किसी एक भंडार गृह से दूसरे भंडार गृह पारगमन के दौरान, या किसी भंडार गृह में या भंडारण में माल के प्रसंस्करण के दौरान, किसी कारखाने या किसी भंडार गृह में माल के नुकसान के मामले में।/
In case of any loss of goods, where the loss occurs in transit from a factory to a warehouse or to another factory or from one warehouse to another during the course of processing of the goods in a warehouse or in storage whether in a factory or in a warehouse

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के छूट (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 outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गईं है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए है।/
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।
जैहाँ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रूपये से ज्यादा हो तो रूपये 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 आदेशो का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I 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 संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर 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 below mentioned appeals have been filed by the Appellants (*hereinafter referred to as* "Appellant No.1 and Appellant No. 2", as detailed in Table below) against Order-in-Original No. 11/D/2020-21 dated 08.02.2021 (*hereinafter referred to as* 'impugned order') passed by the Assistant Commissioner, Central GST Division, Morbi-I, Rajkot Commissionerate (*hereinafter referred to as* 'adjudicating authority'):-

Sl. No.	Appeal No.	Appellants	Name & Address of the Appellant
1.	V2/66/RAJ/2021	Appellant No.1	M/s Gravity Ceramic Pvt. Ltd., Survey No. 286-P-2, Morbi-Jetpar Road, At Post Rangpar 363642, District- Morbi.
2.	V2/67/RAJ/2021	Appellant No.2	Shri Pradipkumar Kavathiya Director, M/s Gravity Ceramic Pvt. Ltd., At Post Rangpar -363642, District- Morbi.

2. The facts of the case, in brief, are that Appellant No. 1 was engaged in manufacture of excisable goods i.e. Ceramic Glaze Tiles falling under Chapter Sub Heading No. 69089090 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AAECG0342EEM001. Intelligence gathered by the officers of Directorate General of Central Excise Intelligence, Zonal Unit, Ahmedabad (DGCEI) indicated that various Tile manufacturers of Morbi were indulged in malpractices in connivance with Shroffs / Brokers and thereby engaged in large scale evasion of Central Excise duty. Simultaneous searches were carried out on 22.12.2015 at the premises of Shroffs in Rajkot and Morbi and various incriminating documents were seized. On scrutiny of said documents and Statements tendered by the said Shroffs, it was revealed that huge amounts of cash were deposited from all over India into bank accounts managed by said Shroffs and such cash amounts were passed on to Tile Manufacturers through Brokers/Middlemen/Cash Handlers. Subsequently, simultaneous searches were carried out on 23.12.2015 and 31.12.2015 at the premises of Brokers/Middlemen/Cash Handlers engaged by the Tile manufacturers and certain incriminating documents were seized.

2.1 Investigation carried out revealed that the Shroffs opened bank accounts in the names of their firms and passed on the bank account details to Tile manufacturers through their Brokers/Middlemen. The Tile manufacturers further

passed on the bank account details to their customers/ buyers to deposit the cash in respect of the goods sold to them without bills into these accounts. After depositing the cash, the customers used to inform the Tile manufacturers, who in turn would inform the Brokers or directly to the Shroffs. Details of such cash deposit along with the copies of pay-in-slips were communicated to the manufacturers by the Customers. The Shroffs on confirming the receipt of the cash in their bank accounts, passed on the cash to the Brokers after deducting their commission from it. The Brokers further handed over the cash to the Tiles manufacturers after deducting their commission. This way the sale proceeds of an illicit transaction was routed from buyers of goods to Tiles manufacturers through Shroffs and Brokers.

2.2 During scrutiny of documents seized from the office premises of M/s K.N. Brothers, Rajkot / Shree Ambaji Enterprise, Rajkot, both Shroffs, and Shri Pravin Shirvi, Broker / Middleman, it was revealed that the said Shroffs had received total amount of Rs.1,85,51,725/- in their bank accounts during the period from April, 2014 to December, 2015 and which were handed over to Shri Pravin Shirvi based in Morbi, which in turn was passed on to the Appellant No.1, in cash through Shri Pravin Shirvi, a broker. The said amount was alleged to be sale proceeds of goods removed clandestinely by Appellant No.1.

3. Show Cause Notice No. DGGI/AZU/Gr-E/36-28/2019-20 dated 04.05.2019 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty of Rs. 23,05,153/- should not be demanded and recovered from them under proviso to Section 11A(4) of the Central Excise Act,1944 (*hereinafter referred to as* "Act") along with interest under Section 11AA of the Act and also proposing imposition of penalty under Section 11AC of the Act. The Show Cause Notice also proposed imposition of penalty upon Appellant No. 2 under Rule 26(1)of the Central Excise Rules, 2002.

3.1 The above said Show Cause Notice was adjudicated vide the impugned order which confirmed Central Excise duty of Rs.23,05,153/- under Section 11A(4) along with interest under Section 11AA of the Act and imposed penalty of Rs.23,05,153/- under Section 11AC of the Act upon Appellant No. 1 with option of reduced penalty as envisaged under provisions of Section 11AC of the Act. The impugned order also imposed penalty of Rs.5,00,000/- upon Appellant No. 2 under Rule 26(1) of the Rules.

4. Being aggrieved with the impugned order, Appellant Nos.1 and 2 have preferred appeals on various grounds, *inter alia*, as below :-

Appellant No. 1 :-

(i) The adjudicating authority has relied upon Statements of Shroff, Middleman/Broker and Partners while confirming the demand raised in the show cause notice. However, the adjudicating authority has passed the order without allowing cross examination of Departmental witnesses inspite of specific request made for the same. It is settled position of law that any statement recorded under Section 14 of the Central Excise Act, 1944 can be admitted as evidence only when its authenticity is established under provisions of Section 9D(1) of the Act and relied upon following case laws:

(a) J.K. Cigarettes Ltd. Vs. CCE - 2009 (242) ELT 189 (Del).
(b) M/s Jindal Drugs Pvt Ltd -2016 (340) E.L.T. 67 (P & H)
(c) Ambika International - 2018 (361) E.L.T. 90 (P & H)
(d) G-Tech Industries - 2016 (339) E.L.T. 209 (P & H)
(e) Andaman Timber Industries -2015-TIOL-255-SC-CX
(f) Parmarth Iron Pvt. Ltd - 2010 (255) E.L.T. 496 (All.)

(ii) In view of the provisions of Section 9D of the Central Excise Act, 1944 and settled position of law by way of above referred judgments, since cross examination of departmental witnesses were not allowed their statements cannot be relied upon while passing the order and determining the duty amount payable by it. Especially when, there is no other evidence except so called oral evidences in the form of those statements and un-authenticated third-party private records. Therefore, in view of the above, impugned order passed by the learned Assistant Commissioner is liable to be set aside on this ground too.

(iii) That it is settled position of law that passing order without furnishing relied upon documents amounts to violation of principle of natural justice and such order is liable to be aside on this ground too; that they relied upon the following decisions:

a. Rajam Industries Pvt. Ltd. V/s. Addl DG, DGCI, Chennai - 2010 (255) ELT 161(Mad.)
b. Parmarth Iron Pvt. Ltd. V/s. CCE-I - 2020 (255) ELT 496 (All)
c. Videocon International Ltd. V/s. Commr. Of Cus. (Import), Mumbai - 2010 (250) ELT 553 (Tri. Mumbai)

(iv) That the adjudicating authority has not neutrally evaluated the evidences as well as submission made by it but heavily relied upon the general statements of Shroff, Middleman/Broker, statement of partner as well as only scan copy of private records of Shri Pravin Shirvi and M/s K. N. Brothers reproduced in the SCN. He has not seen that their Director had retracted his statement by executing affidavit before notary on

28.5.2020, as discussed in reply submitted to him, to the effect that they have not cleared the goods manufactured without Central Excise invoices and without payment of Central Excise duty; that they have not received any cash as mentioned in the SCN.

(v) That root cause of investigation which lead to demand of Central Excise duty viz. Bank Statements of various bank accounts (like 8 Scanned Images at page 8 to 15 of the SCN) referred in Statement dated 23.12.2015 of Shri Lalit Ashumal Gangawani, Actual Owner of M/s. K. N. Brothers, Rajkot, and also other bank accounts referred in Annexure - A to the SCN are neither supplied with SCN nor relied upon for demanding the duty. The same are neither seized from the premises of M/s. K. N. Brother nor produced by any of the person viz. owner of M/s K.N. Brother during recording of their statements. When the source of the amount received by the Shroff is not relied upon, how documents of middleman/broker can be relied upon? Certainly, same cannot be relied upon as Annexure - A is said to have been prepared on the basis of said two documents viz. Bank Statements of Shroff based at Rajkot and Daily Sheets maintained by the middlemen/brokers of Morbi. In absence of relying upon proof of receipt of fund by Shroff, it cannot be presumed that middlemen/brokers had received the funds which were distributed to tile manufacturer.

(vi) That the adjudicating authority based on the scan copy of certain bank accounts of Shroff and scan copy of private records of middleman/broker and general statements of Shroff and middleman/broker tried to discard vital discrepancies raised by the appellant without any cogent grounds. There is no link between the bank accounts of Shroff and private records of middleman/broker. Therefore, in absence of receipt of cash by the Shroff, link of such payment to middleman/broker and payment of cash to appellant, it is erroneous to uphold the allegations against appellant. He not only failed to judge the allegations, documentary evidences and defence neutrally but also failed as quasi-judicial authority and following principal of natural justice by passing speaking order as well as following judicial discipline too. Therefore, impugned order passed by him is liable to be set aside on this ground too.

(vii) That the investigation has prepared Annexure - A to the SCN based on the private records of Shri Parvin Shirvi. Thus, the adjudicating

authority simply based on the scan copy of few pages of such private record of Pravin Shirvi's reproduced in the SCN and said vague statements upheld the allegations. Therefore, order passed by him is liable to be set aside on this ground too.

(viii) That in the entire case except for so called evidences of receipt of money from the buyers of tiles that too without identity of buyers of the goods as well as identity of receiver of such cash from the middleman, no other evidence of manufacture of tiles, procurement of raw materials including fuel and power for manufacture of tiles, deployment of staff, manufacture, transportation of raw materials as well as finished goods, payment to all including raw material suppliers, transporters etc. in cash, no inculpatory statement of manufacturer viz. appellant, no statement of any of buyer, no statement of transporters who transported raw materials, who transported finished goods etc. are relied upon or even available. It is settled position of law that in absence of such evidences, grave allegations clandestine removal cannot sustain. It is also settled position of law that grave allegation of clandestine removal cannot sustain on the basis of assumption and presumption and relied upon following case laws:

(a) Synergy Steels Ltd.- 2020 (372) ELT 129 (Tri. - Del.)
(b) Savitri Concast Ltd. - 2015 (329) ELT 213 (Tri. - Del.)
(c) Aswani & Co. - 2015 (327) ELT 81 (Tri. - Del.)
(d) Shiv Prasad Mills Pvt. Ltd. - 2015 (329) ELT 250 (Tri. - Del.)
(e) Shree Maruti Fabrics - 2014 (311) ELT 345 (Tri. - Ahmd.)

(ix) That it is not a matter of dispute that Tiles were notified at Sr. No. 58 and 59 under Notification No. 49/2008-C.E.(N.T.) dated 24.12.2008 as amended issued under Section 4A of the Central Excise Act, 1944. Accordingly, as provided under Section 4A ibid duty of excise was payable on the retail sale price declared on the goods less permissible abatement @ 45%. Thus, duty of excise was payable @ 12.36% (upto 28.02.2015) and @ 12.50% with effect from 01.03.2015 on the 55% of retail sale price (RSP/MRP) declared on the goods/packages. That the investigation has nowhere made any attempt to find out actual quantity of tiles manufactured and cleared clandestinely. No attempt was made to know whether goods were cleared with declaration of RSP/MRP or without declaration of RSP/MRP on the goods/packages. There is no evidence adduced in the impugned show cause notice about any case booked by the metrology department of various states across India against appellant or other tile manufacturers that goods were sold by it

without declaring RSP/MRP. Though there is no evidence of manufacture and clearance of goods that too without declaration of RSP/MRP it is not only alleged but also duty is assessed considering the so called alleged realised value as abated value without any legal backing. Neither Section 4A ibid nor rules made there under provides like that to assess duty by taking realised value or transaction value as abated value and the investigation has failed to follow the said provisions. Therefore, sake of argument it is presumed that if RSP/MRP was not declared on packages then also it has to be determined in the prescribed manner i.e. as per Section 4A(4) read with Rule 4(i) of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008 and not by any other manner. As per the said provisions, highest of the RSP/MRP declared on the goods during the previous or succeeding months is to be taken for the purpose of assessment and in absence of other details of quantity etc. such realised value duty cannot be quantified. In any case duty has to be calculated after allowing abatement @ 45%.

(x) That all the allegations are baseless and totally unsubstantiated, therefore, question of alleged suppression of facts etc. also does not arise. None of the situation suppression of facts, wilful mis-statement, fraud, collusion etc. as stated in Section 11A(4) of the Central Excise Act, 1944 exists in the instant case but it is alleged suppression of facts in the impugned notice based on the above referred general allegation.

Appellant No.2

(i) That his company has already filed an appeal against the impugned order and as per submission made therein the impugned erroneous order is liable to be set aside in limine and therefore, order imposing penalty upon him is liable to be set aside;

(ii) That no penalty is imposable upon him under Rule 26(1) of the Central Excise Rules, 2002, as there is no reason to believe on his part that goods were liable to confiscation;

(iii) That there is no single documentary evidence to sustain the allegations; that the seized documents are not at all sustainable as evidence for the reasons detailed in reply filed by the Appellant No. 1. Investigating Officers have not recorded statements of buyers, transporter, supplier etc. Allegation of clandestine manufacture and removal of goods itself is fallacious.

(iv) That even duty demand has been worked out based on adverse inference drawn by investigation from the seized documents which itself are not sustainable evidence for various reasons discussed by his company i.e. Appellant No.1 in their reply; that under the given circumstances no penalty can be imposed upon the Appellant No.2 under Rule 26 ibid; that they relied upon the following decisions:

(a) CCE Vs. Manoj Kumar Pani - 2020 (260) ELT 92 (Tri. Delhi)
(b) Aarti Steel Industries Vs. CCE, 2010 (262) ELT 462 (Tri. Mumbai)
(c) Nirmal Inductomelt Pvt. Ltd. Vs. CCE - 2010 (259) ELT 243 (Tri. Delhi)

(v) In view of above, no penalty is imposable upon him under Rule 26 of the Central Excise Rules, 2002.

5 Personal hearing in the matter was scheduled on 01.02.2022. Shri P. D. Rachchh, Advocate, appeared on behalf of both the Appellants. He reiterated the submissions made in appeal memorandum and additional written submission made during the personal hearing. In additional submission, grounds raised in appeal memorandum are reiterated.

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 by the Appellants. 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 Appellants No. 1and 2 is correct, legal and proper or not.

7. On perusal of records, I find that an offence case was booked by the officers of Directorate General of Central Excise Intelligence, Ahmedabad against Appellant No. 1 for clandestine removal of goods. Simultaneous searches carried out at the premises of Shroff / Brokers / Middlemen situated in Rajkot and Morbi resulted in recovery of various incriminating documents indicating huge amount of cash transactions. On the basis of investigation carried out by the DGCEI, it was alleged that various Tile manufacturers of Morbi were indulged in malpractices in connivance with Shroffs / Brokers and thereby engaged in large scale evasion of Central Excise duty. During investigation, it was revealed by the investigating officers that the Tile manufacturers sold goods without payment of duty and collected sale proceeds from their buyers in cash through said Shroff/Brokers/ middlemen. As per the *modus operandi* unearthed by the DGCEI, the Tile manufacturers passed on the bank account details of the Shroffs to their buyers with instructions to deposit the cash in respect of the goods sold to them without bills into these accounts. After depositing the cash, the buyers used to inform the

Tile manufacturers, who in turn would inform the Brokers or directly to the Shroffs. Details of such cash deposit along with the copies of pay-in-slips were communicated to the Tile manufacturers by the Customers. The Shroffs on confirming the receipt of the cash in their bank accounts, passed on the cash to the Brokers after deducting their commission from it. The Brokers further handed over the cash to the Tile manufacturers after deducting their commission. This way the sale proceeds was routed through Shroffs/Brokers/ middlemen.

8. I find from the case records that the DGCEI had covered 4 Shroffs and 4 brokers/middlemen during investigation, which revealed that 186 manufacturers were routing sale proceeds of illicit transactions from the said Shroffs/Brokers/Middlemen. I find that the DGCEI has, *inter alia*, relied upon evidences collected from the premises of M/s K.N. Brothers / Shree Ambaji Enterprise, Rajkot, Shroff, and Shri Pravin Shirvi, Morbi, Broker, to allege clandestine removal of goods by the Appellant herein. It is settled position of law that in the case involving clandestine removal of goods, initial burden of proof is on the Department to prove the charges. Hence, it would be pertinent to examine the said evidences gathered by the DGCEI and relied upon by the adjudicating authority in the impugned order to confirm the demand of Central Excise duty.

8.1. I find that during search carried out at the office premises of M/s K.N. Brothers, Rajkot /Shree Ambaji Enterprise Rajkot, Shroffs, on 22.12.2015, certain private records were seized. The said private records contained bank statements of various bank accounts operated by M/s K.N. Brothers, Rajkot / Shree Ambaji Enterprise, Rajkot, sample of which is reproduced in the Show Cause Notice. I find that the said bank statements contained details like particulars, deposit amount, initiating branch code etc. Further, it was mentioned in handwritten form the name of city from where the amount was deposited and code name of concerned middlemen/Broker to whom they had handed over the said cash amount.

8.2. I have gone through the Statement of Shri Lalit Ashumal Gangwani, Owner of M/s K.N. Brothers, Rajkot / M/s. Shree Ambaji Enterprise, Rajkot, recorded on 23.12.2015 under Section 14 of the Act. In the said statement, Shri Lalit Ashumal Gangwani, *inter alia*, deposed that:

> "Q.5 Please give details about your work in M/s Ambaji Enterprise, Rajkot and M/s K.N. Brothers, Rajkot.
>
> A.5. ... ... We have opened the above mentioned 9 bank accounts and give the details of these accounts to the Middlemen located in Morbi. These middle men are working on behalf of Tile Manufacturers located in Morbi. These Middlemen then gives our Bank details to the Tiles Manufacturers of Morbi who in turn further passes these details to their Tiles dealers located all over

India. The Tiles dealers then deposit cash in these accounts as per the instruction of the ceramic Tiles Manufacturers who in turn inform the Middlemen. The Middlemen then inform us about the cash deposited and the name of the city from where the amount has been deposited. We check all our bank accounts through online banking system on the computer installed in our office and take out the printout of the cash amount deposited during the entire day in all the accounts and mark the details on the printouts. On the same day, latest by 15:30 hours, we do RTGS to either M/s Siddhanath Agency and or to M/s Radheyshyam Enterprises in Sakar Complex, Soni Bazar, Rajkot. In lieu of the RTGS, M/s Siddhanath Agency and or to M/s Radheyshyam Agency gives the cash amount. The said cash is then distributed to concern Middlemen.

Q.6: Please give details of persons who had deposited the amount in your firms.

A.6. We are not aware of any persons who had deposited the cash amount in our bank accounts, the ceramic Tile Manufacturers direct the said parties to deposit the amount in cash in these accounts. As already stated above, we had given our bank accounts details to the middle man who had in turn given these numbers to the Tile Manufacturers."

8.3 I find that search was carried out at the office premises of Shri Pravin Shirvi, Morbi, a broker/middlemen on 23.12.2015 and certain private records were seized. As reproduced in the Show Cause Notice, the said private records contained details like name of bank, cash amount, place from where the amount was deposited in bank, name of the person / authorized representative who collected the cash from him, date on which cash was handed over and name of the beneficiary of Tiles manufacturer of Morbi.

8.4 I have gone through the Statement of Shri Pravin Shirvi, Morbi, recorded on 24.12.2015 under Section 14 of the Act. In the said statement, Shri Pravin Shirvi, *inter alia*, deposed that,

"Q-4 : Please state- about your business or service and since when you are in this line

Ans : I am doing the business of commission agent for disbursing the cash received from Shroff, located at Rajkot to Tiles manufacturer, Showroom owners of tiles and to watch manufacturers all located at Morbi. I am receiving the cash from M/s K. N. Brothers, office No. 505, 5th floor, Unicorn Centre, Near Panchnath Mandir, Main toad, Rajkot and from M/s Ambaji Enterprise, 101,1st floor, Sadguru Arcade, Dhebar Road One way, Rajkot and also from M/s Shree Hari. Krishna Enterprise, Danapith, Rajkot.

The procedure is that initially we take the Bank accounts details from these Shroffs and convey the same to the tiles manufacturers and also to Tiles showroom owners and watch manufacturers. These manufacturers and Tiles showroom owners in turn forward the said details to their customers located all over India. The customers, as per the instructions of these manufacturers and showroom owners, deposits cash in these accounts and inform them, about the deposits made by them. These manufacturers and show room owners in turn inform us about the details of the account in which the amount has been deposited and also the city from where the amount has been deposited: We then inform the concern Shroff, in whose account the cash has been deposited. The next day the Shroff then hand over the cash amount to us in Morbi and we after

deducting our commission hands over the cash to the concern Ceramic Tiles manufactuers, Ceramic Tiles Show room owners and also to watch manufacturers. ... ...

... ...
... ...

Q-6 : I am showing you page 959 of seized file (1) (seized from his premises) which shows the details of transaction dated 31.07.2014. Please go through the same and explain the entries.

A.6 : I have gone through all the pages filed in seized file (1) and I state that all the documents filed in this file pertains to my business of disbursing cash. I explain the entries made in page 959 as under:
(i) The entries pertain to transaction made by me on 31.07.2014
(ii) The left side shows the amount received by me. ... ...
... ...

The right side shows the cash disbursed to respective persons as under:

(i) Rs.2,78,600/- has been paid in cash to Shri Viren of M/s Sunheart Ceramics.
(ii) 2nd and 3rd entry pertains to cash disbursement to watch manufacturers.
(iii) 4thentry also pertains to cash disbursement to watch manufacturers except of Rs.3,07,400/- (1,00,000/-+ 2,07,400/-) where the amount has been paid to Shri Kanti of Ramco Ceramics).
(iv) 5thentry pertains to payment made to watch manufacturers.
(v) 6th entry pertains to cash payment of Rs. 2,50,000/- to Shri Ravi of M/s Famous Ceramics.
(vi) 7% entry pertains to payment of Rs. 27,00,000/- made to Shri Nilesh of GEB.
(vii) 8th to 11thentries pertain to payment made to watch manufacturers.

Thus, in brief, I have made cash payment of Rs. 2,78,600/- to Shri Viren of Sunheart Ceramics (Brand name of M/s. Sunshine Tiles), Rs. 3,07,400/- to Shri Kanti of M/s Ramco (Brand name of M/s.Ramoji) and Rs. 2,50,000/- to Shri Ravi of M/s Famous Ceramics on 31.07.2014.

I further state that I have made the entries in similar manner in all the pages which you have seized.

I further state that on the pages where ever the cash have been paid, the name of the person of Tiles Manufacturers and the name of tile manufacturer has been mentioned as can be seen above. "

9. On analyzing the documentary evidences collected during investigation from M/s K.N. Brothers, Rajkot / M/s Shree Ambaji Enterprise, Rajkot, Shroff, and Shri Pravin Shirvi, Broker, as well as deposition made by Shri Lalit Ashumal Gangwani, owner of M/s K.N. Brothers, Rajkot/ M/s Shree Ambaji Enterprise, Rajkot and Shri Pravin Shirvi, broker, in their respective Statements recorded under Section 14 of the Act, I find that customers of Appellant No. 1 had deposited cash amount in bank accounts of M/s K.N. Brothers, Rajkot/ M/s Shree Ambaji Enterprise, Rajkot, Shroff, which was converted into cash by them and handed

over to Shri Pravin Shirvi, Broker/Middleman, who admittedly handed over the said cash amount to Appellant No. 1.

9.1 On examining the Statements of Shri Lalit Ashumal Gangwani, owner of M/s K.N. Brothers, Rajkot/ M/s Shree Ambaji Enterprise, Rajkot and Shri Pravin Shirvi, broker, it is apparent that the said Statements contained plethora of the facts, which are in the knowledge of the deponents only. For example, Shri Pravin Shirvi, broker deciphered the meaning of each and every entry written in their private records. They also gave details of when and how much cash was delivered to which Tile manufacturers and even concerned persons who had received cash amount. It is not the case that the said statements were recorded under duress or threat. Further, said statements have not been retracted. So, veracity of deposition made in said Statements and information contained in seized documents is not under dispute.

9.2 I find that the Appellant No. 1 had devised such a *modus operandi* that it was almost impossible to identify buyers of goods or transporters who transported the goods. The Appellant No. 1 used to inform M/s K.N. Brothers, Rajkot/ M/s Shree Ambaji Enterprise, Rajkot, Shroff or Shri Pravin Shirvi, Broker about deposit of cash in bank accounts of Shroff on receipt of communication from their buyers and such cash amount would reach to them through middlemen/broker. When cash amount was deposited by buyers of goods in bank accounts of Shroff, the same was not reflected in bank statements, as emerging from the records. So, there was no details of buyers available who had deposited cash amount in bank accounts of Shroff. This way the Appellant No. 1 was able to hide the identity of buyers of illicitly removed goods. It is a basic common sense that no person will maintain authentic records of the illegal activities or manufacture being done by it. It is also not possible to unearth all evidences involved in the case. The adjudicating authority is required to examine the evidences on record and decide the case. The Hon'ble High Court in the case of International Cylinders Pvt Ltd reported at 2010 (255) ELT 68 (H.P.) has held that once the Department proves that something illegal had been done by the manufacturer which *prima facie* shows that illegal activities were being carried, the burden would shift to the manufacturer.

9.3 It is also pertinent to mention that the adjudicating authority was not conducting a trial of a criminal case, but was adjudicating a Show Cause Notice as to whether there has been clandestine removal of excisable goods without payment of excise duty. In such cases, preponderance of probabilities would be sufficient and case is not required to be proved beyond reasonable doubt. I rely

on the Order passed by the Hon'ble CESTAT, Bangalore passed in the case of Ramachandra Rexins Pvt. Ltd. Reported as 2013 (295) E.L.T. 116 (Tri. - Bang.), wherein it has been held that,

> "7.2 In a case of clandestine activity involving suppression of production and clandestine removal, it is not expected that such evasion has to be established by the Department in a mathematical precision. After all, a person indulging in clandestine activity takes sufficient precaution to hide/destroy the evidence. The evidence available shall be those left in spite of the best care taken by the persons involved in such clandestine activity. In such a situation, the entire facts and circumstances of the case have to be looked into and a decision has to be arrived at on the yardstick of 'preponderance of probability' and not on the yardstick of 'beyond reasonable doubt', as the decision is being rendered in quasi-judicial proceedings."

9.4 I also rely on the Order passed by the Hon'ble Tribunal in the case of A.N. Guha & Co. reported in 1996 (86) E.L.T. 333(Tri.), wherein it has been held that,

> "In all such cases of clandestine removal, it is not possible for the Department to prove the same with mathematical precision. The Department is deemed to have discharged their burden if they place so much of evidence which, prima facie, shows that there was a clandestine removal if such evidence is produced by the Department. Then the onus shifts on to the Appellants to prove that there was no clandestine removal".

10. After careful examination of evidences available on record in the form of documentary evidences as well as oral evidence, I am of the considered opinion that the Department has discharged initial burden of proof for alleging clandestine removal of goods and the burden of proof shifts to the assessee to establish by independent evidence that there was no clandestine removal and the assessee cannot escape from the rigour of law by picking loopholes in the evidences placed by the Department. I rely on the decision rendered by the Hon'ble Madras High Court in the case of Lawn Textile Mills Pvt. Ltd. Reported as 2018 (362) E.L.T. 559 (Mad.), wherein it has been held that,

> "30. The above facts will clearly show that the allegation is one of clandestine removal. It may be true that the burden of proving such an allegation is on the Department. However, clandestine removal with an intention to evade payment of duty is always done in a secret manner and not as an open transaction for the Department to immediately detect the same. Therefore, in case of clandestine removal, where secrecies involved, there may be cases where direct documentary evidence will not be available. However, based on the seized records, if the Department is able to *prima facie* establish the case of clandestine

removal and the assesse is not able to give any plausible explanation for the same, then the allegation of clandestine removal has to be held to be proved. In other words, the standard and degree of proof, which is required in such cases, may not be the same, as in other cases where there is no allegation of clandestine removal."

11. The Appellant has contended that since cross examination of Departmental witnesses were not allowed, their statements cannot be relied upon while passing the order and determining the duty amount payable by it. In this regard I find that the Appellant No. 1 had sought cross examination of Shri Lalit Ashumal Gangwani, owner of M/s K.N. Brother, Rajkot / M/s Shree Ambaji Enterprise, Shri Pravin Shirvi, Morbi and also departmental witnesses, during the course of adjudication. The adjudicating authority denied the request of cross examination by observing in the impugned order, *inter alia*, as under:

"22.5 Further as discussed above, all the witnesses have admitted their respective role in this case, under Section 14 of the Central Excise Act, 1944, voluntarily, which is binding upon them and relied upon in the case of the Noticee. Further, I find that all the witnesses have not retracted their statements. Therefore, the same are legal and valid pieces of evidence in the eyes of law. It is a settled legal position that cross examination is not required to be allowed in all cases. Moreover, there is no provision under the Central Excise law to allow cross examination of the witnesses, during adjudication of the case. The denial of opportunity of cross-examination does not vitiate the adjudication proceedings. The Adjudicating Authority was not conducting a trail of a criminal case, but was adjudicating a SCN as to whether there has been clandestine removal of excisable goods without payment of duty. I find that the Noticee has not provided any independent evidence to show that there was no clandestine removal. ... ..."

12. I find that none of the Statements of Shroff/ Middlemen/Brokers and Partner of the Appellant No. 1 recorded during investigation have been retracted nor there is any allegation of duress or threat during recording of Statements. Further, Shroff/Middlemen/broker have no reason to depose before the investigating officers something which is contrary to facts. It is also pertinent to mention that the present case was not one-off case involving clandestine removal of goods by Tile manufacturers of Morbi. It is on record that DGCEI had simultaneously booked offence cases against 186 such manufacturers for evasion of Central Excise duty who had adopted similar *modus operandi* by routing sale proceeds of illicitly cleared finished goods through Shroffs / Middlemen/brokers. It is also on records that out of said 186 manufacturers, 61 had admitted and had also paid duty evaded by them. So, the documentary evidences gathered by the investigating officers from the premises of Shroffs / middlemen contained trails of illicitly removed goods and preponderance of probability is certainly against Appellant No. 1. It has been consistently held by the higher appellate fora that

cross examination is not mandatory and it depends on facts of each and every case. I rely on the decision rendered by the Hon'ble Bombay High Court in the case of Patel Engineering Ltd reported as 2014 (307) E.L.T. 862 (Bom.), wherein it has been held that,

> "23. Therefore, we are of the opinion that it will not be correct to hold that irrespective of the facts and circumstances and in all inquiries, the right of cross examination can be asserted. Further, as held above which rule or principle of natural justice must be applied and followed depends upon several factors and as enumerated above. Even if there is denial of the request to cross examine the witnesses in an inquiry, without anything more, by such denial alone, it will not be enough to conclude that principles of natural justice have been violated. Therefore, the judgments relied upon by Shri Kantawala must be seen in the factual backdrop and peculiar circumstances of the assessee's case before this Court."

12.1 By following the above decision and considering the facts of the case, I hold that the adjudicating authority has not erred by not acceding request for cross examination of the witnesses, as sought by Appellant No. 1.

13. The Appellant has contended that in the entire case except for so called evidences of receipt of money from the buyers of tiles through Shroff/ Middlemen/ Broker, no other evidence of manufacture of tiles, procurement of raw materials including fuel and power for manufacture of tiles, deployment of staff, manufacture, transportation of raw materials as well as finished goods, payment to all including raw material suppliers, transporters etc. in cash have been gathered. The Appellant further contended that no statement of any of buyers, transporters who transported raw materials and finished goods etc. are relied upon or even available. It is settled position of law that in absence of such evidences, grave allegations of clandestine removal cannot sustain and relied upon various case laws.

14. I find that the investigating officers gathered evidences from the premises of M/s K.N. Brothers, Rajkot / M/s. Shree Ambaji Enterprise, Rajkot, Shroffs, or Shri Pravin Shirvi, Morbi, Middlemen, which indicted that Appellant No. 1 had routed sales proceeds of illicitly removed goods through the said Shroffs and Middlemen/Broker. The said evidences were corroborated by the depositions made by Shri Lalit Ashumal Gangwani, Owner of M/s K.N. Brothers / M/s. Shree Ambaji Enterprise, Shri Pravin Shirvi, Morbi Further, as discussed supra, Appellant No. 1 had devised such a *modus operandi* that it was almost impossible to identify buyers of goods or transporters who transported the goods. As a result, no buyers of goods or transporters could be identified during investigation. In catena of decisions, it has been held that in cases of clandestine removal, it is not possible to unearth all the evidences and Department is not required to prove the case

with mathematical precision. I rely on the Order passed by the Hon'ble CESTAT, Ahmedabad in the case of Apurva Aluminium Corporation reported at 1996 (261) E.L.T. 515(Tri. Ahmd.), wherein at Para 5.1 of the order, the Tribunal has held that,

> "Once again the onus of proving that they have accounted for all the goods produced, shifts to the appellants and they have failed to discharge this burden. They want the department to show challan-wise details of goods transported or not transported. There are several decisions of Hon'ble Supreme Court and High Courts wherein it has been held that in such clandestine activities, only the person who indulges in such activities knows all the details and it would not be possible for any investigating officer to unearth all the evidences required and prove with mathematical precision, the evasion or the other illegal activities".

15. The Appellant has also contended that the adjudicating authority relied upon the Statements of Shroff, Middleman/Broker as well as private records seized from the premises of Shri Pravin Shirvi and M/s Shree Ambaji Enterprise, but ignored that Director of Appellant No. 1, had executed affidavit dated 28.5.2020 to the effect that they have not cleared the goods manufactured by them without Central Excise invoices and without payment of Central Excise duty and that they have not received any cash as mentioned in the SCN.

15.1. I have gone through the affidavit dated 28.5.2020 filed by Shri Pradipkumar Kavathiya, Appellant No. 2 herein, contained in appeal memorandum. I find that as narrated in Para 16 of Show Cause Notice, summons were issued to the Appellant by the investigating authority on 27.9.2016, 19.3.2018 and 4.12.2018 to produce documents. The Appellant was issued summons dated 6.3.2019 and 24.4.2019 for recording Statement under Section 14 of the Act but the Appellant failed to appear before the investigating authority. Thus, opportunities were given to the Appellant to explain their position. However, they chose not to avail the opportunity. It is apparent that filing affidavit after issuance of Show Cause Notice is merely an afterthought and it has no bearing on the outcome of this case.

16. In view of above, various contentions raised by Appellant No. 1 are of no help to them and they have failed to discharge the burden cast on them that they had not indulged in clandestine removal of goods. On the other hand, the Department has adduced sufficient oral and documentary corroborative evidences to demonstrate that the Appellant No.1 indulged in clandestine removal of goods and evaded payment of Central Excise duty. I, therefore, hold that confirmation of demand of Central Excise duty amount of Rs. 23,05,153/- by the adjudicating authority is correct, legal and proper. Since demand is confirmed, it is natural consequence that the confirmed demand is required to be paid along with interest

at applicable rate under Section 11AA of the Act. I, therefore, uphold order to pay interest on confirmed demand.

17. The Appellant has also contended that Tiles were notified at Sr. No. 58 and 59 under Notification No. 49/2008-C.E.(N.T.) dated 24.12.2008, as amended issued under Section 4A of the Act and duty was payable on the retail sale price declared on the goods less abatement @ 45%. Though there is no evidence of manufacture and clearance of goods that too without declaration of RSP/MRP, duty is assessed considering the so called alleged realized value as abated value without any legal backing. The Appellant further contended that duty is to be determined as per Section 4A(4) of the Act read with Rule 4(i) of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008, which provided that highest of the RSP/MRP declared on the goods during the previous or succeeding months is to be taken for the purpose of assessment.

17.1 I find it is pertinent to examine the provisions contained in Section 4A of the Act, which are reproduced as under:

> "Section 4A. Valuation of excisable goods with reference to retail sale price.- (1) The Central Government may, by notification in the Official Gazette, specify any goods, in relation to which it is required, under the provisions of the [Legal Metrology Act, 2009 (1 of 2010)] or the rules made thereunder or under any other law for the time being in force, to declare on the package thereof the retail sale price of such goods, to which the provisions of sub-section (2) shall apply.
>
> (2) Where the goods specified under sub-section (1) are excisable goods and are chargeable to duty of excise with reference to value, then, notwithstanding anything contained in section 4, such value shall be deemed to be the retail sale price declared on such goods less such amount of abatement, if any, from such retail sale price as the Central Government may allow by notification in the Official Gazette."

17.2 I find that in terms of the Legal Metrology Act, 2009, retail sale price is required to be declared on packages when sold to retail customers. This would mean that when goods are sold to customers, other than retail customers, like institutional customers, the provisions of Legal Metrology Act, 2009 would not be applicable.

17.3 On examining the present case in backdrop of above provisions, I find that Appellant No. 1 has not produced any evidences that the goods were sold to retail customers. Further, as discussed above, Appellant No.1 had adopted such a modus operandi that identity of buyers could not be ascertained during investigation. Since, applicability of provisions contained in Legal Metrology Act, 2009 itself is not confirmed, it is not possible to extend benefit of abatement under Section 4A

of the Act. Even if it is presumed that all the goods sold by Appellant No.1 were to retail customers then also what was realized through Shroff/Middlemen cannot be considered as MRP value for the reason that in cases when goods are sold through dealers, realized value would be less than MRP value since dealer price is always less than MRP price.

17.4 As regards contention of Appellant No.1 that duty is to be determined as per Section 4A(4) of the Act read with Rule 4(i) of Central Excise (Determination of Retail Sale Price of Excisable Goods) Rules, 2008, I find it is pertinent to examine the provisions of Rule 4 ibid, which are reproduced as under:

> "RULE 4. Where a manufacturer removes the excisable goods specified under sub-section (1) of section 4A of the Act, -
>
> (a) without declaring the retail sale price on the packages of such goods; or
>
> (b) by declaring the retail sale price, which is not the retail sale price as required to be declared under the provisions of the Standards of Weights and Measures Act, 1976 (60 of 1976) or rules made thereunder or any other law for the time being in force; or
>
> (c) by declaring the retail sale price but obliterates the same after their removal from the place of manufacture,
>
> then, the retail sale price of such goods shall be ascertained in the following manner, namely :-
>
> (i) if the manufacturer has manufactured and removed identical goods, within a period of one month, before or after removal of such goods, by declaring the retail sale price, then, the said declared retail sale price shall be taken as the retail sale price of such goods :
>
> (ii) if the retail sale price cannot be ascertained in terms of clause (i), the retail sale price of such goods shall be ascertained by conducting the enquiries in the retail market where such goods have normally been sold at or about the same time of the removal of such goods from the place of manufacture :
>
> Provided that if more than one retail sale price is ascertained under clause (i) or clause (ii), then, the highest of the retail sale price, so ascertained, shall be taken as the retail sale price of all such goods."

17.5 I find that in the present case, the Appellant No. 1 has not demonstrated as to how their case is covered by any of the situation as envisaged under sub clause (a), (b) or (c) of Rule 4 ibid. Hence, provisions of Rule 4(i) ibid is not applicable in the present case.

17.6 In view of above, plea of Appellant No. 1 to assess the goods under Section 4A of the Act cannot be accepted.

18. The Appellant has contended that all the allegations are baseless and totally unsubstantiated, therefore, question of alleged suppression of facts etc.

also does not arise. The Appellant further contended that none of the situation suppression of facts, willful mis-statement, fraud, collusion etc. as stated in Section 11A(4) of the Central Excise Act, 1944 exists in the instant case but it is alleged suppression of facts in the impugned order based on the general allegation. I find that the Appellant No. 1 was found indulging in clandestine removal of goods and routed the cash through Shroff/Middlemen/Broker. The *modus operandi* adopted by Appellant No. 1 was unearthed during investigation carried out against them by DGCEI, Ahmedabad. Thus, this is a clear case of suppression of facts with intent to evade payment of duty. Considering the facts of the case, I am of the opinion that the adjudicating authority was justified in invoking extended period of limitation on the grounds of suppression of facts. Since invocation of extended period of limitation on the grounds of suppression of facts is upheld, penalty under Section 11AC of the Act is mandatory, as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty of Rs. 23,05,153 /- imposed under Section 11AC of the Act.

19. Regarding penalty imposed upon Appellant No. 2 under Rule 26 of the Rules, I find that the Appellant was the Partner of Appellant No. 1 and was looking after day-to-day affairs of Appellant No.1 and was the key person of Appellant No. 1 and was directly involved in clandestine removal of the goods manufactured by Appellant No. 1 without payment of Central Excise duty and without cover of Central Excise Invoices. He was found concerned in clandestine manufacture and removal of such goods and hence, he was knowing and had reason to believe that the said goods were liable to confiscation under the Act and the Rules. I, therefore, find that imposition of penalty of Rs.5,00,000/- upon Appellant No. 2 under Rule 26(1) of the Rules is correct and legal.

20. In view of above, I uphold the impugned order and reject the appeals of Appellant Nos. 1 and 2.

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

21. The appeals filed by the Appellants are disposed off as above.

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To,

1. M/s Gravity Ceramic Pvt. Ltd., Survey No. 286-P-2, Morbi-Jetpar Road, At Post Rangpar- 363642, Taluka Morbi, District- Morbi.	मेसर्स ग्रेविटी सिरामिक प्राइवेट लिमिटेड, सर्वे नम्बर 286-पी-2, मोरबी-जेतपर रोड, पोस्ट रंगपर 363642,तालुका मोरबी, डिस्ट्रिक्ट मोरबी.
2. Shri Pradipkumar Kavathiya Director, M/s Gravity Ceramic Pvt. Ltd., Survey No. 286-P-2, Morbi-Jetpar Road, At Post Rangpar -363642, Taluka Morbi, District- Morbi.	श्री प्रदीपकुमार कावठिया, मेसर्स ग्रेविटी सिरामिक प्राइवेट लिमिटेड, सर्वे नम्बर 286-पी-2, मोरबी-जेतपर रोड, पोस्ट रंगपर 363642, तालुका मोरबी, डिस्ट्रिक्ट मोरबी.

प्रतिलिपि :-

1) मुख्य आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, गुजरात क्षेत्र, अहमदाबाद को जानकारी हेतु।
2) प्रधान आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, राजकोट आयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) उप / सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल मोरबी-I,राजकोट आयुक्तालय,राजकोट को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।