: : 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-20220464SX000000AA67

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIONo.	दिनांक/ Date
	V2/116, 173 to 177/RAJ/2021	05/BB/AC/2020-21	21-01-2021

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

RAJ-EXCUS-000-APP-027 TO 032-2022

आदेश का दिनांक / Date of Order:	27.04.2022	जारी करने की तारीख / Date of issue:	29.04.2022

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 Osho Sanitaryware Pvt Ltd, 8-A, National Highway, Sartanpar Road Morbi-363642 .

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 असावी 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 क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी 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 आवेश (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 नियमावली, 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 क्रमशः 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी 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 आवेश (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" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
– बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं 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 ईकाई,वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली–110001, को किया जाना चाहिए। /
A revision application lies to the Under Secretary, to the Government of India, Revision Application Unit, Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi-110001, under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35B ibid:

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

(ii) भारत के बाहर किसी राष्ट्र या क्षेत्र को निर्यात कर रहे माल के विनिर्माण में प्रयुक्त कच्चे माल पर भरी गई केन्द्रीय उत्पाद शुल्क के 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 गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा 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 Commissibner (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 आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय 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 लगी 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 to Appellant No.6', as detailed in Table below) against Order-in-Original No. 05/BB/AC/2020-21 dated 21.01.2021 (*hereinafter referred to as* 'impugned order') passed by the Assistant Commissioner, Central GST Division-II, Morbi (*hereinafter referred to as* 'adjudicating authority'):-

1.	V2/116/RAJ/2021	Appellant No.1	M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642
2.	V2/173/RAJ/2021	Appellant No.2	Shri Alpesh Jerambhai Patel Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642
3.	V2/174/RAJ/2021	Appellant No.3	Shri Anil Prabhubhai Sanja, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642
4.	V2/175/RAJ/2021	Appellant No.4	Shri Chirag Ratanjibhai Sanja, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642
5.	V2/176/RAJ/2021	Appellant No.5	Shri Lalji Thobhanbhai Patel, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642
6.	V2/177/RAJ/2021	Appellant No.6	Shri Yogesh Prabhubhai Sanja, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642

2. The facts of the case, in brief, are that Appellant No. 1 was engaged in manufacture of Ceramic sink, wash basins, wash basin pedestals, bath,

bidets, water closet pans, flushing cisterns urinals and similar sanitary fixtures falling under Chapter Sub Heading No. 69101000 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AACCE7276MEM001. Investigation conducted by the officers of the Directorate General of Central Excise Intelligence, Zonal Unit, Ahmedabad (DGCEI), in the case against a tile manufacturer viz. M/s. Specific Ceramic Ltd, Karoli, Gandhinagar, indicated existence of some suspicious bank accounts. On gathering further information about these accounts and their analysis, it was observed that these accounts pertained to certain "Shroffs" (Cash Handlers) and cash transactions of several Crores had been made through these accounts apparently on behalf of various tile manufacturers. Accordingly, simultaneous searches were carried at the Shroffs premises and some of the connected people subsequently. During the searches and the investigations conducted thereafter, it was revealed that most of the cash deposits in these bank accounts of 'Shroffs' were pertaining to the clandestine removal of finished goods by the tile manufacturers situated at Morbi. These shroffs used to deliver the amount received to some brokers who would finally hand over these amounts to their client manufacturers, after deducting their commission.

2.1 An in-depth common investigation, against the manufacturers involved in clandestine removal of tiles, was carried out on the basis of analysis of these documents viz. diaries, registers recovered from Shroff's/broker's premises. Investigation carried out revealed the amount and date of cash deposits, station from where such amounts were received and details of beneficiary manufacturers, to whom such cash were handed over by brokers/middlemen. As a result of common investigation, names of 186 such tiles manufacturers were identified. Appellant No. 1 is one of such manufacturers who had received cash as sale consideration against clandestine clearances of tiles through the bank accounts of the Shroffs.

2.2 Based on outcome of common investigation carried out, the quantification of Ceramic Tiles/Sanitaryware illicitly manufactured and clandestinely cleared by Appellant No. 1 to various buyers has been done taking into account the sale consideration of Rs.2,32,08,720/- received illicitly in cash in the bank account of M/s Shree Ambaji Enterprise, M/s P C Enterprise and M/s K N Brothers, all shroffs, which was thereafter withdrawn in cash and routed through the middlemen/brokers to be handed over to the various authorised representative of Appellant No. 1 during the period from February-2015 to

December-2015 involving total Central Excise duty amounting to Rs. 28,99,623/- .

3. Show Cause Notice No. DGGI/AZU/Group-D/36-160/2019-20 dated 15.11.2019 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty amounting to Rs.28,99,623/- should not be demanded and recovered from them under proviso to Section 11A(4) of the erstwhile Central Excise Act, 1944 (*hereinafter referred to as* "Act") alongwith interest under Section 11AA of the Act and also proposing imposition of penalty under Section 11AC of the Act and fine in lieu of confiscation under Section 34 of the Act. The Show Cause Notice also proposed imposition of penalty upon Appellant Nos. 2 to 6 under Rule 26(1) of the Central Excise Rules, 2002 (*hereinafter referred to as* "Rules").

3.1 The above said Show Cause Notice was adjudicated vide the impugned order wherein the demand of Central Excise duty amounting to Rs.28,99,623/- was confirmed under Section 11A(4) along with interest under Section 11AA of the Act. The impugned order imposed penalty of Rs.28,99,623/- 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. 2,00,000/- each upon Appellant No. 2 to 6 under Rule 26(1) of the Rules.

4. Being aggrieved with the impugned order, Appellant Nos.1 to 6 have preferred appeals on various grounds, *inter alia*, as below :-

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

(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 in spite 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) 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. 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 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, exculpatory statements of directors as well as only scan copy of private records of K. N. Brothers, Ambaji Enterprises and P C Enterprises and Sarvodaya Shroff of Morbi reproduced in the SCN.

(iv) 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.

(v) That in the entire case except for so called evidences of receipt of money from the buyers of tiles/sanitarywares 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.)

(vi) 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 Nos. 2 to 6:-

(i) Their firm has already filed appeal against the impugned order as per the submission made therein contending that impugned order is liable to be set aside *in limine* and therefore, order imposing penalty upon them is also liable to be set aside.

(ii) That it is a settled position of law that for imposition of penalty under Rule 26, inculpatory Statement of concern person must be recorded by the investigation. However, in the present case, no statement was recorded during investigation and hence, no penalty can be imposed under Rule 26.

(iii) That no penalty is imposable upon them under Rule 26(1) of the Central Excise Rules, 2002, as there is no reason to believe on their part that goods were liable to confiscation.

(iv) 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 has not recorded statement of any buyers, transporter, supplier etc. Allegation of clandestine manufacture and removal of goods itself is fallacious.

(v) 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 their firm i.e. Appellant No.1 in their reply; that under the given circumstances no penalty can be imposed upon them under Rule 26 ibid and relied upon the following case laws:

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

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

4. Personal Hearing in the matter was scheduled in virtual mode on 05.04.2022. Shri P.D. Rachchh, Advocate, appeared on behalf of the Appellant Nos. 1 to 6. He reiterated the submissions made in appeal memoranda in respect of all the six appeals as well as synopsis submitted by him.

5. 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 Appellant Nos. 1 to 6 is correct, legal and proper or not.

5.1 The present appeal was filed with this office on 20.05.2021 whereas the impugned order has been communicated by the department and received by the appellant on 19.02.2021. The present appeal has been filed

by the appellant after 60 days from the date of communication of impugned order. Further, the appellant has filed an application for condonation of delay in filing appeal wherein they relied upon the decision dated 27.04.2021 of Supreme Court in the Suo Moto matter. Further, the Board vide Circular No. 157/13/2021-GST dated 20.07.2021 has clarified that the extension of timelines granted by the Hon'ble Supreme Court vide its Order dated 27.04.2021 is applicable in respect of any appeal which is required to be filed before the appellate authority under GST Laws. Thus, the timelines for filing of appeals have been extended until further orders and the appeal filed by the appellant is considered to have been filed well within the time. Accordingly, the application for condone in delay for filing appeal against impugned order, is accepted and delay in filing appeal is condoned.

6. 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 allegedly routed through Shroffs/Brokers/middlemen.

7. 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 Shri K.N. Brothers, Rajkot, M/s Maruti Enterprise, Rajkot, all Shroffs, and M/s Sarvodaya Shroff, Morbi, Broker, to allege clandestine removal of goods by the Appellants 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.

7.1. I find that during search carried out at the office premises of M/s K.N. Brothers, Rajkot, Shroff, 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, 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.

7.2. I have gone through the Statement of Shri Lalit Ashumal Gangwani, Owner of M/s K.N. Brothers, 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."

7.3 I have gone through the Statement of Shri Nitinbhai Arjanbhai Chikani, actual owner of M/s Maruti Enterprise, Rajkot, recorded on 24.12.2015 under Section 14 of the Act. In the said statement, Shri Nitinbhai Arjanbhai Chikani, inter alia, deposed that,

"Q.5 Please give the details about your work in M/s Maruti Enterprise, Plot no. 33, Udaynagar street-1, Mavdi main Road, Rajkot, M/s India Enterprise, Plot No. 33, Udaynagar street-1, Mavdi main road, Rajkot and M/s PC Enterprise, Office No. 110, Haridarshan Arcade, 150 Ft. Ring Road, Rajkot.

A.5 Though, I am not the owner of the above mentioned firms but I looked after all the work of M/s Maruti Enterprises (now closed), M/s India enterprise and M/s PC enterprise with the help of staff. Basically, our work is to receive the cash amount in our 9 bank accounts of the aforesaid firms.

These Bank accounts were opened during the period from March 2015 to June 2015. All the bank accounts of M/s Maruti Enterprise were closed on December 2015 except one account of Bank of India.

We have opened the above mentioned 9 bank accounts and gave the details of these accounts to the middleman located in Morbi. The middleman are working on behalf of tile manufacturers located in Morbi. These middleman then gives our bank details to the tiles manufacturer of Morbi who in turn further passes these details to their tiles dealers located all over India.

The tile dealers then deposits cash in these accounts as per the instructions of the ceramic tile manufacturers who in turn inform the middleman. The middle man 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' systems 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 hrs, we do RTGS to M/s Siddhanth Agency in lieu of the RTGS, M/s Siddhanath Agency gives the cash amount. The said cash is then distributed to concern middleman.

Q.6 Please give the details of persons who had deposited the amount in your firms namely M/s Maruti Enterprise, M/s India Enterprise and M/s PC Enterprise?

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 account details to the middle man who had in turn given these numbers to the tile manufacturers."

7.4. I have gone through the Statement of Shri Sandipbhai Bachubhai Sanariya, Accountant-Cum-Cashier of M/s. Sarvodaya Shroff, Morbi, recorded on 24.12.2015 under Section 14 of the Act. In the said statement, Shri Sandipbhai Bachubhai Sanariya, *inter alia*, deposed that,

> *"Q.2 Please state about business or service activities and working pattern of your firm, M/s. Sarvodaya Shroff?*
>
> *A.2 I am working as an Account-Cum Cashier in M/s. Sarvodaya Shroff, having office at 1st floor, Above Shree Ram Farsan, Chandramuli Complex, Ravapar Road, Bapa Sitaram Chowk, Morbi since five years. Shri Shaileshbhai Odhavjibhai Marvaniya, is the owner of M/s. Sarvodaya Shroff who is residing at "Keshav", Darpan-3, Ravapar Road, Morbi. Shri Shaileshbhai Odhavjibhai Marvaniya, is also one of the partner of M/s. Sun World Vitrified, Ghuntu Road, Rajkot, a tiles manufacturer, having share of 20%. I state that M/s. Sarvodaya Shroff is doing the business of commission agent for disbursing the cash deposited by the customers of various Tile manufacturers, Traders & Showroom located at Rajkot, throughout India, since last seven years. We are charging commission Rs.50/- to Rs.100/- per lakh from our client and varies from client to client. Our main Shroffs are M/s. Maruti Enterprises, M/s. JP Enterprise, M/s. India Enterprise & M/s. PC Enterprise, all belonged to Shri Nitinbhai of Rajkot and M/s. Ambaji Enterprise, 101 1st Floor, Sathguru Arcade, Dhebar Road, One Way, Rajkot (now closed) and M/s. K. N. Brothers, Office No. 505, 5th Floor Unicorn Centre, Near Panchnath Mandir, Main Road, Rajkot.*
>
> *The procedure is that initially we take the bank account details from our main Shroff and convey the same to the tile manufacturers and also to Tiles showroom owners. These manufacturers and Tiles showroom owners in turn forward the said details to their customers located all over India, who wish to deposit cash against sale of tiles by them. The customers, as per instructions of these manufacturers and showroom owners, deposit cash in these accounts and inform them about the deposits made by them. These manufacturers and showroom owners in turn inform us about the details of the account in which the amount has been deposited and also the amount and the city from where the amount has been deposited. We then inform the concerned Shroff, in whose account the cash amount to us in Morbi at our office and we after deducting our commission, hand over the cash to the concerned Ceramic Tiles manufacturers and Ceramic Tiles Showroom owners. I further state Shri Shaileshbhai Odhavjibhai Marvaniya used to come to our office in morning to give cash & detail statements of the parties to whom cash is to be delivered and in the evening I used to hand over day to day details of all transactions Cash Balance, Cash acknowledgement slips, Cash Book statement to Shri Shaileshbhai Ordhavjibhai Marvaniya.*
>
> *Q.3. Please produce the documents / details relating to the transactions made with Shroffs and clients, Cash acknowledgement slips showing handing over cash to respective client, Cash Book Statements, Commission for the last five years of your firm M/S. Sarvodaya Shroff?*

A.3. As I have been asked to produce above documents, I immediately contacted my owner Shri Shaileshbhai to hand over the documents /details as asked for submission. In turn Shri Shaileshbhai asked his nephew, Shri Chirag Rameshbhai Marvaniya, to deliver some documents to me which I produce today as detailed below.

(i) A file containing copy of statements showing detail of cash deposits in respective bank accounts, throughout India, for the period from 03.12.2015 to 19.12.2015, Rajkot office Rojmel for December'2015 Cash Acknowledgement Slip, containing pages from 1 to 799.

(ii) A file containing Cash Acknowledgement Slip, containing pages from 1 to 849.

(iii) A file containing Cash Acknowledgement Slip, containing pages from 1 to 701.

I further state, we maintain a diary wherein entries of all transactions relating to receipts of cash from Shroffs and disbursement of the same to the respective clients with commission deducted are being shown by us. Shri Shaileshbhai keeps the diary in his own custody and every morning he gives us the same along with cash balance for making daily entries and we hand over back the diary to Shri Shailesbhai at the end of each day. Therefore, I am not in a position to produce the same. However, I assure that I will inform my owner Shri Shaileshbhai to produce the same

I further state that in Cash Acknowledgement slip as per the direction of Shri Shaileshbhai, we used to mention the cash amount delivered in thousands viz. Rs.99,000/- would be written as "99". In the cash acknowledgement slip we used to write the name of the person along with his mobile number to whom cash delivered and on the back side we write the code name of the client representing the tiles factories / showrooms with details of amounts deposited in bank accounts at each center. The figures are also mentioned in the same pattern i.e. in thousand on each slip.

I further state that I don't know the place where Shri Shaileshbhai Odhavjibhai Marvaniya keeps details of all transactions, Cash, Cash Acknowledgement slips, Cash Book Statements etc. on everyday and where all these documents of the past period are lying. Only Shri Shaileshbhai knows about the whereabouts of the documents of the past period.

... ...

Q.8 I am showing you the statement dated 22.12.2015 of Shri Solanki JS Mohanlal S/o Shri Mohan Lal Solanki, Proprietor of M/s. K.N. Brothers, Office No. 505, 5th Floor, Unicorn Centre Near Panchnath Mandir, Main Road, Rajkot and statement dated 24.12.2015 of Shri Nitinbhai Arjanbhai Chikani, S/o Shri Arjanbhai Jadavjibhai Chikani, Block No. 403 Vasant Vihar Patidar Chowk Sadhu Vasvani Road, Rajkot. Please go through it and officer your comments.

I have gone through the statement dated 22.12.2015 of Shri Solanki JS Mohanlal S/O Shri Mohan Lal Solanki, Proprietor of M/s.

K. N. Brothers, Office No. 505, 5th Floor, Unicorn Centre, Near Panchnath Mandir, Main Road, Rajkot and statement dated 24.12.2015 of Shri Nitinbhai Arjanbhai Chikani S/o Shri Arjanbhai Jadavjibhai Chikani, Block No. 403, Vasant Vihar Patidar Chowk, Sadhu Vasvani Road, Rajkot and put my dated signature in token of the correctness of the facts mentioned therein and I am in full agreement of the same.

Q. 9 Please provide the details of bank accounts of main Shroffs wherein the customers of your clients deposit cash on day to day basis.

A.9. I state that Bank Account number 7933005900000048 of Punjab National Bank, Kuvadava Branch, Rajkot of our Shroff namely M/s. KN brothers; Bank Account Number 3766002100027112 to Punjab National Bank, Kalavad Road, Rajkot of our Shroff M/s. P. C. Enterprise are the accounts dedicated to our firms, wherein we instruct the clients to deposit cash by their customers on day to day basis from different locations meant to be delivered to the tiles manufacturer/show rooms of the manufactures"

7.5. I have also gone through the further Statement of Shri Sandipbhai Bachubhai Sanariya, Accountant-Cum-Cashier of M/s. Sarvodaya Shroff, Morbi, recorded on 02.01.2016 under Section 14 of the Act. In the said statement, Shri Sandipbhai Bachubhai Sanariya, *inter alia*, deposed that,

"Q.2. During recording your Statement dated 24.12.15, you stated that you maintain a diary for recording all transactions relating to receipts of cash from Shroffs and disbursement of the same to the respective clients. You had further stated that you would inform your owner Shri Shaileshbhai to produce the same. Please produce the same.

A.2. In this regards, I state that I had informed to Shri Shaileshbhai on the same day to handover the diary and other related records to DGCEI Office, Ahmedabad immediately. Sir, I do not know the reason why he has yet not produced the said records to your office till date.

Q.3. Please produce the documents / details relating to the transactions made with Shroffs and clients, cash acknowledgement slips showing handling over cash to respective clients, Cash book statements, commission etc. for the last five years of your firm M/a. Sarvoday Shroff.

A.3. Sir, in my statement dated 24.12.15, I have already stated that the documents / details relating to the transactions made with Shroffs and clients, Cash Acknowledgement slips showing handling over cash to respective clients, Cash book statements, commission etc. in respect of my firm M/S. Sarvoday Shroff have been kept by Shri Shaileshbhai, Owner of the firm. Further, I have already produced records which I received from Shri Chirag, nephew of Shri Shaileshbhai on 24.12.15 to your office during recording my statement. I do not have any records of the firm with me and therefore J am not in a position to produce the same.

Q.4. please peruse following files produced by you during recording your statement dated 24.12.15
(i) A file containing copy of a statements showing details of cash deposits in respective bank accounts, throughout India, for the period from 03.12.2015 to 19.12.2015, Rajkot office Rojmel for December'2015, Cash Acknowledgement Slip, containing pages from 1 to 799;
(ii) A file containing Cash Acknowledgement Slip, containing pages from
1 to 849;
(iii) A file containing Cash Acknowledgement Slip, containing pages from 1 to 701.
Please explain who has prepared these records.

A.4. Today, I have perused following files which I had produced during recording my statement dated 24.12.15. I state that I have prepared all cash acknowledgement slips which are available in the all three files. I have prepared these slips to record the name and details of the persons who collect cash from us, cash amount, place from where the same was deposited etc. As regards, statements showing details of cash deposits in respective bank accounts as available in File No. 1 at P. No. 31 to 55, I state that the same were prepared by M/S. K.N. Brothers and handed over to us for our record. Further, statements showing details of cash deposits in respective bank accounts as available in File No. 1 at P. No. 01 to 29, I state that the same were prepared by Shri Nitin of M/S. P.C. Enterprise and handed over to us for our record.

Q.5. Please explain and de-code entries as recorded by you in all cash acknowledgement slips produced by you

A.5. Today, I have gone through the records as produced by me. Sir, please provide me blank worksheet containing columns like S. no., Record No., Page No., date, name of the person of the manufacturer who collects the cash, name of the Ceramic Tiles manufacturer at Morbi, Actual cash handed over, City from where the was deposited, Remarks etc Please provide me sufficient amount of blank seats with basic data of first three columns. I will sit here and verify acknowledgement slips and fill up the de-coded factual data in the said blank worksheets in my own handwriting.

Q.6. Today, as requested, you are provided following three worksheets having first three columns duly filled up. Please peruse each acknowledgement slip and fill up the de-coded data in respective column and returned all seats duly signed by you.

A.6. Today, I have gone through each cash acknowledgement slips as produced by me. After going through and verification, I have filled up all the details like date, name of the person of the manufacturer who collects the cash, name of the Ceramic Tiles manufacturer at Morbi, Actual cash handed over, City from where the cash was deposited, remarks etc. in my own handwriting and as per my understanding. I hereby submit following worksheets correctly filled up and signed by me.
For File A-I- Worksheet pages from 01 to 27
For File A-I- Worksheet pages from 01 to 31 and
For File A-I- Worksheet pages from 01 to 26

8. On analyzing the documentary evidences collected during investigation from M/s K.N. Brothers, Rajkot / M/s Ambaji Enterprise, Rajkot, M/s P.C. Enterprise, Rajkot, all Shroffs, and M/s Sarvoday Shroff, Morbi, broker, as well as deposition made by Shri Lalit Ashumal Gangwani, owner of M/s K.N. Brothers, Rajkot / M/s Ambaji Enterprise, Rajkot, Shri Nitinbhai Arjanbhai Chikani, actual owner of M/s PC Enterprise, Rajkot, Shri Sandipbhai Bachubhai Sanariya, Accountant-Cum-Cashier of M/s. Sarvodaya Shroff, Morbi, 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 Ambaji Enterprise, Rajkot, M/s P.C. Enterprise, Rajkot, all Shroffs, which was converted into cash by them and handed over to M/s Sarvodaya Shroff, Morbi, Broker/Middleman, who admittedly handed over the said cash amount to Appellant No. 1.

8.1 On examining the Statements of Shri Lalit Ashumal Gangwani, owner of M/s K.N. Brothers, Rajkot /M/s Ambaji Enterprise, Rajkot, Shri Nitinbhai Arjanbhai Chikani, actual owner of M/s PC Enterprise, Rajkot, Shri Sandipbhai Bachubhai Sanariya, Accountant-Cum-Cashier of M/s. Sarvodaya Shroff, Morbi, it is apparent that the said Statements contained plethora of the facts, which are in the knowledge of the deponents only. For example, Shri Sandipbhai Bachubhai Sanariya 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.

8.2 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 PC Enterprise, Rajkot or Shri Sandipbhai Bachubhai Sanariya, Middlemen, 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/brokers. 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.

8.3 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, Banglore 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."*

8.4 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".*

9. 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."*

10. The Appellant has contended that the Adjudicating authority erred in confirming the demand without allowing cross examination of the witnesses and in absence of the cross examination, the statement of third party cannot be relied upon by the Department. In this regard I find that the Appellant No. 1 had sought cross examination of Shri Lalit Ashumal Gangwani and Shri Jayesh Solanki of M/s K.N. Brothers and Shri Sandipbhai Bachubhai Sanariya of M/s. Sarvodaya Shroff, Morbi during the course of adjudication. The adjudicating authority denied the request of cross examination by observing in the impugned order, *inter alia*, as under:

> *"19.4 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 on 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. The denial of opportunity of cross-examination does not vitiate the adjudication proceedings. The adjudicating authority was not conducting a trial 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. In this regard, I place reliance upon the judgement of Hon'ble High Court of Madras in the case of Commissioner of Central Excise Salem Vs M/s Erode Annai Spinning Mills (Pvt.) Ltd, reported at 2019 (366) ELT647, wherein it was held that where opportunity of cross examination was not allowed, the entire proceedings will not be vitiated. ... ..."

10.1 I find that none of the Statements of Shroff/ Middlemen/Brokers 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/Sanitarywares manufacturers. It is on record that DGCEI had simultaneously booked offence cases against 186such 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 authority 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 ease before this Court."

10.2 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.

11. 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.

12. I find that the investigating officers gathered evidences from the premises of M/s K.N. Brothers, Rajkot/ M/s Ambaji Enterprise, Rajkot, M/s PC Enterprise, Rajkot, both Shroffs and M/s. Sarvodaya Shroff, Morbi, Middlemen, which indicated that Appellant No. 1 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 Ambaji Enterprise, Shri Nitinbhai Arjanbhai Chikani, actual owner of M/s. PC Enterprise, Rajkot and Shri Sandipbhai Bachubhai Sanariya of M/s. Sarvodaya Shroff, Morbi during the course of adjudication. Therefore, demand cannot be said to be based only on private records of third party but duly corroborated by host of evidences recovered during investigation. The very fact of many persons involved negate the concept of third party. Further, as discussed supra, Appellant No. 1 had devised such a modus operandi that it was difficult to identify buyers of goods or transporters who transported the goods. 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. Ahd.), 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 challanwise 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".

13. In view of above, the 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 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. 28,99,623/- 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.

14. Regarding penalty imposed under Section 11AC of the Act, I find that 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. 28,99,623/- imposed under Section 11AC of the Act.

15. Regarding penalty imposed upon Appellant Nos. 2 to 6 under Rule 26 of the Rules, I find that the said Appellants were Directors of Appellant No. 1 and were the key persons of Appellant No. 1 and were 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. They were found concerned in clandestine manufacture and removal of such goods and hence, they were 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. 2,00,000/- each upon Appellant Nos. 2 to 6 under Rule 26(1) of the Rules is correct and legal.

16. In view of above, I uphold the impugned order and reject the appeals of Appellant Nos. 1 & 6.

17. अपीलकर्ताओ द्वारा दर्ज की गई अपीलोका निपटारा उपरोक्त तरीकेसे किया जाता है।

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

सत्यापित / Attested

एन. सी. गजरिया
N. C. Gajariya
अधीक्षक
Superintendent

(अखिलेश कुमार)
आयुक्त (अपील)

Date: 27/04/2022

F. No. V2/116 & 173 to 177/RAJ/2021

By R.P.A.D.

M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642	Appellant No.1	सेवामें, मेसर्स ओशो सैनिटरिवेर प्रा लिमिटेड 8-A नेशनल हाइवे, मकनसर, मोरबी – 363642
Shri Alpesh Jerambhai Patel Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642	Appellant No.2	श्री अल्पेश जेरामभई पटेल, निर्देशक, मेसर्स ओशो सैनिटरिवेर प्रा लिमिटेड 8-A नेशनल हाइवे, मकनसर, मोरबी – 363642
Shri Anil Prabhubhai Sanja, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642	Appellant No.3	श्री अनिल प्रभुभाई सांजा, निर्देशक, मेसर्स ओशो सैनिटरिवेर प्रा लिमिटेड 8-A नेशनल हाइवे, मकनसर, मोरबी – 363642
Shri Chirag Ratanjibhai Sanja, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642	Appellant No.4	श्री चिराग रतनजी भाई सांजा निर्देशक, मेसर्स ओशो सैनिटरिवेर प्रा लिमिटेड 8-A नेशनल हाइवे, मकनसर, मोरबी – 363642
Shri Lalji Thobhanbhai Patel, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A, National Highway, Makansar, Morbi-363642	Appellant No.5	श्री लालजी थोभण भाई पटेल, निर्देशक, मेसर्स ओशो सैनिटरिवेर प्रा लिमिटेड 8-A नेशनल हाइवे, मकनसर, मोरबी – 363642

Shri Yogesh Prabhubhai Sanja, Director of M/s. Osho Sanitaryware Pvt. Ltd. 8-A; National Highway, Makansar, Morbi-363642	Appellant No.6	श्री योगेश प्रभुभाई सांजा, निर्देशक, मेसर्स ओशो सैनिटरिवेर प्रा लिमिटेड,8-A नेशनल हाइवे, मकनसर, मोरबी – 363642

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,राजकोटआयुक्तालय, राजकोट को आवश्यक कार्यवाही हेतु।
3) संयुक्तआयुक्त (मण्डल -10), राज्य वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क, 4th मंज़िल बहुमाली भवन रेस कोर्स रिंग रोड, राजकोट को, सेक्शन 107(15) of GST Act, 2017 के अनुसार जानकारी हेतु।
4) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क,मोरबी मंडल-II, मोरबी राजकोट आयुक्तालय,राजकोट को आवश्यक कार्यवाही हेतु।
5) गार्ड फ़ाइल।