: : 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-20220564SX0000823371

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIONo.	दिनांक/ Date
	V2/150 to 151/RAJ/2021	5/BB/AC/MRB-II/2021-22	15-04-2021

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

RAJ-EXCUS-000-APP-039 TO 40-2022

आदेश का दिनांक / Date of Order: **20.05.2022** जारी करने की तारीख / Date of issue: **23.05.2022**

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 Big Tiles, 8-A National Highway, B/h. Vermora Vitrified Tiles, At: Dhuva Tal: Wankaner Distt: Morbi-363621.

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 रजिस्ट्रार 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 रजिस्ट्रार 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" 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 होगे।/
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 सेमायाविधि 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।
जहाँ 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 नयायाधिकरण 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 two 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. 5/BB/AC/MRB-II/2021-22 dated 15.4.2021 (*hereinafter referred to as* 'impugned order') passed by the Asst. Commissioner, Central GST Morbi-II Division, Rajkot Commissionerate (*hereinafter referred to as* 'adjudicating authority') :-

Sl. No.	Appeal No.	Appellants	Name & Address of the Appellant
1.	V2/150/RAJ/2021	Appellant No.1	M/s Big Tiles National Highway 8A, B/h Varmora Vitrified Tiles, At Dhuva, Taluka Wankaner, District: Morbi.
2.	V2/151/RAJ/2021	Appellant No.2	Shri Ashish Marvaniya, Partner of M/s Big Tiles, District: Morbi.

1.1 Since issue involved in above appeals is common, I take up both appeals together for decision vide this common order.

2. The facts of the case, in brief, are that Appellant No. 1 was engaged in manufacture of Ceramic Floor and Wall Tiles falling under Chapter Sub Heading No. 69089090 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AAIFB8827CXM001. 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/Middleman/Cash Handlers engaged by the Tile manufacturers and certain incriminating documents were seized.

2.1 Investigation carried out revealed that the Shroffs had 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 Tile manufacturers after deducting their commission. This way the sale proceeds of an illicit transaction was routed from buyers of goods to Tile manufacturers through Shroffs and Brokers.

2.2 During scrutiny of documents seized from the office premises of M/s K.N. Brothers / Shree Ambaji Enterprise, Rajkot, M/s P.C. Enterprise, Rajkot all Shroffs, and M/s Sarvoday Shroff, Broker/ Middleman, it was revealed that the said Shroff had received total amount of Rs. 1,81,52,679/- in their bank account during the period from 18.2.2015 to 19.12.2015, which was passed on to Appellant No. 1 in cash through M/s Sarvoday Shroff, Broker/ Middleman. 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-C/Big/36-47/2019-20 dated .10.2019 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty amount of Rs. 22,67,991/- 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. 22,67,991/- under Section 11A(4) along with interest under Section 11AA of the Act and imposed penalty of Rs. 22,67,991/- 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) That it was submitted before the Adjudicating Authority that it is a settled law that demand cannot be sustained if no stock difference in the recorded quantity of finished goods and physical quantity of finished goods; in the recorded quantity of inputs and the physical quantity of the inputs is found in the factory during visit of central excise officers. No demand could be sustained if there is nothing on record to show purchase of raw materials for the manufacture of final product; no statement of raw material suppliers are recorded. No demand could be sustained if investigation has not proceeded to bring on record unaccounted purchase of raw material. No demand could be sustained if no investigation to indicate unusual consumption of electricity. No demand could sustain if there is no tangible evidence to indicate manufacture and clandestine removal of goods. It is a settled law that charge of clandestine removal of dutiable goods has to be proved by the department by adducing cogent and concrete evidence and it cannot be based on assumption and presumption. It is a settled law that without verifying manufacture, electricity consumption, labour, etc., no demand could sustain. It is a settled law that demand could not be based on conjuncture and surmises. A case of alleged clandestine clearance cannot be proved unless clandestine / surreptitious manufacture is proved. Suspicion cannot take place of evidence. Tangible evidence has to be proved by department. A case of clandestine clearance has to be proved by positive evidence. Complete corroboration is a must. No case sustains if any credible / independent evidence is not found.

(ii) That in this case, DGGI has miserably failed to investigate the fact that raw materials were surreptitiously procured, excess electricity was utilized, excess labour was utilized, surreptitious / clandestine manufacture of excess quantity over and above the quantity which is cleared under invoice had taken place. DGGI has also failed to prove how alleged clandestinely cleared goods were supplied to buyers / transported to the buyer; who are the buyers. Since it is so, the Show-cause Notice deserves to be quashed and set aside and relied upon following case laws:

a. Vishwa Traders Pvt. Ltd. - 2012 (278) ELT 362 (TRI.-AHD).
b. Premium Packaging Pvt. Ltd. -2005 (184) E.L.T. 165 (Tri. - Del.)
C. K. Harinath Gupta - 1994 (71) ELT 980
d. M. Industries - 1993(68) E.L.T. 807(TRIBUNAL)
Krishna & Co. - 1998(97) E.L.T. 74 (TRIBUNAL)
f. Ganga Rubber Industries -1989(39) E.L.T. 650 (T-NRB)
Gurpreet Rubber Industries -1996(82) E.L.T. 347 (TRIBUNAL)

h. Kashmir Vanaspati (P) Ltd. - 1989(39) E.L.T. 655 (TRIBUNAL)
i. Ashwin Vanaspati Industries P. Ltd. - 1992(59) E.L.T. 175 (Tri)
j. R.G. Electronics -1992(60) E.L.T. 121 (T-SRB)
k. Hans Castings Private Limited - 1998 (102) E.L.T. 139 (TRIBUNAL)
l. Jay Laminart Limited - 1998(102) E.L.T. 402 (TRIBUNAL)
m. Prabhavati Sahakari Soot Girini Ltd -1990(48) E.L.T. 522 (T)

(iii) That it was submitted before the Adjudicating Authority that this is a case of alleged clandestine clearance of ceramic tiles. It is admitted in the Show-cause Notice that ceramic tiles attract duty of Central Excise under Section 4A of the Act and not u/s. 4 of Central Excise Act, 1944. The basic difference between these two provisions are that, in case of assessment u/s. 4(supra), duty at ad-valorem basis could be calculated on the alleged amount of cash receipt because it is a case of assessment on the basis of transaction value. Whereas on the other hand, in case of section 4A(supra), MRP based assessment is required to be made. For this purpose, MRP is required to be known and then, after abatement, duty is required to be calculated. However, this exercise is not followed. Therefore, without prejudice to the fact that entire Show-cause Notice is completely baseless and all the allegations leveled against appellant are not sustainable in the eyes of law, even otherwise the demand fails.

(iv) That the Adjudicating Authority has placed reliance on the statement of the Shroffs viz. (a) statement dated 23/12/2015 of Shri Lalit Ashumal Gangwani, (b) statement of Shri Sandip Sanariya of Sarvoday Shroff and has concluded that cash was deposited by various buyers of ceramic tiles in the bank account of said Shroff and said Shroff had given cash to said Sandip Sanariya after deducting their commission and then said Sandip Sanariya in turn given cash to the appellant herein. There are absolutely no evidence which could support the entire sequence of allegation. Therefore, in this case, Adjudicating Authority was required to afford cross examination of all those people whose statements are relied upon. Since the same is not done, the impugned order deserves to be quashed and set aside.

(v) As demand itself is wrongly confirmed in the impugned order, the demand of interest as well as imposition of penalty are equally wrong, illegal and incorrect. When the demand itself is not sustainable, no interest would be payable and no penalty could be imposed under Section 11AC of the Act. Thus, the impugned order deserves to be quashed and set aside.

Appellant No. 2 :-

(i) The entire case is mainly against the company and appellant is made a co-noticee only because he is one of the partners of the company. The company has already filed an appeal challenging the impugned order itself. If the appeal of the company is allowed, automatically present appeal of the appellant would also be allowed. All the submissions made by the company in its appeal are equally important for the purpose of this appeal. Therefore, instead of repeating all those submissions herein and burdening this reply, appellant request to kindly consider all the submissions made by the company in their appeal.

(ii) That no penalty could have been imposed on him as there are no specific allegations of personal gain by the appellant and there is no evidence of appellant's personal involvement in the alleged evasion of duty by the company and relied upon Order No. A/1624 to 1626/WZB/ AHD dated 14.02.2017 of the Hon'ble CESTAT, Ahmedabad passed in the case of Gujarat Borosil Ltd V/s. CCE, Surat-II.

(iii) That it is a settled law that before imposing penalty under Rule 26, it requires to be proved that he was dealing with the goods with the knowledge that they are liable for confiscation. As there is no such evidence against him, no penalty could have been even otherwise imposed on him and relied upon following case laws:

a. A.K. Tantia reported at 2003 (158) ELT 638
b. ITC Ltd reported at 1998 (104) ELT 151
c. Shri Anil Bhalla reported at 2001 (138) ELT 883.

4.1 Hearing in the matter was held in virtual mode through video conferencing on 27.4.2022. Shri Devashish Trivedi, Advocate, appeared on behalf of both the Appellants. He reiterated the submissions made in appeal memorandum.

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

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, it was alleged that 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.

7. I find from the case records that the DGCEI had covered 4 Shroffs and 4 brokers/middleman 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 / Shree Ambaji Enterprise, Rajkot and M/s P.C. Enterprise, Rajkot, all Shroffs and M/s Sarvoday Shroff, Morbi, Broker / Middleman 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.

7.1. I find that during search carried out at the office premises of M/s K.N. Brothers / Shree Ambaji Enterprise, 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 middleman/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 / 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 Middleman located in Morbi. These middle men are working on behalf of Tile Manufacturers located in Morbi. These Middleman 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 Middleman. The Middleman 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 Middleman.
>
> 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 PC 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, BapaSitaram 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 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.

A.8 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"

7.4.1 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

7.5 I have gone through the Statement of Shri Arvind Hajipara, Partner of M/s Badveshvar Mahadev Tiles, Kolkata, recorded on 22.6.2019 under Section 14 of the Act. In the said statement, Shri Arvind Hajipara, *inter alia*, deposed that,

"Q.4. What are the products dealing by your company?

A.4. We are engaged in the trading of Ceramic Tiles and Sanitary wares since 2011.

Q-5 : Please provide names of major suppliers of your company for the F.Y. 2014-15 and 2015-16.

A.5 : We had purchased Ceramic Tiles from the following manufacturers during F.Y. 2014-15 and 2015-16 :
1. M/s Omen Vitrified Pvt Ltd, Morbi
2. M/s Saheb Ceramic Pvt Ltd, Morbi
3. M/s Coto Ceramic Pvt Ltd, Morbi
4. M/s Big Tiles, Morbi
5. M/s Wageshwar Tiles Co, Morbi
6. M/s Sunora Ceramic Pvt Ltd, Morbi

... ...

Q. 7 : Please explain have you purchased Ceramic Tiles from aforesaid tile manufacturers without covering of Central Excise invoices during F.Y. 2014-15 and 2015-16 ?

A.7 : We had purchased Ceramic Tiles from the aforesaid tile manufacturers under Central Excise invoices during F.Y. 2014-15 and 2015-16. However, sometimes we had received different grade than the mentioned in the invoices from them and the payment for the differential amount is paid in the bank account numbers given by the aforesaid companies.

Q-8 : Do you know the details of bank account holders ?
A.8 : We do not know the details of bank account holders, as per the directions given by manufacturers, we had deposited the payments in the said accounts."

8. On analyzing the documentary evidences collected during search at the office premises of M/s K.N. Brothers / Shree Ambaji Enterprise, Rajkot, and M/s PC Enterprise, Rajkot, all Shroffs, and M/s Sarvodaya Shroff, Morbi, broker/ middleman, as well as deposition made by Shri Lalit Ashumal Gangwani, owner

of M/s K.N. Brothers / Shree Ambaji Enterprise, Shri Nitinbhai Arjanbhai Chikani, owner of M/s PC Enterprise, Rajkot and Shri Sandipbhai Bachubhai Sanariya of M/s. Sarvodaya Shroff 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 Shroff M/s K.N. Brothers / Shree Ambaji Enterprise, Rajkot, M/s PC Enterprise, Rajkot which was converted into cash by them and handed over to M/s Sarvoday Shroff, Broker/Middleman, who 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 / Shree Ambaji Enterprise, Rajkot, Shri Nitinbhai Arjanbhai Chikani of M/s PC Enterprise, Rajkot and Shri Sandipbhai Bachubhai Sanariya of M/s. Sarvodaya Shroff, 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 the private records seized from his premises. He also gave details of when and how much cash was delivered to which Tile manufacturer and even concerned person who had received cash amount. It is not the case that the said Statements were recorded under duress or threat. Further, said Statements of Shri Lalit Ashumal Gangwani, Shri Nitinbhai Arjanbhai Chikani and Shri Sandipbhai Bachubhai Sanariya have not been retracted. So, veracity of deposition made in said Statements 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 / Shree Ambaji Enterprise, Rajkot, M/s PC Enterprise, Shroffs, or Shri Sandipbhai Bachubhai Sanariya, Morbi, Middleman, about deposit of cash in bank accounts of Shroffs on receipt of communication from their buyers and such cash amount would reach to them through middleman/broker. When cash amount was deposited by buyers of goods in bank accounts of Shroffs, 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, 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."

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 assessee 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 since adjudicating authority denied cross examination of witnesses whose Statements were relied upon, the impugned order deserves to be set aside. 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. Brothers / Shree Ambaji Enterprise, Shri Sandipbhai Bachubhai Sanariya, Accountant-Cum-Cashier of M/s. Sarvodaya Shroff and other Departmental witnesses during the course of adjudication. The adjudicating authority denied the request of cross examination by observing at para 19.2 of the impugned order as under:

> "19.2 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/ Middleman/Broker recorded during investigation have been retracted nor there is any allegation of duress or threat during recording of Statements. Further, Shroff/Middleman/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 / Middleman/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 / middleman 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 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 a case of alleged clandestine clearance cannot be proved unless clandestine / surreptitious manufacture is proved. In the present case, no statement of any of buyers, transporters who transported

raw materials and finished goods etc. have been recorded. No investigation was conducted to prove that raw materials were surreptitiously procured, excess electricity was utilized, excess labour was utilized, surreptitious / clandestine manufacture of excess quantity over and above the quantity which is cleared under invoice had taken place. 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.

11.1 I find that the investigating officers gathered evidences from the premises of M/s K.N. Brothers / Shree Ambaji Enterprise, Rajkot, M/s PC Enterprise, Rajkot, Shroffs, and M/s. Sarvodaya Shroff, Morbi, Middleman, which indicted that Appellant No. 1 routed sales proceeds of illicitly removed goods through the said Shroffs and Middleman/Broker. The said evidences were corroborated by the depositions made by Shri Lalit Ashumal Gangwani, Owner of M/s K.N. Brothers / Shree Ambaji Enterprise, Rajkot, Shri Nitinbhai Arjanbhai Chikani, owner of M/s PC Enterprise, Rajkot and Shri Sandipbhai Bachubhai Sanariya of M/s. Sarvodaya Shroff, Morbi during the course of adjudication. It is also observed that Shri Arvind Hajipara, Partner of M/s Badveshvar Mahadev Tiles, Kolkata, in his Statement recorded on 22.6.2019 under Section 14 of the Act has admitted that they had received different grade of goods from Appellant No. 1 than mentioned in invoices and differential amount was paid in bank account numbers given by Appellant No. 1. 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. 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 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".

12. 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. 22,67,991/- 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.

13. The Appellant has contended that Tiles were assessed under Section 4A of the Act and duty was payable on the retail sale price declared on the goods after allowing abatement and not under Section 4 of the Act. For this purpose, MRP is required to be known and then, after abatement, duty is required to be calculated. However, this exercise is not followed. Therefore, entire demand raised under Section 4 of the Act in the Show Cause Notice is completely baseless and all the allegations leveled against appellant are not sustainable in the eyes of law.

13.1 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."

13.2 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.

13.3 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 realised through Shroff/Middleman cannot be considered as MRP value for the reason that in cases when goods are sold through dealers, realised value would be less than MRP value since dealer price is always less than MRP price.

14. I find that the Appellant No. 1 was found indulging in clandestine removal of goods and routed the cash through Shroff/Middleman/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. The adjudicating authority was justified in invoking extended period of limitation on the grounds of suppression of facts. Since extended period of limitation on the grounds of suppression of facts was correctly invoked, 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. 22,67,991/- imposed under Section 11AC of the Act.

15. Regarding penalty imposed upon Appellant No. 2 under Rule 26 of the Rules, I find that Appellant No. 2 was Partner of Appellant No. 1 and was looking after day-to day affairs of Appellant No.1 and was the key persons 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.

16. In view of above, I uphold the impugned order and reject appeals of Appellants No. 1 and 2.

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

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

..20 May, 2022..

(AKHILESH KUMAR)
Commissioner (Appeals)

सत्यापित,

विपुल शाह
अधीक्षक (अपील्स)

By R.P.A.D.

To, 1. M/s Big Tiles National Highway 8A, B/h Varmora Vitrified Tiles, At Dhuva, Taluka Wankaner, District: Morbi.	सेवा में, मैसर्स बिग टाइल राष्ट्रीय राजमार्ग ४ए, वरमोरा विट्रिफाइड टाइल के पीछे, धुवा, तालुका वांकानेर, जिला: मोरबी।
2. Shri Ashish Marvaniya, Partner of M/s Big Tiles National Highway 8A, B/h Varmora Vitrified Tiles, At Dhuva, Taluka Wankaner, District: Morbi.	श्री आशीष मारवानिया, मैसर्स बिग टाइल्स के भागीदार राष्ट्रीय राजमार्ग ४ए, वरमोरा विट्रिफाइड टाइल के पीछे, धुवा, तालुका वांकानेर, जिला: 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) सहायक आयुक्त, वस्तु एवं सेवा कर एवं केन्द्रीय उत्पाद शुल्क मण्डल मोरबी-I, राजकोट को आवश्यक कार्यवाही हेतु।
4) गार्ड फ़ाइल।