: : 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-20220664SX000000A522

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेशसं / OIONo.	दिनांक/ Date
	V2/195 to 196/RAJ/2021	21/D/2020-21	15-03-2021

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

RAJ-EXCUS-000-APP-116 TO 117-2022

आदेश का दिनांक / Date of Order:	08.06.2022	जारी करने की तारीख / Date of issue:	09.06.2022

श्री अखिलेश 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 Orbit Cera Tiles Pvt. Ltd., Opp. GEB Sub-Station, Lalpar 8-A National Highway,Morbi - 363 642 Gujarat

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 असावाँ अहमदाबाद- ३८००१६को की जानी चाहिए।/

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

(iii) अपीलीय न्यायाधिकरण के समक्ष अपील प्रस्तुत करने के लिए केन्द्रीय उत्पाद शुल्क (अपील) नियमावली, 2001, के नियम 6 के अंतर्गत निर्धारित किए गये प्रपत्र EA-3 को चार प्रतियों में दर्ज किया जाना चाहिए। इनमें से कम से कम एक प्रति के साथ, जहां उत्पाद शुल्क की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/

The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 / as prescribed under Rule 6 of Central Excise (Appeal) Rules, 2001 and shall be accompanied against one which at least should be accompanied by a fee of Rs. 1,000/- Rs.5000/-, Rs.10,000/- where amount of duty demand/interest/penalty/refund is upto 5 Lac., 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asst. Registrar of branch of any nominated public sector bank of the place where the bench of any nominated public sector bank of the place where the bench of the Tribunal is situated. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-.

(B) अपीलीय न्यायाधिकरण के समक्ष अपील, वित्त अधिनियम,1994की धारा 86(1) के अंतर्गत सेवाकर नियमवाली, 1994, के नियम 9(1) के तहत निर्धारित प्रपत्र S.T.-5में चार प्रतियों में की जा सकेगी एवं उसके साथ जिस आदेश के विरुद्ध अपील की गयी हो, उसकी प्रति साथ में संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और इनमें से कम से कम एक प्रति के साथ, जहां सेवाकर की माँग , ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied is 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 Commissioner authorizing the Assistant Commissioner or Deputy Commissioner of Central Excise/ Service Tax to file the appeal before the Appellate Tribunal.

(ii) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सेस्टेट) के प्रति अपीलों के मामले में केन्द्रीय उत्पाद शुल्क अधिनियम 1944 की धारा 35एफ के अंतर्गत, जो की वित्तीय अधिनियम, 1994 की धारा 83 के अंतर्गत सेवाकर को भी लागू की गई है, इस आदेश के प्रति अपीलीय प्राधिकरण में अपील करते समय उत्पाद शुल्क/सेवा कर मांग के 10 प्रतिशत (10%), जब मांग एवं जुर्माना विवादित है, या जुर्माना, जब केवल जुर्माना विवादित है, का भुगतान किया जाए, बशर्ते कि इस धारा के अंतर्गत जमा कि जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो।
केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "मांग किए गए शुल्क" में निम्न शामिल है
(i) धारा 11 डी के अंतर्गत रकम
(ii) सेनवेट जमा की ली गई गलत राशि
(iii) सेनवेट जमा नियमावली के नियम 6 के अंतर्गत देय रकम
- बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं॰ 2) अधिनियम 2014 के आरंभ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्ज़ी एवं अपील को लागू नहीं 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 outside India 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 समायाविधि 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 नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case, if the order covers various numbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lakh fee of Rs. 100/- for each.

(E) यथासंशोधित न्यायालय शुल्क अधिनियम, 1975, के अनुसूची-I के अनुसार मूल आदेश एवं स्थगन आदेश की प्रति पर निर्धारित 6.50 रुपये का न्यायालय शुल्क टिकिट लगा होना चाहिए। /
One copy of application or O.I.O. as the case may be, and the order of the adjudicating authority shall bear a court fee stamp of Rs.6.50 as prescribed under Schedule-I in terms of the Court Fee Act,1975, as amended.

(F) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्य विधि) नियमावली, 1982 में वर्णित एवं अन्य संबन्धित मामलों को सम्मिलित करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है। /
Attention is also invited to the rules covering these and other related matters contained in the Customs, Excise and Service Appellate Tribunal (Procedure) Rules, 1982.

(G) उच्च अपीलीय प्राधिकारी को अपील दाखिल करने से संबंधित व्यापक, विस्तृत और नवीनतम प्रावधानों के लिए, अपीलार्थी विभागीय वेबसाइट www.cbec.gov.in को देख सकते है। /
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 & Appellant No. 2', as detailed in Table below) against Order-in-Original No. 21/D/2020-21 dated 15.3.2021 (*hereinafter referred to as* 'impugned order') passed by the Assistant Commissioner, Central GST Division, Morbi-I (*hereinafter referred to as* 'adjudicating authority'):-

Sl. No.	Appeal No.	Appellants	Name & Address of the Appellant
1.	V2/195/RAJ/2021	Appellant No.1	M/s. Orbit Cera Tiles Pvt Ltd Opp. GEB Sub Station, Lalpar, 8A National Highway, Morbi.
2.	V2/196/RAJ/2021	Appellant No.2	Shri Mavji Parsotam Soria, Director of Orbit Cera Tiles Pvt Ltd, Morbi.

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. 69071010 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AAACO5462DXM001. Intelligence gathered by the officers of Directorate General of Central Excise Intelligence, Zonal Unit, Ahmedabad (DGCEI) indicated that various Tile manufacturers of Morbi were indulging in malpractices in connivance with Shroffs / Brokers and thereby engaged in large scale evasion of Central Excise duty. Simultaneous searches were carried out on 22.12.2015 at the premises of Shroffs in Rajkot and Morbi and various incriminating documents were seized. On scrutiny of said documents and Statements tendered by the said Shroffs, it was revealed that huge amounts of cash were deposited from all over India into bank accounts managed by said Shroffs and such cash amounts were passed on to Tile Manufacturers through Brokers/Middlemen/Cash Handlers. Subsequently, simultaneous searches were carried out on 23.12.2015 and 31.12.2015 at the premises of Brokers/Middlemen/Cash Handlers engaged by the Tile manufacturers and certain incriminating documents were seized.

2.1 Investigation carried out revealed that the Shroffs opened bank accounts in the names of their firms and passed on the bank account details to the Tile manufacturers through their Brokers/Middlemen. The Tile manufacturers further passed on the bank account details to their customers/ 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 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, Rajkot, Shroff, it was revealed that the said Shroff had received total amount of Rs. 1,02,78,618/- in their bank accounts during the period from December, 2014 to December, 2015, which were passed on to Appellant No. 1 in cash through Shri Satish Patel, Morbi, 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/Group-A/36-129/2019-20 dated 28.12.2019 was issued to Appellant No. 1 calling them to show cause as to why Central Excise duty amounting to Rs. 12,80,394/- 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") along with 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 No. 2 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. 12,80,394/- was confirmed under Section 11A(4) along with interest under Section 11AA of the Act. The impugned order imposed penalty of Rs. 12,80,394/- 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. 3,00,000/- upon Appellant No. 2 under Rule 26(1) of the Rules.

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

Appellant No. 1:-

(i) The adjudicating authority has relied upon Statements of Shroff, Middleman/Broker 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 and un-authenticated third party private records. Therefore, in view of the above, impugned order passed by the learned Assistant Commissioner is liable to be set aside on this ground too.

(iii) That 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 [illegible] is liable to be set aside on this ground too.

(iv) That the adjudicating authority has not neutrally evaluated the evidences as well as submission made by it but heavily relied upon the general statements of Shroff, Middleman/Broker, scan copy of private records of K. N. Brothers, and Shri Satish Patel, broker reproduced in the SCN. He has not seen that Shri Mavjibhai Parshotambhai Soria, Director of Appellant has filed affidavit dated 22.8.2020 to the effect that they have never sold goods without invoice and without payment of duty of excise; that they have not received any cash as mentioned in SCN from any person.

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

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

(vi) That it is not a matter of dispute that Tiles were notified at Sr. No. 58 and 59 under Notification No. 49/2008-C.E.(N.T.) dated 24.12.2008 as amended issued under Section 4A of the Central Excise Act, 1944. Accordingly, as provided under Section 4A ibid duty of excise was payable on the retail sale price declared on the goods less permissible abatement @ 45%. Thus, duty of excise was payable @ 12.36% (upto 28.02.2015) and @ 12.50% with effect from 01.03.2015 on the 55% of retail sale price (RSP/MRP) declared on the goods/packages. That the investigation has nowhere made any attempt to find out actual [illegible]ity of tiles manufactured and cleared clandestinely. No attempt

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

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

Appellant No. 2 :-

(i) 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 him 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 him 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 him under Rule 26 of the Central Excise Rules, 2002.

4. Personal Hearing in the matter was scheduled in virtual mode on 20.5.2022. Shri P.D. Rachchh, Advocate, appeared on behalf of Appellant Nos. 1 to 2. He reiterated the submissions made in appeal memoranda in respect of all the appeals as well as those made in 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 & 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 [illegible] 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 M/s K. N. Brothers, Rajkot, Shroff, and Shri Satish Patel, Morbi, broker/ middleman, 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 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 Satish Patel, Morbi, recorded on 23.12.2015 under Section 14 of the Act. In the said statement, Shri Satish Patel, *inter alia,* deposed that,

"Q.6. Please give the details about your work in M/s. Angel, Akshardham Shopping Centre, Near Reva Township, Sanada Road, Morbi.

A.6. From the said address, I am working as a middlemen for facilitating the delivery of cash between various Shroff situated in Rajkot and tiles manufacturers situated in or around Morbi. My Work is to collect the cash amount on behalf of various tile/ceramic manufacturers as well as traders from the Shroff situated at Rajkot. I further state that I am having my business dealing with the firms acting as Shroff in the name of M/s Ambaji Enterprises and M/s K. N. Brothers which are situated in Rajkot. These Shroff firms are operated by Shri Lalitbhai A. Gangwani. I further state that I have number of clients in Morbi. Majority of my clients are engaged in manufacturing or trading of tiles/ ceramic goods.

Q.7 Please state about the percentage of commission received by you against Receipt and delivery of cash amount for and on behalf of your Clients?

A.7 : I state that I receive the commission amount of Rs. 50/- on the amount of cash of Rs. 1,00,000/- (One Lakh Only) delivered to our clients.

Q.8 Please explain in detail how you carry out the process of ...ng/delivering cash to your clients.

A.8. I state that I act as a middleman between Shroff and my clients who are manufacturers or traders of tiles. My clients approach me and inform that their certain amount of money has been deposited in the accounts of the Shroff i.e. M/s K.N. Brothers and M/s Ambaji Enterprises. Accordingly, I approach M/s K.N. Brothers and M/s Ambaji Enterprises to deliver the cash amount to my clients.

I further state that our Shroff, M/s K.N. Brothers and M/s Ambaji Enterprises have given me a bank account number and the said number was given by me to my clients. Accordingly, dealers/buyers of the tiles manufacturers (who are my clients) deposits the cash amount in the said account of Shroff as per the instructions of the Ceramic Tiles manufacturers. My clients then inform me about the cash deposited and the name of the city from where the amount has been deposited. And once the said amount is deposited in the account of our Shroff, my work is to receive the cash from Shroff and deliver the same to my clients. I further state that generally Shri Jayesh Solanki of M/s K. N. Brothers used to deliver the cash to me.

Further, on being asked I state that the cash amount was deposited by the dealers / buyers of the Tiles for delivery of the same to the concerned Ceramic Tiles Manufacturers against their illicit receipt of the excisable goods. i.e. Ceramic Tiles or by undervaluing said goods.

Q-9 : Please give the details of persons/ ceramic tiles manufacturers for whom you have received the amount in cash.

A-9 : We maintain Rojmel Account containing details of cash amount collected from the buyers of ceramic tiles manufacturers / traders. The said Rojmel Account has already been withdrawn during the course of Panchnama drawn at my office premises on 23.12.2015.

... ...

Q-11 Give the details of cash handed over to all the above said middlemen.

A.11. I state that I have not maintained ledger account, manufacture wise or trader wise and I am not in a position to give amount of cash received from Shroff and handed over to my clients. However, I have maintained date-wise Rojmel, in loose sheets, in respect of amount of the cash received by me, for my client, from the Shroff as well as the cash delivered over to my client. Two types of Rojmel sheets have been maintained by me.

One set of Rojmel sheets having "Sunora" heading are showing the amounts received from different Shroffs for different clients during the period from 29-12-2014 to 22-08-2015. Similar sheets without any heading have been maintained for the onward period upto 21-12-2015. The first column shows the amount received from Shroff. The second column has the mention of "H" or "A" or "P" or "B" or "S" or "SBI" which represents the Bank name in whose account the cash amount has been deposited to the Shroff. I clarify that, "H" represents HDFC BANK, "A" represents AXIS BANK, "P" represents PUNJAB NATIONAL BANK, "S" or "SBI" represents STATE BANK OF INDIA, "B" represents BANK OF BARODA and so on. The third column shows the place from where the tile dealers have deposited the cash amount and the fourth column shows the name of the manufacturer of tiles or dealers of tiles and/or the name of their representative, located at Morbi to whom the cash is to be delivered. I would like to add that wherever the cash has been delivered directly to the tile manufacturer, there is a mention of "F" at the appropriate [illegible] along with the name of representative and the name of the tile manufacturer.

Second set of Rojmel sheets having the details of disbursement of cash to my clients. The first two column are in respect of Angadia transfers and do not relate to tile dealers. The third column is the amount reimbursed to the persons whose names are shown in column number four. These sheets are available with me only for the period from 01-01-2015 to 21-12-2015 as such sheets for the past period were destroyed after settlement of accounts.

To illustrate the transaction mentioned therein, the entry number 17 written in Gujarati, on the sheet for the date 29-12-2014 is reproduced below:

"41/800 P Kolkata F Bhanubhai Silvania"

I explain that "41/800" stands for Rs. 41,800/-, which has been deposited in "P" i.e. PUNJAB NATIONAL BANK account of our Shroff i.e. M/s K.N.Brothers, by the dealer/ buyer of ceramic tiles. I further explain that the said amount has been deposited from "Kolkata', Kolkata city. Further, capital letter "F" written in fourth column stands for manufacturer/ factory owner of ceramic tiles, and fifth column "Bhanubhai" stands for Shri Bhanubhai who is the representative person of the tile manufacturer. Further the last column "Silvania" stands for M/s Silvania Ceramics, Morbi, who is the tile manufacturer, for whom the cash has been sent by the dealer/ buyer. To sum up the transaction in nutshell, I explain that the above referred entry shows that on 29-12-2014, an amount of Rs. 41800/- was deposited in M/s K.N.Brother's Account (Shroff), maintained in PUNJAB NATIONAL BANK, from the dealer/ buyer of tile based at Kolkata, which is meant to be delivered to the tile manufacturer, M/s Silvania Ceramics of Morbi. The name of the responsible person of the said tile manufacturer is Shri Bhanubhai."

8. On analyzing the documentary evidences collected during investigation from M/s K.N. Brothers, Rajkot, Shroff, and Shri Satish Patel, Morbi, broker, as well as deposition made by Shri Lalit Ashumal Gangwani, owner of M/s K.N. Brothers, Rajkot and Shri Satish Patel, 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, Shroff, which was converted into cash by them and handed over to Shri Satish Patel, 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 and Shri Satish Patel, 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 Satish Patel, Morbi deciphered the meaning of each and every entry written in his private records. He 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, Shroff, or Shri Satish Patel, Morbi, broker/Middleman, 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 middleman/broker. When cash amount was deposited by buyers of goods in bank accounts of Shroff, the same was not reflected in bank statements, as emerging from the records. So, there was no details of buyers available who had deposited cash amount in bank accounts of Shroff. This way the Appellant No. 1 was able to hide the identity of buyers of illicitly removed goods. It is a basic common sense that no person will maintain authentic records of the illegal activities or manufacture being done by it. It is also not possible to unearth all evidences involved in the case. The adjudicating authority is required to examine the evidences on record and decide the case. The Hon'ble High Court in the case of International Cylinders Pvt Ltd reported at 2010 (255) ELT 68 (H.P.) has held that once the Department proves that something illegal had been done by the manufacturer which *prima facie* shows that illegal activities were being carried, the burden would shift to the manufacturer.

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 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 assesse 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 since cross examination of Departmental witnesses were not allowed, their statements cannot be relied upon while passing the order and determining the duty amount payable by it. In this regard, I find that the Appellant No. 1 had sought cross examination of Shri Lalit Ashumal Gangwani and Shri Jayesh Solanki of M/s K.N. Brothers and Shri Satish Patel, Morbi during the course of adjudication. The adjudicating authority rejected the request of cross examination by observing in the impugned order,

inter alia, as under:

> "16.4 Further, as discussed above, all the aforesaid persons 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 M/s noticee. Further, I find that all the aforesaid persons have not retracted their statements. Therefore, the same are legal and valid pieces of evidence in the eyes of law. Further, I find that the facts available on record and relied upon in the Show Cause Notice are not only in the form of oral evidences i.e. Statement of Shroff/ Broker (Middleman) etc. but also backed by documentary evidences i.e. Bank Statements, Daily Sheet, Writing Pad etc. recovered / submitted by the Shroff / Broker. Therefore, I hold that all these evidences are correctly relied upon in the Show Cause Notice by the investigation agency and is therefore valid.
>
> 16.5 Further, I find that 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. 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 manufacturers of Morbi. It is on record that DGCEI had simultaneously booked offence cases against 186 such manufacturers for evasion of Central Excise duty who had adopted similar *modus operandi* by routing sale proceeds of illicitly cleared finished goods through Shroffs / Middlemen/brokers. It is also on records that out of said 186 manufacturers, 61 had admitted the allegations and had also paid duty evaded by them. So, the documentary evidences gathered by the investigating officers from the premises of Shroff / 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 ev[illegible]ely on the decision rendered by the Hon'ble Bombay High Court in

the case of Patel Engineering Ltd reported as 2014 (307) E.L.T. 862 (Bom.), wherein it has been held that,

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

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.

11.1 I find that the investigating officers gathered evidences from the premises of M/s K.N. Brothers, Rajkot, Shroff, which indicated that Appellant No. 1 routed sales proceeds of illicitly removed goods through the said Shroff and Middlemen/Broker. The said evidences were corroborated by the depositions made by Shri Lalit Ashumal Gangwani, owner of M/s K.N. Brothers and Shri Satish Patel, Morbi, broker, during the course of adjudication. Further, as discussed *supra*, Appellant No. 1 had devised such a *modus operandi* that it was almost 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 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. Appellant No. 1 has contended 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, scan copy of private records of K. N. Brothers, and Shri Satish Patel, broker reproduced in the SCN but ignored that Shri Mavjibhai Parshotambhai Soria, Director of Appellant has filed affidavit dated 22.8.2020 to the effect that they have never sold goods without invoice and without payment of duty of excise; that they have not received any cash as mentioned in SCN from any person.

12.1 I have gone through the Affidavit dated 22.8.2020 filed by Shri Mavjibhai Parshotambhai Soria, who is Appellant No. 2 herein, contained in appeal memorandum. I find that as narrated in Para 3 of Show Cause Notice, summons were issued to the Appellant by the investigating authority on 15.9.2016, 2.2.2018 and 22.1.2019 to produce various documents and to give oral evidence but they did not appear. Thus, opportunities were given to the Appellant to explain their position. However, they chose not to avail the opportunity. It is apparent that filing affidavit after issuance of Show Cause Notice is merely an afterthought and it has no bearing on the outcome of this case.

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. 12,80,394/- 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 with interest at applicable rate under Section 11AA of the Act. I,

therefore, uphold order to pay interest on confirmed demand.

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

14.1 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."

14.2 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.

14.3 On examining the present case in backdrop of above provisions, I find that Appellant No. 1 has not produced any evidences that the goods were sold to retail customers. Further, as discussed above, Appellant No.1 had adopted such a modus operandi that identity of buyers could not be ascertained during

investigation. Since, applicability of provisions contained in Legal Metrology Act, 2009 itself is not confirmed, it is not possible to extend benefit of abatement under Section 4A of the Act. Even if it is presumed that all the goods sold by Appellant No.1 were to retail customers then also what was realized through Shroff/Middlemen cannot be considered as MRP value for the reason that in cases when goods are sold through dealers, realized value would be less than MRP value since dealer price is always less than MRP price.

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

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

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

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

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

also does not arise. The Appellant further contended that none of the situation suppression of facts, 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 order based on the general allegation. I find that the Appellant No. 1 was found indulging in clandestine removal of goods and routed the cash through Shroff/Middlemen/Broker. The *modus operandi* adopted by Appellant No. 1 was unearthed during investigation carried out against them by DGCEI, Ahmedabad. Thus, this is a clear case of suppression of facts with intent to evade payment of duty. Considering the facts of the case, I am of the opinion that the adjudicating authority was justified in invoking extended period of limitation on the grounds of suppression of facts. Since invocation of extended period of limitation on the grounds of suppression of facts is upheld, penalty under Section 11AC of the Act is mandatory, as has been held by the Hon'ble Supreme Court in the case of Rajasthan Spinning & Weaving Mills reported as 2009 (238) E.L.T. 3 (S.C.), wherein it is held that when there are ingredients for invoking extended period of limitation for demand of duty, imposition of penalty under Section 11AC is mandatory. The ratio of the said judgment applies to the facts of the present case. I, therefore, uphold penalty of Rs. 12,80,394/- imposed under Section 11AC of the Act.

16. Regarding penalty imposed upon Appellant No. 2 under Rule 26 of the Rules, I find that the said Appellant was Director of Appellant No. 1 and was looking after day-to day affairs of Appellant No.1 and was the key person of Appellant No. 1 and was directly involved in clandestine removal of the goods manufactured by Appellant No. 1 without payment of Central Excise duty and without cover of Central Excise Invoices. He was found concerned in clandestine manufacture and removal of such goods and hence, he was knowing and had reason to believe that the said goods were liable to confiscation under the Act and the Rules. I, therefore, find that imposition of penalty of Rs. 3,00,000/- 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 the appeals of Appellant Nos. 1 & 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.

सत्यापित,

विपुल शाह
अधीक्षक (अपील्स)

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To, 1. M/s. Orbit Cera Tiles Pvt Ltd Opp. GEB Sub Station, Lalpar, 8A National Highway, Morbi.	सेवामें, मैसर्स ऑर्बिट सेरा टाइल्स प्राइवेट लिमिटेड जीईबी सब स्टेशन के सामने, लालपर, 8ए राष्ट्रीय राजमार्ग, मोरबी।
2. Shri Mavji Parsotam Soria Director of M/s. Orbit Cera Tiles Pvt Ltd, Opp. GEB Sub Station, Lalpar, 8A National Highway, Morbi.	श्री मावजी परसोतम सोरिया, निदेशक, मैसर्स ऑर्बिट सेरा टाइल्स प्राइवेट लिमिटेड जीईबी सब स्टेशन के सामने, लालपर, 8ए राष्ट्रीय राजमार्ग, 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।