: : 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, GSTBhavan,
रेस कोर्स रिंग रोड, / Race Course Ring Road,
राजकोट / Rajkot – 360 001
Tele Fax No. 0281 – 2477952/2441142Email: commrappl3-cexamd@nic.in

रजिस्टर्डडाकए.डी. द्वारा :- DIN-20220964SX0000000C19

क	अपील / फाइलसंख्या/ Appeal /File No.	मूलआदेससं / OIO No.	दिनांक/ Date
	V2/447/RAJ/2021	21/D/2021-22	16-07-2021

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

RAJ-EXCUS-000-APP-342-2022

आदेश का दिनांक / Date of Order: **26.09.2022** जारी करने की तारीख / Date of issue: **28.09.2022**

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. Boss Ceramics, Plot No. 207/26, Rafaleshwar GIDC, 8-A National Highway,Morbi-363642

इस आदेश(अपील) से व्यथित कोई व्यक्ति निम्नलिखित तरीके में उपयुक्त प्राधिकारी / प्राधिकरण के समक्ष अपील दायर कर सकता है।/
Any person aggrieved by this Order-in-Appeal may file an appeal to the appropriate authority in the following way.

(A) सीमा शुल्क , केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील,केन्द्रीय उत्पाद शुल्क अधिनियम ,1944 की धारा 35B के अंतर्गत एवं वित्त अधिनियम, 1994 की धारा 86 के अंतर्गत निम्नलिखि+त जगह की जा सकती है।/

Appeal to Customs, Excise & Service Tax Appellate Tribunal under Section 35B of CEA, 1944 / Under Section 86 of the Finance Act, 1994 an appeal lies to:-

(i) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठ, वेस्ट ब्लॉक नं 2, आर॰ के॰ पुरम, नई दिल्ली, को की जानी चाहिए।/

The special bench of Customs, Excise & Scrvice 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, Asawa 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, जहा 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, जहा सेवाकर की माँग ,ब्याज की माँग और लगाया गया जुर्माना, रुपए 5 लाख या उससे कम,5 लाख रुपए या 50 लाख रुपए तक अथवा 50 लाख रुपए से अधिक है तो क्रमश: 1,000/- रुपये, 5,000/- रुपये अथवा 10,000/- रुपये का निर्धारित जमा शुल्क की प्रति संलग्न करें। निर्धारित शुल्क का भुगतान, संबंधित अपीलीय न्यायाधिकरण की शाखा के सहायक रजिस्टार के नाम से किसी भी सार्वजिनक क्षेत्र के बैंक द्वारा जारी रेखांकित बैंक ड्राफ्ट द्वारा किया जाना चाहिए। संबंधित ड्राफ्ट का भुगतान, बैंक की उस शाखा में होना चाहिए जहां संबंधित अपीलीय न्यायाधिकरण की शाखा स्थित है। स्थगन आदेश (स्टे ऑर्डर) के लिए आवेदन-पत्र के साथ 500/- रुपए का निर्धारित शुल्क जमा करना होगा।/

The appeal under sub section (1) of Section 86 of the Finance Act, 1994, to the Appellate Tribunal Shall be filed in quadruplicate in Form S.T.5 as prescribed under Rule 9(1) of the Service Tax Rules, 1994, and Shall be accompanied by a copy of the order appealed against (one of which shall be certified copy) and should be accompanied by a fees of Rs. 1000/- where the amount of service tax & interest demanded & penalty levied of Rs. 5 Lakhs or less, Rs.5000/- where the amount of service tax & interest demanded & penalty levied is more than five lakhs but not exceeding Rs. Fifty Lakhs, Rs.10,000/- where the amount of service tax & interest demanded & penalty levied is more than fifty Lakhs rupees, in the form of crossed bank draft in favour of the Assistant Registrar of the bench of nominated Public Sector Bank of the place where the bench of Tribunal is situated. / Application made for grant of stay shall be accompanied by a fee of Rs.500/-.

(i) वित्त अधिनियम,1994की धारा 86 की उप-धाराओं (2) एवं (2A) के अंतर्गत दर्ज की गयी अपील, सेवाकर नियमवाली, 1994, के नियम 9(2) एवं 9(2A) के तहत निर्धारित प्रपत्र S.T.-7 में की जा सकेगी एवं उसके साथ आयुक्त, केन्द्रीय उत्पाद शुल्क अथवा आयुक्त (अपील), केन्द्रीय उत्पाद शुल्क द्वारा पारित आदेश की प्रतियाँ संलग्न करें (उनमें से एक प्रति प्रमाणित होनी चाहिए) और आयुक्त द्वारा सहायक आयुक्त अथवा उपायुक्त, केन्द्रीय उत्पाद शुल्क/ सेवाकर, को अपीलीय न्यायाधिकरण को आवेदन दर्ज करने का निर्देश देने वाले आदेश की प्रति भी साथ में संलग्न करनी होगी। /
The appeal under sub section (2) and (2A) of the section 86 the Finance Act 1994, shall be filed in For ST.7 as prescribed under Rule 9 (2) &9(2A) of the Service Tax Rules, 1994 and shall be accompanied by a copy of order of Commissioner Central Excise or Commissioner, Central Excise (Appeals) (one of which shall be a certified copy) and copy of the order passed by the 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 outsideIndia export to Nepal or Bhutan, without payment of duty.

(iv) सुनिश्चित उत्पाद के उत्पादन शुल्क के भुगतान के लिए जो क्रेडीट केडीट इस अधिनियम एवं इसके विभिन्न प्रावधानों के तहत मान्य की गई है और ऐसे आदेश जो आयुक्त (अपील) के द्वारा वित्त अधिनियम (नं॰ 2),1998 की धारा 109 के द्वारा नियत की गई तारीख अथवा समायावधि पर या बाद में पारित किए गए है।/
Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under such order is passed by the 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 रुपये या उससे कम हो तो रुपये 200/- का भुगतान किया जाए और यदि संलग्न रकम एक लाख रुपये से ज्यादा हो तो रुपये 1000 -/ का भुगतान किया जाए।
The revision application shall be accompanied by a fee of Rs. 200/- where the amount involved in Rupees One Lac or less and Rs. 1000/- where the amount involved is more than Rupees One Lac.

(D) यदि इस आदेश में कई मूल आदेशों का समावेश है तो प्रत्येक मूल आदेश के लिए शुल्क का भुगतान, उपर्युक्त ढंग से किया जाना चाहिये। इस तथ्य के होते हुए भी की लिखा पढ़ी कार्य से बचने के लिए यथास्थिति अपीलीय नयाधिकरण को एक अपील या केंद्रीय सरकार को एक आवेदन किया जाता है। / In case,if the order covers variousnumbers of order- in Original, fee for each O.I.O. should be paid in the aforesaid manner, notwithstanding 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 ::

M/s Boss Ceramics, Plot No. 207/26, Rafaleshwar GIDC, 8-A National Highway, Morbi- 363 642 (*hereinafter referred to as* 'Appellant) has filed Appeal No.447/Raj/2021 against Order-in-Original No. 21/D/2021-22 dated 16.07.2021 (*hereinafter referred to as* 'impugned order') passed by the Assistant Commissioner, Central GST Division-I, Morbi (*hereinafter referred to as* 'adjudicating authority').

2. The facts of the case, in brief, are that the appellant was engaged in manufacture of Ceramic Glazed Tiles falling under Chapter Sub Heading No. 6908 of the Central Excise Tariff Act, 1985 and was holding Central Excise Registration No. AADFB1342HXM001. Intelligence gathered by the officers of Directorate General of Central Excise Intelligence, Regional Unit, Rajkot (DGCEI) indicated that M/s B'son Ceramic, Morbi were indulging in evasion of Central Excise duty by way of illicit removal of unglazed ceramic tiles manufactured by them without payment of duty. During the search proceedings carried out at the factory premises of M/s B'son Ceramic, documents along with electronic gadgets were resumed under Panchnama dated 24.05.2016. During the investigation against M/s B'son Ceramic, documentary evidences were collected which corroborated the evidences regarding clandestine purchase of Ceramic Unglazed Tiles by the appellant which was manufactured by M/s B'son and sold to the appellant without payment of Central Excise duty.

2.1 Statement of Shri Manoj Velajibhai Ughareja, Partner of M/s Boss Ceramics, was recorded under Section 14 of Central Excise Act, 1944 read with Section 174 of CGST Act, 2017 on 04.06.2020. During the recording of statement of the partner of appellant unit, he admitted that they have purchased Unglazed Tiles (biscuits) from M/s B'son Ceramic without covering of Central Excise invoice and manufactured premium grade ceramic wall tiles from the said clandestine purchase of biscuits.

3. Show Cause Notice No. DGGI/RRU/36-02/2020-21 dated 16.06.2020 was issued to Appellant calling them to show cause as to why Central Excise duty amounting to Rs.9,97,474/- 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.

The above said Show Cause Notice was adjudicated vide the impugned

order wherein the demand of Central Excise duty amounting to Rs.9,97,474/- was confirmed under Section 11A(4) along with interest under Section 11AA of the Act. The impugned order imposed penalty of Rs.9,97,474/- under Section 11AC of the Act.

4. Being aggrieved with the impugned order, Appellant has preferred appeals on various grounds, *inter alia*, as below:-

(i) The adjudicating authority has failed to furnish legible certified copies of documents as requested by them vide letter dated 13.07.2020 as well as reply dated 01.10.2020 before passing the order and hence the impugned order violated the principles of natural justice. They relied upon the following decisions.

(a) *Rajam Industries (P) Ltd-2020 (255) ELT.161 (Mad)*

(b) Parmarth Iron Pvt. Ltd - 2010 (255) E.L.T. 496 (All.)

(c) *Videocon International Ltd-2010 (25) ELT.553 (Tri-Mumbai)*

(ii) The adjudicating authority has relied upon various statements referred and relied upon in the show cause notice confirming the demand. 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.)

(iii) 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.

(iv) The show cause notice is running into 26 pages plus Annexure-RUD plus Annexure-I showing duty liability in respect of clandestinely purchase of Unglazed Ceramic Tiles from M/s B'son Ceramics, Morbi. It is not forthcoming from the same that base on which document the Annexure-I is prepared. Neither Panchnama nor statements nor other documents referred in Annexure-RUD have direct or indirect relation with the demand of duty against the appellant.

(v) The adjudicating authority erred in finding that it is not the case to decide whether the goods cleared by M/s B'son are excisable or otherwise. The adjudicating authority intentionally misinterpreted Circular dated 17.10.1988. It is settled position of law that Board's Circular is binding upon the department and clarification issued by the Board is squarely applicable to the goods manufactured by M/s B'son as clay biscuit tiles are not marketable.

(vi) The allegation of purchase of goods without payment of duty and without invoice are totally baseless. The investigation has not adduced any documentary evidence to the effect of supply of said goods without invoice and without payment of duty. There is no evidence of manufacture of Ceramic Tiles out of ceramic unglazed tile purchased from M/s B'son and there is no evidence of sale to buyers of the ceramic glazed tiles without invoice and without payment of duty of excise. There is no evidence of transportation of such goods nor receipt of sale value from anyone except oral evidences. The only evidence adduced against the appellant is one statement dated 04.06.2020 of one of the partners Shri Manojbhai Veljibhai Ughreja but the same is version of the officer so as to fabricate the case against the appellant.

(vii) In any case, two Annexure-II and III where the name of appellant written are not legible and cannot have any evidential value in absence of any evidence as provided under Section 36B(2) of the Central Excise Act, 1944. Pen drive is not computer within the meaning of 'Explanation' to Section 36B ibid, therefore, printout of pen drive cannot be considered as printout of computer, so it cannot be considered as admissible evidence. They relied upon the following case laws:

(a) *Bhandari Caterers-2019 (29) GSTL.489 (Tri-Del)*

(b) *Indal Nickel & Alloys Ltd-2020 (371) ELT.661 (Del)*

(c) *Ambica Organics-2016 (334) ELT.97 (Tri-Ahmd)*

(d) *Premium Packaging Pvt Ltd-2005 (184) ELT.165 (Tri-Del)*

(viii) Root cause of investigation which led to demand of Central Excise duty is investigation against M/s B'son Ceramic, Morbi. No independent investigation is carried out against appellant except recording confessional statement of one of the partners of appellant. No evidence of manufacture of ceramic glazed tiles, procurement of other raw materials including fuel and power for manufacture of tiles, deployment of staff, transportation of raw materials as well as finished goods, statement of buyer specifically stating name of appellant, statement of transporters who transported finished goods, receipt of cash 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. Reliance is placed amongst other following decisions:

(a) *Synergy Steels Ltd-2020 (372) EKT,129 (Tri-Del)*

(b) *Savitri Concast Ltd-2015 (329) ELT.213 (Tri-Del)*

(c) *Aswani & Co-2015 (327) ELT.81 (Tri-Del)*

(d) *Shiv Prasad Mills Pvt Ltd-2015 (329) ELT.250 (Tri-Del)*

(e) *Shree Maruti Fabrics-2014 (311) ELT.345 (Tri-Ahmd).*

(ix) While issue of show cause notice, no reliance can be placed on any decision, but the investigation has placed reliance upon certain decisions regarding admissibility and evidential value of the records/documents seized during investigation. The investigation has placed reliance upon decisions without understanding the circumstances and facts of each cases.

(x) Thus, in absence of any evidence for alleged clandestine manufacture and clearance of goods except so called allegations of cash receipt by around 186 tile manufacturers, it cannot be alleged suppression etc, and therefore, demand beyond normal period is time barred.

(xi) When no duty is payable, question of payment of interest and imposition of penalty does not arise.

4.1 Personal Hearing in the matter was held on 06.09.2022. Shri P.D. Rachchh, Advocate, appeared on behalf of Appellant. He reiterated the submissions made in appeal memorandum. He further stated that he would submit a synopsis of submissions as additional written submission.

5. I have carefully gone through the facts of the case, the impugned order, the appeal memorandum and written as well as oral submissions made by the Appellant. The issue to be decided is whether the impugned order, in the facts of

this case, confirming demand and imposing penalty is correct, legal and proper or not.

6. The first contention of the appellant in the present appeal is that the adjudicating authority has failed to furnish legible certified copies of documents as requested by them vide letter dated 13.07.2020 as well as reply dated 01.10.2020 before passing the order and hence the impugned order violated the principles of natural justice. In this regard, I find that the adjudicating authority had addressed the issue at Paragraph 20.2 and 20.4 of the impugned order wherein he observed that Deputy Director, DGGI, RRU, Rajkot vide letter dated 04.05.2021 informed that legible copies of relied upon documents were supplied to the partner of M/s Boss on 25.06.2020 and submitted copy of acknowledgement. Therefore, the contention of the appellant in this regard is fallacious and is liable for rejection.

7. Coming to the merits of the case, I find that an offence case was booked by the officers of Directorate General of Central Excise Intelligence, Rajkot (DGCEI) against the appellant for clandestine removal of goods. During the search proceedings carried out at the factory premises of M/s B'son Ceramic, certain documents along with electronic gadgets were resumed under Panchnama dated 24.05.2016. During the investigation against M/s B'son Ceramic documentary evidences were collected which corroborated the evidences regarding clandestine purchase of Ceramic Unglazed Tiles by the appellant, which was manufactured by M/s B'son and sold to the appellant without payment of Central Excise duty. Shri Manoj Velajibhai Ughareja, Partner of M/s Boss Ceramics, in his statement recorded under Section 14 of Central Excise Act, 1944 read with Section 174 of CGST Act, 2017 admitted that they have purchased Unglazed Tiles (biscuits) from M/s B'son Ceramic without covering of Central Excise invoice and manufactured premium grade ceramic wall tiles from the said clandestine purchase of biscuits.

8. The appellant, on the other hand, had contended that the allegation of purchase of goods without payment of duty and without invoice are totally baseless. The investigation has not adduced any documentary evidence to the effect of supply of said goods without invoice and without payment of duty. There is no evidence of manufacture of Ceramic Tiles out of ceramic unglazed tile purchased from M/s B'son and there is no evidence of sale to buyers of the ceramic glazed tiles without invoice and without payment of duty of excise. There is no evidence of transportation of such goods nor receipt of sale value from anyone except oral evidences. The only evidence adduced against the appellant is one

statement dated 04.06.2020 of one of the partners Shri Manojbhai Veljibhai Ughreja but the same is version of the officer so as to fabricate the case against the appellant.

9. In this regard, I find that the investigation was conducted at the level of the supplier of goods viz. M/s B'son Ceramic for clandestine removal of excisable goods by them. The appellant, a manufacturer of ceramic glazed tiles, had allegedly purchased unglazed ceramic tiles from the said M/s B'son Ceramic. The only evidence adduced by the investigation is a statement of one of the partners Shri Manojbhai Veljibhai Ughreja wherein he admitted that they had produced unglazed ceramic tiles from M/s B'son Ceamic and manufactured and cleared glazed ceramic tiles clandestinely.

10. It is settled law that clandestine removal of excisable goods being a serious allegation, the department was bound to conduct investigation about transportation of goods, buyer of goods and receipt of sale proceeds. Without conducting any inquiry at the buyers end and transportation of goods and without collecting tangible evidences regarding manufacture and removal of goods, the allegation of clandestine removal cannot be established. In the present case, I observe that no investigation has been made by the agency who investigated the case to identify the buyer of the finished goods, the transporter who transported the goods and not collected any evidence of receipt of sale proceeds. In the cases relating to clandestine removal of excisable goods, following are the indicators of clandestine removal activities by a manufacturer:-

(i) Excess stock of raw materials found in the factory premises.

(ii) Shortage of raw materials in the records of manufacturer.

(iii) Excess/shortage of manufactured goods found in the factory premises.

(iv) Excess consumption of electricity/power used in the manufacture of finished goods.

(v) Any transit seizure of clandestinely removed goods made by the investigating authority.

(vi) Any cash amounts seized from the factory premises or dealer's premises or residential premises searched during investigation.

(vii) Confessionary statements of the persons concerned with the clandestine manufacture/removal of excisable goods.

11. In the present case, there is no excess/shortage of either raw materials or manufactured goods found in the factory premises. In fact, the factory of the appellant was not even visited by the investigating agency. There is no recovery

of cash from anywhere. The only evidence available with the revenue is the statement of one of the partners Shri Manojbhai Veljibhai Ughreja which stands retracted. Hon'ble Tribunal in the case of *Sakeen Alloys Pvt Ltd-2013 (296) E.L.T. 392 (Tri. - Ahmd.)* held that in a clandestine removal case, the facts of clandestine removal of excisable goods cannot be established only on the basis of certain statement which retracted later but there has to be positive evidences like purchase of excess raw materials, shortage/excess of raw materials/finished goods found in the stock/factory premises of the appellant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash. The Hon'ble Tribunal held as under:

> *11. From the above settled law, it is clear that in a clandestine removal case, the facts of clandestine removal of excisable goods cannot be established only on the basis of certain statements which are retracted later but there has to be positive evidences like purchase of excess raw materials, shortage/excess of raw materials/finished goods found in the stock/factory premises of the appellant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash. In the present case also, it is observed, from the annexures to the show cause notice dated 1-5-2009 issued to the appellants, that there were huge cash transactions to the tune of Rs. 11.23 Crores. When such large number of transactions involving huge amounts are being undertaken in clandestine removal activities, it is very likely that some cash would have been seized. There is not a single instance where either seizure of cash is made or any clandestinely removed goods are seized or raw materials/finished goods were found either short or in excess in the factory premises of the appellant or at any other place. As per the Panchnama drawn at the factory premises it is shown that there was no excess/shortage of the raw materials or finished goods found.* ***The documentary evidences collected from the business premises of M/s. Sunrise Enterprise and the statements recorded by investigation, can at the most raise a reasonable doubt that some clandestine removal activities are undertaken by the appellant. However, such a suspicion or doubt has to be strengthened by positive evidences which seem to be lacking in this case. Any suspicion whosoever cannot take the place of evidence regarding clandestine removal of excisable goods. Moreover, after having positive evidences, quantification of duty on clandestinely removed goods also becomes essential.*** *As already mentioned above, the stock lying in the stock yard of M/s. Sunrise Enterprise, Mehsana was found containing the goods received from M/s. Sakeen Alloys Pvt. Limited under proper invoices. When the goods received under proper invoices are found in the stock yard of M/s. Sunrise Enterprise, then it is possible that out of such goods certain quantities were sold to various customers by accepting payment in cash. In such a situation, the quantification undertaken by the investigation becomes doubtful and incorrect. For this purpose cross-examination of the person Incharge looking after the records of M/s. Sunrise Enterprise was must, which was not allowed by the adjudicating authority. In view of the above observations, the demand of duty of Rs. 1,85,10,861/- is not sustainable and is required to be set aside.*

12. The above decision of Tribunal has been affirmed confirmed by Hon'ble Gujarat High Court as reported at *2014 (308) E.L.T. 655 (Guj.)* wherein it is held that;

> *7. As can be noted from the decision of the Tribunal, it has extensively dealt with the factual matrix presented before it. The Tribunal rightly concluded that in the case*

of clandestine removal of excisable goods, there needs to be positive evidences for establishing the evasion, though contended by the Revenue. In absence of any material reflecting the purchase of excessive raw material, shortage of finished goods, excess consumption of power like electricity, seizure of cash, etc., the Tribunal noted and held that there was nothing to bank upon except the bare confessional statements of the proprietor and of some of the persons connected with the manufacturing activities and such statements were retracted within no time of their recording. The Tribunal also noted the fact that the requisite opportunity of cross-examination was also not made available so as to bring to the fore the true picture and therefore, it concluded against the Revenue observing that not permitting the cross-examination of a person in-charge of records of M/s. Sunrise Enterprises and absence of other cogent and positive evidences, would not permit it to sustain the demand of Rs. 1.85 Crores raised in the Demand notice and confirmed by both the authorities below.

13. In the case of *Shree Maruti Fabrics-2014 (311) E.L.T. 345 (Tri. - Ahmd.)* Hon'ble Tribunal has held that duty demand can be sustained only when the goods are manufactured and cleared. Hon'ble Tribunal held as under:

> *7.....The duty demand can be sustained only when the goods are manufactured and cleared. However in the instant case there is not a single consignee of the goods, no transporter of the goods. No investigation has been done at the factory as to the manufacture of the goods. There is no investigation as to how the raw materials were procured, the consumption of electricity, the payments of wages, etc. The show cause notice or the adjudication order even does not show how the amounts received in the Bank accounts of these dummy concerns were transferred to appellant's account, if any. I therefore agree with the submissions made by the appellant and hold that the demands are not sustainable.*

In the present case also, there is not a single consignee of goods and no transporter of goods identified by the investigating agency.

14. Further, it is held by Hon'ble Supreme Court in the case of *Shalimar Rubber Industries v. Collr. of C.E., Cochin* - 2002 (146) E.L.T. 248 (S.C.), that no reliance can be placed on the oral statement of the raw material suppliers as he is not subjected to any examination and cross examination during adjudication. In the present case also the clandestine purchase has been alleged on the basis of statement of raw material supplier and he was not subjected to cross examination and hence his statement cannot be relied as evidence of clandestine purchase and removal of goods by the appellant.

15. I find that the adjudicating authority has placed reliance in the cases of *Naresh J. sukhwawani-1996 (83) ELT.258 (S.C), 2010 (260) ELT.449 (Tri-Del),* Alex Industries-2008 (230) ELT.73 (Tri-Mum), Divine Solutions-2006 (206) ELT.1005 (Tri-Chennai), Karori Engg Works-2004 (166) ELT.373 (Tri-Del) in confirming the demand based on the confessional statement of Shri Shri Manojbhai Veljibhai Ughreja. I find that the facts of circumstances of the said cases are different from

the present situation. In the present case, the demand has been made alleging clandestine removal of goods and as held in the case of *Sakeen Alloys Pvt Ltd (supra)* by the Tribunal, which is affirmed by the Hon'ble Gujarat High Court also, the facts of clandestine removal of excisable goods cannot be established only on the basis of certain statement which retracted later but there has to be positive evidences like purchase of excess raw materials, shortage/excess of raw materials/finished goods found in the stock/factory premises of the appellant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash. Therefore, I hold that the order confirming the demand on clandestine removal only on the basis of retracted statement is perverse and needs to be set aside.

16. In view of above, I set aside the impugned order and allow the appeal.

१७. 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 / Attested

शैनी डेनीस
अधीक्षक

26th September, 2022.

(AKHILESH KUMAR)
Commissioner (Appeals)

By R.P.A.D.

To,	सेवा मे,
1. M/s Boss Ceramics , Plot No.207/26, Rafaleshwar GIDC 8-A National Highway, Morbi- 363 642.	मेसरस बॉस सीरामिक्स, नेशनल हाइवे 8 A, रफालेश्वर जी आई डी सी , मोरबी– 363 642.

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।