

रजिस्टर्ड डाक ए.डी. द्वारा

: आयुक्त (अपील -I) का कार्यालय, केन्द्रीय उत्पाद शुल्क, :
: सैन्टल एक्साइज भवन, सातवीं मंजिल, पोलिटैक्नीक के पास, :
: आंबावाडी, अहमदाबाद- 380015. :

क फाइल संख्या : File No : V2(28)38 to 40/Ahd-III/2016-17/Appeal-I

ख अपील आदेश संख्या : Order-In-Appeal No.: AHM-EXCUS-003-APP-261 to 263-16-17

दिनांक Date : 28.02.2017 जारी करने की तारीख Date of Issue 21/3/17

श्री उमाशंकर आयुक्त (अपील-I) द्वारा पारित

Passed by Shri Uma Shanker Commissioner (Appeals-I) Ahmedabad

ग _____ आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-I आयुक्तालय द्वारा जारी मूल
आदेश सं _____ दिनांक : _____ से सृजित

Arising out of Order-in-Original: AHM-CEX-003-ADC-MLM-057-15-16 Date: 29.02.2016
Issued by: Additional Commissioner, Central Excise, Din: Gandhinagar, A'bad-III.

घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

M/s. AS PER ORDER

कोई व्यक्ति इस अपील आदेश से असंतोष अनुभव करता है तो वह इस आदेश के प्रति यथास्थिति नीचे बताए गए सक्षम अधिकारी को अपील या पुनरीक्षण आवेदन प्रस्तुत कर सकता है।

Any person aggrieved by this Order-In-Appeal may file an appeal or revision application, as the one may be against such order, to the appropriate authority in the following way :

भारत सरकार का पुनरीक्षण आवेदन :

Revision application to Government of India :

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1994 की धारा अंतर्गत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परन्तुक के अंतर्गत पुनरीक्षण आवेदन अवर सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली : 110001 को की जानी चाहिए।

(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by first proviso to sub-section (1) of Section-35 ibid :

(ii) यदि माल की हानि के मामले में जब ऐसी हानि कारखाने से किसी भण्डागार या अन्य कारखाने में या किसी भण्डागार से दूसरे भण्डागार में माल ले जाते हुए मार्ग में, या किसी भण्डागार या भण्डार में चाहे वह किसी कारखाने में या किसी भण्डागार में हो माल की प्रकिया के दौरान हुई हो।

(ii) In case of any loss of goods where the loss occur 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.

(ख) भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित माल पर या माल के विनिर्माण में उपयोग शुल्क कच्चे माल पर उत्पादन शुल्क के रिबेट के मामलों में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(b) 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.

(ग) यदि शुल्क का भुगतान किए बिना भारत के बाहर (नेपाल या भूटान को) निर्यात किया गया माल हो।

(c) In case of goods exported outside India export to Nepal or Bhutan, without payment of duty.



ध अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी क्रेडिट मान्य की गई है और ऐसे आदेश जो इस धारा एवं नियम के मुताबिक आयुक्त, अपील के द्वारा पारित वो समय पर या बाद में वित्त अधिनियम (नं.2) 1998 धारा 109 द्वारा नियुक्त किए गए हो।

(d) 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 and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

(1). केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 के नियम 9 के अंतर्गत विनिर्दिष्ट प्रपत्र संख्या इए-8 में दो प्रतियों में, प्रेषित आदेश के प्रति आदेश प्रेषित दिनांक से तीन मास के भीतर मूल-आदेश एवं अपील आदेश की दो-दो प्रतियों के साथ उचित आवेदन किया जाना चाहिए। उसके साथ खाता इ. का मुख्यशीर्ष के अंतर्गत धारा 35-इ में निर्धारित फी के भुगतान के सबूत के साथ, टीआर-6 चालान की प्रति भी होनी 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.

(2) रिविजन आवेदन के साथ जहाँ संलग्न रकम एक लाख रुपये या उससे कम हो तो रुपये 200/- फीस भुगतान की जाए और जहाँ संलग्न रकम एक लाख से ज्यादा हो तो 1000/- की फीस भुगतान की जाए।

The revision application shall be accompanied by a fee of Rs.200/- where the amount involved is Rupees One Lac or less and Rs.1,000/- where the amount involved is more than Rupees One Lac.

सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35- षोबी/35-इ के अंतर्गत:-

Under Section 35B/ 35E of CEA, 1944 an appeal lies to :-

(क) वर्गीकरण मूल्यांकन से संबंधित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक नं. 3. आर. के. पुरम, नई दिल्ली को एवं

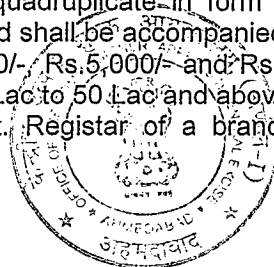
(a) the special bench of Custom, Excise & Service Tax Appellate Tribunal of West Block No.2, R.K. Puram, New Delhi-1 in all matters relating to classification valuation and.

(ख) उक्तलिखित परिच्छेद 2 (1) क में बताए अनुसार के अलावा की अपील, अपीलो के मामले में सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मैन्टल हास्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016.

(b) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Metal Hospital Compound, Meghani Nagar, Ahmedabad : 380 016. in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या उससे कम है वहां रूपए 1000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 5 लाख या 50 लाख तक हो तो रूपए 5000/- फीस भेजनी होगी। जहाँ उत्पाद शुल्क की मांग, ब्याज की मांग ओर लगाया गया जुर्माना रूपए 50 लाख या उससे ज्यादा है वहां रूपए 10000/- फीस भेजनी होगी। की फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध की जाये। यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो

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.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / 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 Asstt. Registrar of a branch of any



nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated

(3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिए फीस का भुगतान उपर्युक्त ढंग से किया जाना चाहिए इस तथ्य के होते हुए भी कि लिखा पढी कार्य से बचने के लिए यथास्थिति अपीलीय न्यायाधिकरण को एक अपील या केन्द्रीय सरकार को एक आवेदन किया जाता है।

In case of the order covers a number 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 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूची-1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रु.6.50 पैसे का न्यायालय शुल्क टिकट लगा होना चाहिए।

One copy of application or O.I.O. as the case may be, and the order of the adjournment authority shall bear a court fee stamp of Rs.6.50 paise as prescribed under scheduled-I item of the court fee Act, 1975 as amended.

(5) इन ओर संबंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्याविधि) नियम, 1982 में निहित है।

Attention is invited to the rules covering these and other related matter contended in the Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

(6) सीमा शुल्क, केन्द्रीय उत्पाद शुल्क एवं सेवाकर अपीलीय प्राधिकरण (सीस्टेट) के प्रति अपीलों के मामलों में केन्द्रीय उत्पाद शुल्क अधिनियम, 1988 की धारा 39फ के अंतर्गत वित्तीय(संख्या-2) अधिनियम 2014(2014 की संख्या 29) दिनांक: 06.08.2014 जो की वित्तीय अधिनियम, 1998 की धारा 23 के अंतर्गत सेवाकर को भी लागू की गई है, द्वारा निश्चित की गई पूर्व-राशि जमा करना अनिवार्य है, बशर्ते कि इस धारा के अंतर्गत जमा की जाने वाली अपेक्षित देय राशि दस करोड़ रुपए से अधिक न हो

केन्द्रीय उत्पाद शुल्क एवं सेवाकर के अंतर्गत "माँग किए गए शुल्क" में निम्न शामिल है

- (i) धारा 11 डी के अंतर्गत निर्धारित रकम
- (ii) सेनवैट जमा की ली गई गलत राशि
- (iii) सेनवैट जमा नियमावली के नियम 6 के अंतर्गत देय रकम

→ आगे बशर्ते यह कि इस धारा के प्रावधान वित्तीय (सं. 2) अधिनियम, 2014 के आरम्भ से पूर्व किसी अपीलीय प्राधिकारी के समक्ष विचाराधीन स्थगन अर्जी एवं अपील को लागू नहीं होगा।

For an appeal to be filed before the CESTAT, it is mandatory to pre-deposit an amount specified under the Finance (No. 2) Act, 2014 (No. 25 of 2014) dated 06.08.2014, 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 provided the amount of pre-deposit payable would be subject to ceiling of Rs. Ten Crores,

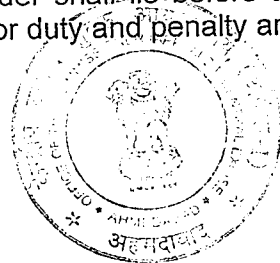
Under Central Excise and Service Tax, "Duty demanded" shall include:

- (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.

(6)(i) इस s.dWR मे., इस आदेश के प्रति अपील प्राधिकरण के समक्ष जहाँ शुल्क अथवा शुल्क या दण्ड विवादित हो तो माँग किए गए शुल्क के 10% भुगतान पर और जहाँ केवल दण्ड विवादित हो तब दण्ड के 10% भुगतान पर की जा सकती है।

(6)(i) In view of above, 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."



ORDER-IN-APPEAL

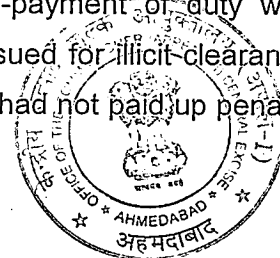
This order covers 3 appeals filed against Order-in-original No.AHM-CEX-003-ADC-MLM-057-15-16 dated 29/02/2016 (hereinafter referred to as 'the impugned order') passed by the Additional Commissioner, Central Excise, Ahmedabad-III (hereinafter referred to as 'the adjudicating authority'). The appeals have been filed by

- (i) M/s Astron Zinc Industries, Godown-II, 985, Survey No. 650, Berna Himmatnagar (hereinafter referred to as 'the appellant');
- (ii) Shri Upeshbhai H. Thakkar, Partner of the appellant firm (co-appellant) and
- (iii) Shri Hasmukhbhai Thakkar, overall in-charge of Astron group of companies (co-appellant).

2. Briefly stated, the facts of the case are that the appellant is a partnership firm holding Central Excise Registration ECC No.AAXFA6830FEM001 and is engaged in the manufacture of Zinc Oxide falling under Chapter 28 of the First Schedule to the Central Excise Tariff Act, 1985 (CETA, 1985). On the basis of information to the effect that the appellant was indulging in clandestine removal of goods without payment of Central Excise duty, a search was carried out on 01/03/2014 by Central Excise officers, simultaneously at the factory premises situated at Godown-II, 985, Survey No. 650, Berna Himmatnagar and at the office premises situated at 96, GIDC, Motipura, Himmatnagar. The physical stock-taking carried out at the factory premises revealed that there was shortage in physical stock of Zinc Oxide in comparison to the stock as per RG-1 register as detailed below:

STOCK AS PER RG-1	PHYSICAL STOCK	DIFFERENCE (SHORTAGE)
35275 kgs	15000 kgs	20275 kgs

The statements of Shri Hasmukhbhai Mangaldas Thakkar, overall in-charge of Astron Group of Companies and Shri Upeshbhai Hasmukhbhai Thakkar, partner of the appellant firm were recorded on 02/03/2014 under Section 14 of the Central Excise Act, 1944 (CEA, 1944), wherein they had admitted that the delivery challans recovered from the factory premises and office premises pertained to cash sale of goods on which no duty had been paid and no invoices were issued and that the shortage of 20275 kgs of Zinc Oxide was owing to illicit clearance under the said delivery challans. On the basis of these challans it appeared that the appellant had illicitly cleared 278200kgs of Zinc Oxide valued at Rs.33,39,38,400/- involving Central Excise duty of Rs.41,94,786/- during the period of October-2013 to February-2014. The appellant had paid up an amount of Rs.45,00,000/- during investigations and had submitted a letter dated 01/07/2014 requesting for waiver of Show Cause Notice as they had paid up the duty amount. However, it appeared to investigation that the waiver of Show Cause Notice was not available to the notice as the short-payment / non-payment of duty was detected from the private records, namely 'delivery challans' issued for illicit clearance and not from 'specified records' and also because the appellant had not paid up penalty



and interest as provided under Section 11A (6) of CEA, 1944. Therefore, a **Show Cause Notice F. No. IV/16-62/PI/Gr.I/2013-14 dated 18/12/2014** (hereinafter referred to as 'the SCN') was issued to the appellant demanding Central Excise duty amounting to **Rs.41,94,786/-**, invoking extended period under Section 11A (4) of CEA, 1944 and proposing to appropriate the amount of Rs.45,00,000/- paid by the appellant. The SCN also proposed to recover interest under Section 11AA of CEA, 1944 and impose penalty on the appellant under Section 11AC of CEA, 1944. The SCN also proposed to impose personal penalties on Hasmukh M. Thakkar, Overall in-charge of Astron group of Industries and on Shri Upesh H. Thakkar, partner of the appellant firm under Rule 26(1) of CER, 2002. Subsequently, the impugned order was issued by the adjudicating authority determining Central Excise duty amount of **Rs.41,94,786/-** under Section 11A(10) of CEA, 1944; confirming recovery of interest under Section 11AA of CEA, 1944; ordering that the payment of Rs.45,00,000/- made by the appellant be appropriated against confirmed duty amount and the payment of Rs.3,05,214/- towards payment of interest / penalty; imposing a penalty of **Rs. 41,94,786/-** on the appellant under Section 11AC; imposing a penalty of Rs.6,00,000/- on Shri Hasmukh M. Thakkar and a penalty of Rs.3,00,000/- on Shri Upesh H. Thakkar both under Rule 26(1) of CER, 2002.

3. Being aggrieved by the impugned order, the appellant has preferred the present appeal mainly on the following grounds:

- i. The adjudicating authority had erred in arriving at a finding of clandestine removal of 278200kgs of Zinc Oxide based on statements of Shri Hasmukhbhai Thakkar and Shri Upeshbhai Thakkar recorded on 02/03/2014 and the rough delivery orders / challans recovered from the factory and the office of the appellants because the statements have been retracted by affidavits dated 03/03/2014 and the delivery challans were rough challans under which no goods were cleared. Since the appellant's factory was located in a remote village area, the booking of transportation was done from the office and the delivery orders / challans were being prepared for being given to the transporters to be carried to the factory. If the goods are cleared from the factory, the same are cleared only on Excise invoices on payment of duty. At times, although the delivery orders / challans were prepared for being given to the transporters, the transporters at the last moment declined to transport the goods or there was change of buyer and consequently no goods under such delivery orders / Challans were cleared from the factory. That the delivery orders were only rough documents prepared for the aforesaid purpose also becomes evident from the fact that no serial numbers were contained in the said delivery orders / challans. There is not a single statement of any buyer of receipt of the goods under such delivery orders / challans nor is there any evidence of receipt of payment by the appellants.



[Handwritten signature]

- ii. In his affidavit Shri Hasmukhbhai M. Thakkar, father of the appellant's father had asserted that he was not conversant with English language whereas the statement was recorded in English. In the affidavit he had denied any clandestine clearance and had explained the circumstances in which delivery orders / challans were prepared as rough documents. He had stated in his affidavit that he had signed the statement under threats of arrest given by the Central Excise officers and since he was suffering from Diabetes and Blood pressure and had under gone Retinotherapy for both eyes on the previous day and had signed the statement to avoid trouble to his health. In his affidavit it was also stated that the department had unlawfully taken the cheques from the appellant. The statement of the partner Shri Upeshbhai H. Thakkar dated 02/03/2014 had been retracted by way of an affidavit dated 02/02/2014.
- iii. The adjudicating authority had erred in proceeding on the basis that the affidavits had not been sent to the department and the postal acknowledgement produced by the appellant related to a letter requesting copy of statement dated 02/03/2014, which was based on a letter dated 05/01/2016 obtained from the Deputy Commissioner of Central Excise (Preventive), copy of which was never provided to the appellants. Thus the adjudicating authority had acted in gross violation of the principles of natural justice. There is no evidence to show that the postal acknowledgement produce by the appellant did not pertain to the sending of affidavits to the department. Assuming while denying that the affidavits retracting the statements had not been sent to the department, nevertheless the fact remains that the affidavits had been affirmed immediately after the statements were recorded and the same cannot be ignored. The appellant relies on the CESTAT order in the case of *TEJWAL DYESTUFF INDUSTRIES vs COMMISSIONER OF CENTRAL EXCISE, AHMEDABAD – 2007 (216) E.L.T. 310 (Tri.-Ahmd.)*, upheld by Hon'ble High Court - 2009 (234) E.L.T. 242 and the CESTAT decision in the case of *FACT PAPER MILLS LTD. vs. COMMISSIONER OF CENTRAL EXCISE, BHAVNAGAR – 2014 (314) E.L.T. 449 (Tri. –Ahmd.)* upheld by Hon'ble High Court - 2015 (322) ELT 283.
- iv. The adjudicating authority had erred in not appreciating that there was no independent corroborative evidence in the form of statements of buyers, transportation of the goods, receipt of payment from buyers and consumption of excess raw materials and not following the decision of Tribunal in the case of *ARYA FIBRES PVT. LTD. vs CCE, AHMEDABAD-II – 2014 (311) E.L.T. 529 (Tri. –Ahmd.)* where it is laid down that a finding of clandestine removal cannot be arrived at based merely on statements or recovery of rough documents in absence of corroborative evidence showing actual transport of goods, receipt of



goods by buyers, receipt of payment from buyers, seizure of goods and consumption of excess electricity and raw materials.

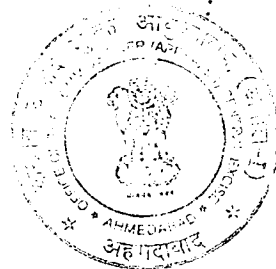
- v. The adjudicating authority had erred in holding that the statements of Shri Hasmukhbhai and Upeshbhai were recorded in presence of Shri Jitendra Dongre, employee of the appellant showing that these depositions were voluntary. He failed to appreciate that as per his affidavit, Shri Hasmukhbhai had undergone Retinotherapy for both eyes on the previous day and Shri Jitendra Dongre had no other alternative but to counter sign the statements as directed by the Central Excise officers who had issued threats to arrest Shri Hasmukhbhai. The adjudicating authority had also erred by not considering the contention of the appellant that physical stock taken on 01/03/2014 was compared with balance appearing in RG-1 register on 28/02/2014 and the clearance made on payment of Central Excise duty on 01/03/2014 was not taken into account and that the finished goods contained in bags which were lying at the place where finished goods coming from Silo and Bag filter were kept (i.e. Kothar).

3.1 On going through the grounds of appeal filed by Shri Hasmukhbhai Thakkar and Shri Upeshbhai H. Thakkar, it is seen that they have reiterated the grounds of appeal filed by the appellant discussed above.

4. Personal hearing with regards to all the three appeals was held on 25/02/2017. Shri J.C. Patel, Advocate along with Shri Rahul Gajera, Advocate appeared and reiterated the grounds of appeal. The Advocate submitted that the statements were retracted. He further submitted that the shortage on day of Panchnama dated 01/03/2014 was recorded on the basis of stock of 28/02/2014 but same day clearance was not taken into consideration by department. He further submitted the citation of **ARYA FIBRES PVT. LTD. vs CCE, AHMEDABAD-II – 2014 (311) E.L.T. 529** and pointed out that although buyers and vehicle numbers were available, the department did not carry out any verification in this regard.

4.1 Another written submission has been submitted by the appellant, received on 06/02/2017. The grounds of appeal have been reiterated and additionally, it has been contended by the appellant that the shortage was on 275kgs and not 20275kgs as worked out in the following manner:

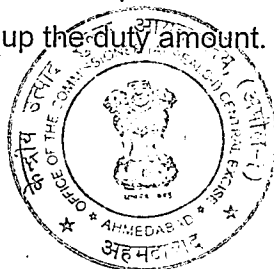
“RG1 stock on 28/02/2014	:	35,275kgs
Production on 01/03/2014 up to the time of stock taking	:	<u>10,550kgs</u>
	Total :	45,825kgs
Less clearances under Invoices 199, 200 & 201 dated 01/03/2014	:	<u>20,000kgs</u>
		25,825kgs
Physical stock found as per Panchnama		<u>25,550kgs</u>



275kgs”

5. I have carefully gone through the facts of the case on records and submissions made by the appellant. In order to get a proper perspective, it is necessary to appreciate the chronology of events leading up to the issuance of the SCN in the present case, which are as follows:

- 1) On the basis of intelligence, the officers of Central Excise conducted simultaneous searches at the factory and office premises of the appellant located at different locations under Panchnama dated 01-02/03/2014.
- 2) During the search operations at the factory premises, physical stock taking was carried out and a shortage of Rs.20275kgs of Zinc oxide was detected on comparing the physical stock with stock recorded in RG-1 register. The details of such delivery challans recovered from the factory premises, for which corresponding Invoices were not available, were recorded in Annexure A2.
- 3) During the search operations in the office premises, delivery challans with no corresponding invoices were detected, which were recorded in Annexure A1.
- 4) The statement of Shri Hasmukhbhai Mangaldas Thakkar, overall in charge of Astron group of companies was recorded on 02/03/2014, wherein he had admitted that such delivery challans recovered from the factory premises and office premises, where corresponding Invoices were not available, pertained to clearances without payment of duty and without issuance of invoices.
- 5) The statement of Shri Upeshbhai Hasmukhbhai Thakkar, partner of the appellant firm and son of Shri Hasmukhbhai M. Thakkar was recorded on 02/03/2014 wherein he corroborated the admissions made in the deposition by Shri Hasmukhbhai M. Thakkar.
- 6) Based on the Panchnama and the two statements, the duty evaded was worked out to be Rs.41,94,786/- on illicit removal of 278200kgs of Zinc Oxide valued at Rs.3,39,38,400/- that was agreed upon by Shri Hasmukhbhai M. Thakkar and Shri Upeshbhai Hasmukhbhai Thakkar in their statements of 02/03/2014.
- 7) The appellant paid up a total of Rs.45,00,000/- vide three challans dated 05/03/2014, dated 10/03/2014 and dated 28/03/2014 (Rs.15,00,000/- each) during the course of investigations.
- 8) The appellant submitted a letter dated 01/07/2014 to the department requesting that SCN be waived in their matter as they had paid up the duty amount.

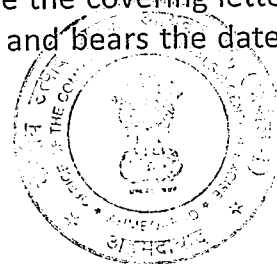


6. Thereafter the SCN was issued on 18/12/2014. In its reply dated 13/04/2015, the appellant submitted that both Shri Hasmukhbhai M. Thakkar and Shri Upeshbhai Hasmukhbhai Thakkar had retracted their statements recorded on 02/03/2014 by way of affidavits dated 03/03/2014. In the impugned order, the adjudicating authority giving his finding regarding retraction, has held in paragraph 15.7 that the copy of acknowledgement submitted by the appellant along with their written reply to SCN actually pertained to the acknowledgement of letter requesting for copy of the respective statements dated 02/03/2014. He has further held that the Deputy Commissioner of Central Excise (Preventive), Ahmedabad-III had confirmed that no such affidavit had been submitted in his office by Shri Hasmukhbhai M. Thakkar and Shri Upeshbhai Hasmukhbhai Thakkar during investigation. Thus, going by the findings in the impugned order, the affidavits were actually produced along with appellant's reply dated 13/04/2015 i.e. more than one year after the depositions were made on 02/03/2014. These findings render the retractions invalid on the grounds of prolonged time lapse. In the case of *BAYIR EXTRACTS PVT. LTD. vs COMMISSIONER OF CUSTOMS, BANGALORE - 2012 (285) E.L.T. 97 (Tri. -Bang.,* it has been laid down that the evidentiary value of the original statement remains intact if the retraction is given after a long gap of the deposition and if the retraction is not submitted before the authority recording the deposition:

“There was no valid retraction of these statements of Shri K.M. Harish. His affidavit dated 12-3-2005 which contained averments such as that there was no power in the unit during the material period is **not acceptable as a valid retraction on account of the long gap between the dates of confessional statement and affidavit and also on account of the fact that it was not sworn to before the authority which recorded the confessional statement.** The clandestine activities having been admitted, the case law cited by counsel is not relevant. The learned counsel has referred to the affidavit as clarificatory. **Any clarificatory statement should have been given, without delay, to the authority which recorded the original statement.** Moreover, there should not be any inconsistency between the original and ‘clarificatory’ statements. In the present case, we have found inconsistencies also. Therefore the view taken by us with regard to the evidentiary value of the Managing Director’s original statement remains intact.”

In the case of *TARA CHAND SHIVAL vs COMMISSIONER OF CENTRAL EXCISE, JAIPUR - 2003 (158) E.L.T. 699 (Tri. -Del.)*, CESTAT has the English translation of the affidavit made in Hindi could not be considered as retraction in the following terms:

“We are not inclined to accept the plea that the statements dated 9-3-2000 and 29-3-2000 were retracted by the appellant before the adjudicating authority. It is claimed that the affidavit was in Hindi and the same was later on translated into English. An English translation of an affidavit dated 4-4-2000 is seen on record. A copy of the appellant’s letter dated 20-5-2001 addressed to the Commissioner is also noticed. This appears to be the covering letter for the English translation of the affidavit dated 4-4-2000 and bears the date seal



of the Commissioner's office indicating that this letter was received in that office on 22-5-2001. These documents, however, do not show that the original affidavit in Hindi was submitted to the Commissioner, nor is there any evidence on record to indicate that any such affidavit in Hindi was received by the Commissioner. We have, therefore, to fall back upon the confessional statements of the appellant."

6.1 As per law settled, the retractions giving cogent explanations clarifying the shortages and the clandestine clearances admitted in the statements of 02/03/2014 were required to be made immediately with valid evidence before the officer recording the statements. On considering the contents of the affidavit as well as the grounds of appeal it is seen that the appellant has not questioned the method of search conducted or challenged the panchnama proceedings, where the impugned shortage has been recorded. In view of the categorical finding given by the adjudicating authority that the affidavits were not submitted to the department during the course of investigation, the onus shifts to the appellant to provide evidence that they had clarified the shortage and challenged the admission of clandestine clearance before the investigating officer immediately after such admissions. On the basis of facts on record, I find that the appellant has not succeeded in establishing the validity of their claim of retraction. This is pertinent in view of the fact available on record that an amount of Rs.45,00,000/- was paid up in 3 installments of Rs.15,00,000/- each vide Challans dated 05/03/2014, dated 10/03/2014 and dated 28/03/2014, after the purported filing of retractions dated 03/03/2014. It is also not forthcoming as to why the appellant had submitted the letter dated 01/07/2014 requesting for waiver of SCN, if they had produced the affidavits before the investigation officer retracting the statements admitting clandestine clearance. The waiver of SCN under Section 11A (2) is subject to the following stipulations:

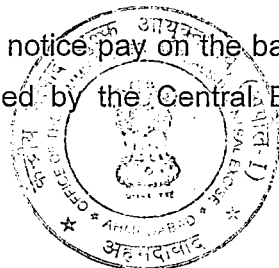
Section 11 A (1)

(b) the person chargeable with duty may, before service of notice under clause (a), pay on the basis of,-

- (i) his own ascertainment of such duty; or*
- (ii) the duty ascertained by the Central Excise Officer, the amount of duty along with interest payable thereon under section 11AA.*

(2) The person who has paid the duty under clause (b) of sub-section (1), shall inform the Central Excise Officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty so paid or any penalty leviable under the provisions of this Act or the rules made thereunder.

Thus the person chargeable with duty may before service of notice pay on the basis of his own ascertainment of such duty or the duty ascertained by the Central Excise

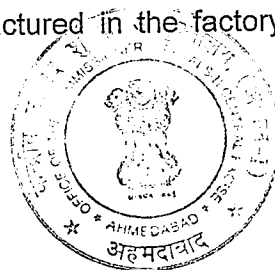


officer, the amount, along with interest and informs the Central Excise officer of such payment in writing. Thus the request for waiver of SCN made by the appellant after payment of duty points to the fact that they had agreed to and accepted the duty amount of Rs.41,94,786/- ascertained by the investigating officer and admitted by both the deponents in their statements dated 02/03/2014. Thereby, the admissions made by Shri Hasmukhbhai M. Thakkar, the overall in-charge of the business of the appellant and by Shri Upeshbhai Hasmukhbhai Thakkar, partner, accepting their liability to pay Central Excise duty towards the illicit clearances as admitted in their statements of 02/03/2014, were reiterated and affirmed by the actual payment made by the appellant and by their request for waiver of SCN vide letter dated 01/07/2014. There is no contention by the appellant that that the duty was not paid on its own volition. There is also no claim that the request for waiver of SCN was made under coercion from the investigating officers. The letter dated 01/07/2014 requesting for waiver of SCN has not been withdrawn by the appellant at any point in time during the investigation, during adjudication process or even in the grounds of appeal. In view of this fact, even if the contention of the appellant is accepted that retractions were filed immediately, these retractions lose credibility in light of the request for waiver of SCN after payment of duty, which is nothing but acceptance of the duty determined on the basis of those very illicit clearances as recorded and admitted in the two statements that the deponents claim to have retracted.

7. It has been held by Hon'ble Supreme Court in the case of *VINOD SOLANKI vs UNION OF INDIA – 2009 (233) E.L.T. 157 (S.C.)* that the attending circumstances such as the time of retraction, the nature of retraction, the manner in which such retraction has been made and other relevant factors are to be considered to arrive at a decision on the evidentiary value of a retracted statement. The relevant extracts are reproduced below:

“With a view to arrive at a finding as regards the voluntary nature of statement or otherwise of a confession which has since been retracted, the Court must bear in mind the attending circumstances which would include the time of retraction, the nature thereof, the manner in which such retraction has been made and other relevant factors. Law does not say that the accused has to prove that retraction of confession made by him was because of threat, coercion, etc. but the requirement is that it may appear to the court as such.”

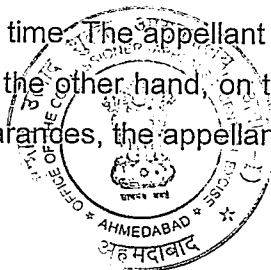
In the present case, on appreciating the events chronologically, the appellant had voluntarily paid up the total duty amount as admitted in the statements of the deponents during the course of investigation. The valuation for arriving at the duty is not challenged at any stage by the appellant. The procedure of search and / or stock taking is not contested. The appellant has not requested for any cross-examination. It is not the contention of appellant that the impugned delivery challans were not prepared by them or were not pertaining to clearance of goods manufactured in the factory. From the



statement of Shri Hasmukhbhai M. Thakkar, it is forthcoming that in cases of duty paid clearances, invoices were issued corresponding to the challans. Only such challans have been listed in Annexures-A1 and A2, where invoices were not issued and it was categorically admitted that these challans pertained to goods cleared on receipt of payments in cash and cleared without payment of duty. While refuting this statement, the appellant has not provided any cogent explanation for not issuing invoices in respect of 278200kgs of Zinc Oxide. The contention that the factory was situated in a remote area is vague and does not justify the non-issuance of invoices. In the grounds of appeal the appellant has contended that the challans were prepared at the office premises and handed over to the transporters who took the challans to the factory and the challans that were lying in the office were such challans that were not taken by the transporters to the factory. However, this reasoning that the factory was in a remote area does not explain the fact that similar delivery challans were also recovered from the factory premises. The health condition of Shri Hasmukhbhai has been raised as a reason for admitting the illicit clearance for fear of arrest. However, there is no such affidavit or letter filed by Shri Jitendra Dongre, in whose presence the statement was recorded, citing coercion or force on part of the recording officer. The appellant has contested that there was only shortage of 275kgs and not 201275kgs as detected during the course of search. However, it is not understood as to what prevented the appellant from providing the explanation such as non-consideration of the stock manufactured on the day of the search and the stock cleared under invoices on the day of search to the search party or to the investigating officer during the course of investigation. It is evident from the records that the illicit clearances have been worked out on the basis of the impugned delivery challans in the following manner:

- a) Annexure A-1 pertains to the delivery challans recovered from the office premises showing illicit clearances of 99000kgs (3960bags) of Zinc Oxide valued at Rs.1,26,72,000/- involving duty evasion of Rs.15,66,259/-.
- b) Annexure A-2 pertains to the delivery challans recovered from the factory premises showing illicit clearances of 179200kgs (7168bags) of Zinc Oxide valued at Rs.2,12,66,400/- involving duty evasion of Rs.26,28,527/-

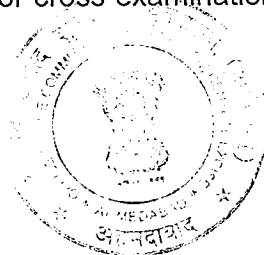
Merely challenging the shortage recorded and failure to explain the non-issuance of invoices evidencing payment of duty does not work out in defence of the appellant because the total evasion of duty amounting to Rs.41,94,786/- has been worked out on the basis of delivery challans covered in Annexure-A1 & A2. The shortage detected during search operation only corroborates illicit clearances worked out on the basis of the impugned challans. Further, the appellant had not paid the duty under protest or lodged any protest regarding the payment at any point of time. The appellant has never filed any refund for the amount of duty paid by them. On the other hand, on the ground that they had paid up duty involved in the clandestine clearances, the appellant had filed



an application for waiver of SCN. In the grounds of appeal, the appellant has not challenged the invoking of extended period on the ground of suppression of facts as brought out in the findings of the impugned order. Therefore, considering the facts on record in the light of Hon'ble Supreme Court ruling in the case of **VINOD SOLANKI vs UNION OF INDIA – 2009 (233) E.L.T. 157 (S.C.)**, it is seen that the attending circumstances are that the finding of the adjudicating authority stating that the affidavits were not received during the course of investigation and there was a long time gap in filing retraction is not successfully negated by the appellant. The nature of retraction is such that it challenges only the recorded shortage and does not explain the delivery challans without invoices. The manner in which such retraction has been made is by way of vague reasons for challans recovered from the office premises such as the factory being located in remote area and fails to explain the recovery of similar challans from the factory premises. The other relevant factors show that there is no explanation as to why duty was paid up after retraction and why closure of the case by waiver of SCN was requested for after the retraction. On the basis of these factors, the evidentiary value of the two confessional statements is liable to be upheld as intact and valid. As regards the contention of the appellant that it could not be implicated as there was no investigation at the end of transporters and buyers, I find that once the preponderance of probability indicating illicit dealings is established by investigation, it is the onus of the appellant to prove that the same is not sustainable, which they have failed to do in the present case. It is settled principle of law that what is admitted need not be proved. I rely on the following ratio of Apex Court decision in the case of **COMMISSIONER OF CENTRAL EXCISE, MADRAS vs SYTEMS & COMPONENTS PVT. LTD. – 2004 (165) E.L.T. 136 (SC)**:

“5. The Appeal filed by the Department has been disposed of by the Tribunal by holding that the Department has not proved that these parts were specifically designed for manufacture of Water Chilling Plant in question. The Tribunal has noted the Technical details supplied by the Respondents and the letter of the Respondents dated 30th November, 1993 giving details of how these parts are used in the Chilling Plant. The Tribunal has still strangely held that this by itself is not sufficient to show that they are specifically designed for the purpose of assembling the Chilling Plant. We are unable to understand this reasoning. Once it is an admitted position by the party itself, that these are parts of a Chilling Plant and the concerned party does not even dispute that they have no independent use there is no need for the Department to prove the same. It is a basic and settled law that what is admitted need not be proved.”

8. The appellant has relied upon the case law in the matter of **ARYA FIBRES PVT. LTD. vs COMMISSIONER OF CENTRAL EXCISE, AHMEDABAD-II – 2014 (311) E.L.T. 529 (Tri. –Ahmd.)**. The principal finding in this case is that cross-examination of witnesses being rejected amounts to violation of principles of natural justice. In the present case the appellant had never made any request for cross-examination. Further,



the distinguishable fact in the present case is that the entire duty as admitted in the confessional statements was paid up during investigation and the appellant had requested for waiver of SCN. The appellant has not challenged the invoking of extended period and the charge of suppression of facts in the impugned order. Shri Hasmukhbhai M. Thakkar, the overall in-charge of the business of the appellant and Shri Upeshbhai Hasmukhbhai Thakkar, partner of the appellant firm, in their respective grounds of appeal, have not contested the finding of their personal involvement in the activities of clandestine clearance. Both of them have not challenged imposition of personal penalty under Rule 26(1) of the Central Excise Rules, 2002 and they have not disputed the quantum of penalty imposed on them. Therefore, there is no ground for interference in the impugned order. All the three appeals are rejected.

9. तीनों अपीलकर्ताओं द्वारा दर्ज की गई अपीलों का निपटारा उपरोक्त तरीके से किया जाता है।
The appeals filed by all the three appellants stand disposed of in above terms.

उमा शंकर

(उमा शंकर)

आयुक्त (अपील्स-१)

Date: 28/02/2017

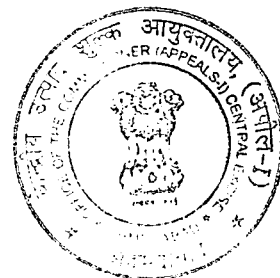
Attested

K. P. Jacob

(K. P. Jacob)
Superintendent (Appeals-I)
Central Excise, Ahmedabad.

By R.P.A.D.

- 1) To,
M/s Astron Zinc Industries,
Godown-II, 985, Survey No.650, Berna,
Himmatnagar.
- 2) Shri Hasmukhbhai M. Thakkar,
251-B, Shri Nagar Society,
Gokulnagar,
Himmatnagar.
- 3) Shri Upeshbhai H. Thakkar,
251-B, Shri Nagar Society,
Gokulnagar,
Himmatnagar.



Copy to:

1. The Chief Commissioner of Central Excise, Ahmedabad.
2. The Commissioner of Central Excise, Ahmedabad-III.
3. The Additional Commissioner, Central Excise (System), Ahmedabad-III.
4. The Deputy Commissioner, Central Excise, Gandhinagar Division, Ahmedabad-I.
5. Guard File.
6. P.A.