



सत्यमेव जयते

## आयुक्त (अपील) का कार्यालय

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,  
वस्तु एवं सेवा कर भवन,  
सप्तर्षी मंजिल, पोलिटेकनिक के पास,  
आम्बावाडी, अहमदाबाद-380015



GST Building, 7<sup>th</sup> Floor,  
Near Polytechnic,  
Ambavadi, Ahmedabad-  
380015

☎ : 079-26305065

टेलीफैक्स : 079 - 26305136

- क फाइल संख्या : File No : V2/51-53/GNR/2019-20 / 15400 To 15402
- ख अपील आदेश संख्या : Order-In-Appeal No. : AHM-EXCUS-003-APP-27-29-2020-21  
दिनांक Date : 29.07.2020 जारी करने की तारीख Date of Issue: 13/08/2020  
आयुक्त (अपील) द्वारा पारित  
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals) Ahmedabad
- ग आयुक्त, केन्द्रीय उत्पाद शुल्क, अहमदाबाद-III आयुक्तालय द्वारा जारी मूल आदेश : **AHM-CEX-003-ADC-JN-01-19-20** दिनांक : 30/04/2019 से सृजित

Arising out of Order-in-Original: **AHM-CEX-003-ADC-JN-01-19-20**, Date: 30/04/2019  
Issued by: Additional Commissioner, CGST, Div:RRA, HQ, Gandhinagar  
Commissionerate, Ahmedabad.

- घ अपीलकर्ता एवं प्रतिवादी का नाम एवं पता

Name & Address of the Appellant & Respondent

**M/s. Morakhia Metals & Alloys Pvt Ltd,**  
**Shrenik. A. Morakhia. (Morakhia Metals) &**  
**Prakash .A. Morakhia ( Morakhia Metals)**  
**3429-3434 & 3441, GIDC Estate, Phase-IV, Chhatral, Gandhinagar-382729.**

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।

- I. Any person aggrieved by this Order-In-Appeal issued under the Central Excise Act 1944, 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।

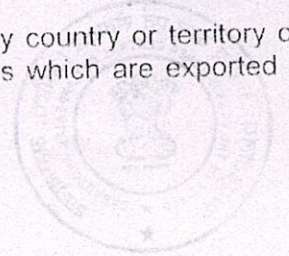
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4<sup>th</sup> Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, 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 मामले 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.

घ 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 हों।

- (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 हों 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- ञबी/35-इ के अंतर्गत:-

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

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 दूसरा मंजिल, बहूमाली भवन, असारवा, अहमदाबाद, गुजरात 380016

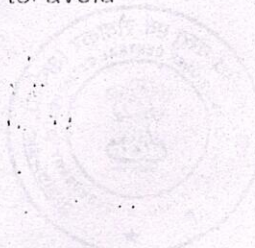
To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2<sup>nd</sup> floor, Bahumali Bhavan, Asarwa, Ahmedabad-380016 in case of appeals other than as mentioned in para-2(i) (a) above.

(2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इए-3 में निर्धारित किए अनुसार अपीलीय न्यायाधिकरणों की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियों 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 scribble 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 (सीस्टैट) 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 63 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 रूपए 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 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

1. M/s. Morakhia Metals & Alloys Pvt. Ltd., 3429-3434 & 3341, GIDC, Phase-IV, Chhatral - 382729, District-Gandhinagar (hereinafter referred to as the "appellant-1"), (2) Shri Shrenik A. Morakhia, Director of M/s. Morakhia Metal & Alloys Pvt. Ltd. (hereinafter referred to as the "appellant-2") and (3) Shri Prakash S. Morakhia, Chairman & Managing Director of M/s. Morakhia Metal & Alloys Pvt. Ltd. (hereinafter referred to as the "appellant-3") have filed the instant appeals against the Order-in-Original No. AHM-CEX-003-ADC-JN-001-19-20 dated 09.05.2019 (hereinafter referred to as the "impugned order") passed by the Additional Commissioner of CGST & Central Excise, Gandhinagar Commissionerate (hereinafter referred to as the "adjudicating authority").

2(i). The facts of the case, in brief, are that the appellant 1 is engaged in the manufacture of Copper Articles / Brass Articles falling under Chapter Head 72/74/85 of the First Schedule to the Central Excise Tariff Act, 1985 (hereinafter referred to as "CETA") and was holding Excise Registration No. AAACM3439JXM001. An intelligence was received that Appellant 1 was availing cenvat credit without physical receipt of goods into the factory premises, on the basis of invoices issued/raised by M/s. Annapurna Impex Pvt. Ltd., Ludhiana (hereinafter referred to as "M/s. Annapurna"). Accordingly, search was conducted by the officers of Central Excise (Preventive), Ahmedabad III at their various premises under Panchnama dated 24.02.2005. Statement of Shri Shrenik A. Morakhia, (Appellant 2) was also recorded in that respect. Scrutiny of the records revealed that the appellant 1 taken/availed cenvat credit amounting to Rs.29,72,150/- on the basis of 15 invoices issued by M/s. Annapurna [shown as "Table-A" in the Show Cause Notice dated 02.05.2006 (hereinafter referred to as "SCN")] pertaining to the period May-2003 to February-2004.

2(ii). Search was also conducted at manufacturing premises of M/s. Annapurna under Panchnama dated 31.03.2005 wherein Shri Parshottamlal, an employee of the firm, disclosed that the factory is not having facility to manufacture copper ingots and sale of copper ingots never took place from their factory till date; that he does not remember of selling of such a big quantity of 8 to 10 tons of Copper Wire Rods from their factory; that Shri Navneet Agrawal, Director of M/s. Annapurna, is looking after all records and they are lying in his custody. Shri Navneet Agrawal, Director of M/s. Annapurna refused/declined to come to join the Panch proceedings and investigation, when contacted.

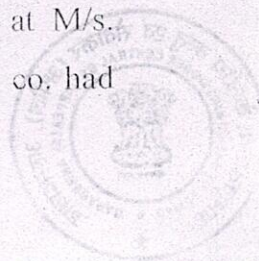


2(iii). On scrutiny of the Lorry Receipts (LRs) collected from appellant 1, it was noticed that in 7 invoices, goods were claimed to be transported by M/s. New Satkar Tempo Transport Union, Plot No. 29A, Shop No.4, Industrial Area-A Extn., Near Transportnagar, Ludhiana. Accordingly, search was conducted at M/s. New Satkar Tempo Transport Union, Ludhiana under Panchnama dated 30.03.2005 and statement of Shri Kulvinder Singh, Proprietor of M/s. New Satkar Tempo Transport Union, was recorded on 30.03.2005 wherein he stated that they have not issued 7 Bilties pertaining to these 7 invoices though it pertained to their firm; that Shri Parshottamlal of M/s. Annapurna had approached him and taken away the said blank bilties. He also stated that the vehicles shown against the said bilties do not pertain to them except one vehicle viz. PB-10R-9724, which was pertaining to Shri Kuldip Singh, son of ex-partner Shri Khajansingh; that the said vehicle PB-10R-9724 is a TATA 407 vehicle with a carrying capacity of less than 3 tonnes and can not carry such big quantity as reflected in the invoice pertaining to the said vehicle. Moreover, the vehicle is not having permit for operation in Gujarat State.

2(iv). It was further noticed that in 6 invoices, goods were claimed to be transported by M/s. Satkar Tempo Transport Union, R. K. Road, Cheema Chowk, Ludhiana. Accordingly, search was conducted at M/s. Satkar Tempo Transport Union, Ludhiana under Panchnama dated 30.03.2005 and statement of Shri Inderjit Singh, was recorded on 30.03.2005 wherein he stated that 2 vehicles shown in the invoices pertained to them however remaining 4 vehicles were not theirs. Moreover, all their vehicles are either TATA 407 or TATA 709 having carrying capacity of 2 M.Ton and 4 M.ton respectively and so quantity of 8507 Kg and 10526 Kg. of copper wire bar can not be transported in these vehicles.

2(v). In 1 invoice, goods were claimed to be transported by M/s. Guru Nanak Road Lines Regd., Mandi Gobindgarh. Search was conducted at M/s. Guru Nanak Road Lines Regd., and statement of Shri Ranjit Singh, Proprietor, was recorded on 01.04.2005 wherein he stated that neither the Bilty/GR No.2011/15-5-03 was issued by them nor the writing/signature in the said bilty/GR pertain to any person of them. He further stated that the vehicle no.MH-08-3659 shown in the said bilty does not pertain to them and they ply their vehicles only in Punjab & Himachal.

2(vi). In 1 invoice, goods were purportedly transported by M/s. Bombay Patiala Transport Co., Near Bus Stand, Patiala. Search was conducted at M/s. Bombay Patiala Transport Co., and it was revealed that the said transport co. had



been closed since 31.03.2005. However, the then manager of the said firm was traced out and his statement was recorded on 28.04.2005 wherein he stated that the said firm had never issued such consignment notes.

2(vii). Inquiries were made with respective RTO office regarding the details of the vehicles available on records and the report received were shown in "Table-F" in the SCN under Para-9. This table shows that the vehicles were either vehicles for transport of passenger/people or vehicles were having carrying capacity of 3 to 4 tonnes which were not enough to carry 8 to 10 tonnes of goods as shown in the 15 invoices.

2(viii). Inquiries were made with the Commissioner of Road Transport Office, Gandhinagar and the Joint Director of Transport, Gujarat State, Gandhinagar vide letter no. IT/Central Excise/on/4122 dated 17.05.2005 reported that except vehicle no. HR-38J-6577, no other transport vehicle has entered the Gujarat State from any of the check posts during the period mentioned in the invoices. For vehicle no. HR-38J-6577, the date of its crossing Gujarat Border does not match with corresponding date of the said vehicle (date of transportation as shown in invoice).

2(ix). Statement of Shri Shrenik A. Morakhia, appellant-2, was recorded on 02.12.2005 wherein he stated that he looks after product planning and activities at the factory and gives daily report telephonically to Shri Prakash S. Morakhia, appellant-3; that appellant-3 looks after purchase, finance & taxation and he checks the entries made and records maintained for central excise purpose on regular basis.

2(x). Statement of Shri Prakash S. Morakhia, appellant-3, was recorded on 14.12.2005 wherein he stated that he looks after raw material and all other purchases trading activity, and overall administration of the factory, finance and taxation that he makes payment of all the purchases of raw materials, transport charges, store items related to manufacturing activity and other miscellaneous charges.

3. On conclusion of investigation, a Show Cause Notice dated 02.05.2006 (hereinafter referred to as "SCN") was issued by the Additional Commissioner, Central Excise, Ahmedabad-III proposing :

- (i) recovery of cenvat credit amounting to Rs.29,72,150/- availed and utilized fraudulently under Rule 12 of Cenvat Credit Rule, 2002 read with provisions of Section 11A of Central Excise Act, 1944;



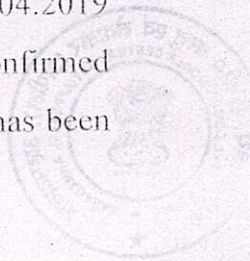
- (ii) charging of interest on such recovery under Rule 12 of Cenvat Credit Rule, 2002 read with provisions of Section 11AB of Central Excise Act, 1944;
- (iii) imposition of penalty upon appellant-1 under Rule 13 of Cenvat Credit Rule, 2002 read with provisions of Section 11AC of Central Excise Act, 1944;
- (iv) imposition of penalty upon appellant-2 and appellant-3 under Rule 26 of Central Excise Rules, 2002 read with Rule 13 of Cenvat Credit Rule, 2002.

4. The adjudicating authority, after hearing the appellant, vide the Order-in-Original No. 26/Addl.Commr/2008 dated 27.03.2008 confirmed the recovery of cenvat alongwith interest and imposed penalty, equivalent to the cenvat credit amount wrongly availed, upon appellant-1. Further, penalties of Rs.10,00,000/- each on appellant-2 and appellant-3 were also imposed vide the said order.

5. Being aggrieved with the said Order-in-Original No. 26/Addl.Commr/2008 dated 27.03.2008, the appellants preferred appeals with the then Commissioner (Appeals-II), Central Excise, Ahmedabad who vide Order-in-Appeal No. 36 to 38/2009 (Ahd-III) CE/KCG/Commr(A) dated 09.02.2009 upheld the Order-in-Original and rejected the appeals filed by the appellants.

6. The appellants preferred appeals before the Hon'ble CESTAT, Ahmedabad against the Orders-in-Appeal passed by the Commissioner (Appeals-II), Central Excise, Ahmedabad. The Hon'ble CESTAT, Ahmedabad vide its Order No. A/10445-10447/2015 dated 24.02.2015 remanded the matter back to the adjudicating authority in view of its own order in case of M/s. Gujarat Cypromet Ltd. reported at 2013(289)ELT 467 (Tri-Ahmd.). The Hon'ble Tribunal had in the case of M/s Gujarat Cypromet directed for cross-examination of witnesses to bring the truth on record as to how they have stated that the goods were never transported to the appellant.

7. The adjudicating authority had in the remand proceedings allowed the appellants cross-examination of the three transporters and did not allow cross-examination of Shri Parshottamlal, employce of M/s. Annapurna. Various dates for the hearing were fixed by the adjudicating authority for cross examination on 20.06.2018, 31.01.2019, 12.03.2019, 29.03.2019, but the persons whose cross-examination was sought did not turn up. Finally, in the personal hearing fixed on 16.04.2019 the appellants submitted that in absence of cross-examination, the statements could not be relied upon. Subsequently, they vide letter dated 26.04.2019 submitted that the Hon'ble Tribunal has held that demand can not be confirmed without granting opportunity of cross-examination and the aforesaid view has been



upheld by Hon'ble Gujarat High Court and therefore the statements have no evidentiary value. It was also contended that if raw material was not received then there can not be any production of finished goods and therefore non-receipt of material is not sustainable. Further, the payment for the transactions is done through valid Banking Channel and money has reached to seller of goods. They relied upon various case laws and also submitted that the Addl. Commissioner, Silvassa vide OIO No.44/Dem/Silvassa/VK/ADC/2016-17 dated 28.10.2016 has dropped the demand notice for same supplier of goods.

8. The adjudicating authority vide the impugned order again confirmed the demand and imposed penalties on the appellants on the grounds that :

- (i). as per the direction of Hon'ble CESTAT, principal of natural justice has been followed and permission to cross-examination the persons as per the request of the appellants were granted, except one for Shri Parshottamlal of M/s. Annapurna, as no statement of that person was recorded. However, the persons did not turn-up;
- (ii). As per the text of Section 9D(1) of the Central Excise Act, 1944, a statement made and signed by a person before any Central Excise Officer of a gazette rank during the course of any inquiry or proceeding under this Act shall be relevant, for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains, when the person who made the statement can not be found and the provisions of sub-section (1) shall, so far as may be apply in relation to any proceeding under this Act, other than a proceeding before a Court, as they apply in relation to a proceeding before a Court;
- (iii). the statements were never retracted by the concerned persons and hence they remain valid for the proceedings under the Act;
- (iv). As regards the contention that demand can not be confirmed without granting opportunity of cross-examination of persons and accordingly opportunity of cross-examination was granted to the appellants, however the concerned persons did not turn-up;
- (v). Hon'ble Supreme Court in case of M/s. Sitaram (AIR 1966 8955) held that Indian Evidence Act applies only to all judicial proceedings and that it has no application to quasi judicial or departmental proceedings. The same view was expressed in case of K.T. Verma (AIR 1957 SC 882). Again in case of Employees of Firestone Type V/s. Workmen (AIR 1968 SC230) and Central Bank of India v/s. Prakash Chand (AIR 1969 SC 983), the Apex Court held that in a domestic enquiry, technical rules of evidence do not apply.
- (vi). in case of K.Balan v/s. UOI (41982(10)ELT 386(Mad.) the High Court of Madras held that right to cross-examination is not necessarily a part of reasonable opportunity;





(vii). that a departmental officer can only summon a witness but can not ensure his presence and the statements of the persons relied upon is valid evidence in light of Section 9D(1) of the Central Excise Act, 1944;

(viii). that in all the case relied upon by the appellants, the common facts was that the request of cross-examination was turned down by the adjudicating authority however in the case on hand the same was granted to the appellants. Reliance is placed in case of Alnoori Tobacco reported at 2004(170)ELT 0135(SC) wherein it has been held that observations of courts are neither to be read as Euclid's theorems nor as provisions of the statutes and that too taken out of their context; that observations must be read in the context in which they appear to have been stated; that Judgements of Courts are not be construed as statutes; that Judges interpret word of statutes, their words are not to be interpreted as statutes;

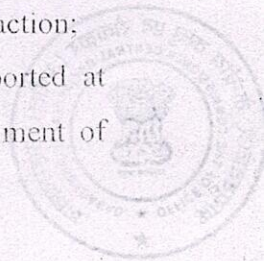
(ix). that reliance has been placed upon the reports of concerned RTO Office also which proves that goods could not have been transported in those vehicles mentioned in the invoices under question; it was also arrived at from the Report of the Jt. Director of Transport, Gujarat State, Gandhinagar that none of the transport vehicle concerned had entered Gujarat from any of the Gujarat Check Post;

(x). reliance is also place of Gujarat High Court's Order in case of M/s. Gyscoal Alloys Ltd. reported at 2014(35)STR 199(Guj) wherein it was held that assessee is required to reverse the credit for non-receipt of input - Number of vehicles through which goods were said to have been transported were of two wheelers and rickshaws - Heavily weighing goods could not ever have been transported through two wheelers or rickshaws - Assessee's explanation that number of vehicles would have been wrongly noted in registers not accepted being a flimsy explanation;

(xi). the above referred case has been referred in a decision by the Gujarat High Court in case of M/s. Manglam Alloys Ltd. also wherein it was held that Revenue authorities and Tribunal concurrently concluded based on evidence of RTO that impugned transactions were nonexistence - HELD : Conclusions were not based on presumptions or adverse inference - Issue was fact based;

(xii). reliance is placed in case of M/s. Vinayak Hardware Pvt. Ltd. reported at 2014(307)ELT 572 (Tri-Del.) of CESTAT Principal Bench, Delhi wherein it has been held that Duty paying documents - Invalid invoices - Paper transactions by dealer without actual movement of goods proved by confessional statements of dealer - Impugned order holding that credit not deniable on the ground that invoices issued by dealer fraudulently, not acceptable - Merely because payment of invoice price made through banking channel and passing of credit by dealer on valid invoices could not be disputed, appellants could not go beyond duty paying document, not acceptable - Credit requires to be reversed along with penal action;

(xiii). reliance is placed in case of M/s. Harsaran Dass Sita Ram reported at 2015(322)ELT 686(P&H) wherein it is held that Cenvat - Wrong availment of



credit without receipt of goods - Burden to prove genuineness of transactions between appellant and supplier of goods lies on appellant;

(xiv). reliance is placed on above judgements and the verification reports of the respective RTO Offices and Jt. Director of Transport, Gujarat State, Gandhinagar reports which are Government Agencies;

(xv). regarding the claim of the appellants that the final products have been manufactured, it is found that the raw material covered under the invoices under question are small chunk of production and it can not be denied that it is very easy for anybody to manipulate the private records by making false entries and possibility of receipt of raw material from open market without any documents can not be ruled out;

(xvi). regarding the claim of the appellants that the payment was made to M/s. Annapurna, it is noticed that same amount or more amounts in cash was withdrawn on the same day or more or less one to three days which is against the normal business practice.

9(i). The appellants again preferred appeals against the impugned order on the grounds that:

- (i). the adjudicating authority has not considered the case laws relied upon by them;
- (ii). their premises were visited on 24.02.2005 and demand notice issued on dated 02.05.2006 is barred by limitation as the Gujarat High Court in case of M/s. Prayagraj Industries has declared that if the notice was issued on the basis of alert circular in such facts it can not be presumed that the assessee was having knowledge of any fraud.
- (iii). Hon'ble Tribunal directed the adjudicating to allow cross-objection however, departmental authority failed to produce those persons for cross-examination and as such the order is passed in gross defiance of Order of Tribunal.
- (iv). Section 138 of the Evidence Act impliedly lays down that the statement of witness would be read as evidence against the party only if it was tested on anvils of cross-examination and thus the order is not sustainable.
- (v). the Tribunal and High Court of Gujarat in case of M/s. Gujarat Cypromet Ltd. has held that cross-examination out to have been granted.
- (vi). credit can not be denied merely on the ground of wrong mentioning of vehicle numbers in purchase invoices.
- (vii). for denying the credit department has to prove non-receipt of goods by other evidences.
- (viii). there can not be any production of finished goods without receipt of raw material.



(ix). adjudicating authority denied the cross-objection of Shri Parshottamlal on the basis that his statement is not recorded but for arriving at the conclusion his statement regarding non-availability of manufacturing facility has been relied upon.

(x). regarding the withdrawal of cash by the supplier of the goods, it is submitted that this proves nothing, and suspicion however strong can not be considered as evidence.

(xi). they rely upon the case law referred before adjudicating authority;

(xii). the case laws relied upon by the adjudicating authority are distinguishable in the facts and circumstances of the case.

(xiii). the order relied upon in the identical supplier case i.e. Annapurna Impex Pvt. Ltd., is in favour of the appellants.

9(ii). Appellant-2 and Appellant-3 have referred the grounds of appeal already raised by Appellant-1 in their grounds of appeal.

10. Opportunities for Personal Hearing were accorded to the appellants on 11.10.2019, 14.11.2019, 19.12.2019, 09.01.2020, 05.02.2020, 27.02.2020. Appellant-1 vide its letter dated 27.02.2020, sought adjournment on the ground that their Advocate is not well. Further date of hearing were granted on 20.03.2020, 25.06.2020, and on 21.07.2020. No one appeared for the hearing nor any adjournment has been sought. Therefore, I proceed to decide the appeal on basis of merits and the documents available in Appeal Petitions.

11. I have carefully gone through the facts of the case, grounds of appeal in the Appeal Memorandum and the records documents available in the Appeal petition. It is observed that the issue to be decided in the present appeal is whether the appellants are eligible for availment of cenvat credit amounting to 29,72,150/- based on the 15 invoices mentioned in the SCN. The proposal for interest and penalties, including those imposed on appellant 2 and appellant 3, are dependent on confirmation of demand.

12. I find that the matter has been subject to one round of litigation where the demand has been confirmed against the appellant by the adjudicating authority as well as the Commissioner (Appeals). The appellant 1, 2 and 3 have raised the matter further by filing appeal before the Hon'ble CESTAT, Ahmedabad, who has remanded the matter back to the adjudicating authority to decide the case after according the appellants to cross-examine the persons whose statements were relied to confirm the case. The adjudicating authority has in remand proceedings accorded opportunity for cross-examination to three of the transporters but they did not turn



up on any given dates. It is the contention of the appellants that since the persons whose cross examination was sought did not appear for cross-examination, their statements cannot be relied upon and hence demand may be dropped as they had made payment to the party concerned through banking channel and also that the demand against the supplier was dropped by the department in another related case. They have also relied upon various case laws in their support.

13(i). I find that the adjudicating authority has as per the directions of the Hon'ble Tribunal accorded the opportunity for cross-examination of 3 of the 4 persons requested and disallowed cross-examination of Shri Parshottam Lal of M/s. Annapurna on the grounds that his statement was not recorded in the case. Further, remaining three persons had not turned up for cross-examination on any of the given dates. It is observed that the version of Shri Parshottam Lal that their factory did not had the capacity of manufacture of copper ingots and that they did not made any sale of copper ingots was part of the panchnama drawn at the premises of M/s. Annapurna and the adjudicating authority has given a finding that the panchnama was never challenged and as such his cross-examination would not fit under Section 9D of the Central Excise Act, 1944. I find that there is no legal infirmity in not according cross-examination of Shri Parshottam Lal by the adjudicating authority.

13(ii). As regards the contention of the appellant regarding reliance on statements of persons who did not appear for cross-examination, I find that the statements of the persons concerned were recorded by the Gazetted Officer of Central Excise and they are admissible as evidence in quasi-judicial proceedings as well as in prosecution. These statements have never been retracted and hence their evidentiary value for any proceedings under the Central Excise Act is not lost. I find that the adjudicating authority has relied upon a number of case laws to hold that their statement remain to be valid pieces of evidence under Section 9D(1) of the Central Excise Act, 1944. It has been held by the Hon'ble CESTAT, Mumbai in Joit Kumar B. Jain Vs. Commissioner of Customs (Preventive), Mumbai 2005(191) ELT 218(Tri.-Mum) that non-appearance of a witness for cross-examination, whose statement relied upon, but best efforts of Commissioner to secure his presence not fatal to the case when important aspects in the statement can be relied upon otherwise. The Hon'ble Tribunal has relied upon the judgement of Hon'ble Madras High Court in K. Balan Vs. Government of India 1982(10) ELT 386(Mad.) wherein it was held by the Hon'ble High Court that the right to cross-examine in a quasi-judicial proceedings in not necessarily a part of reasonable opportunity and depends upon the facts and circumstances of each case. Hence, I find that the adjudicating



authority has accorded opportunity of cross-examination to the appellants and that the evidentiary value of their statements, which are not retracted, are relevant to the proceedings as per the judgements of the Hon'ble Tribunal and Hon'ble High Court.

13(iii). As regards the reliance on RTO reports to prove non-receipt of goods, I find that the appellant has contended that the credit can not be denied merely on ground of wrong mentioning of vehicle numbers in purchase invoices and that for denial department has to prove non-receipt by other evidences. In this regard, it is observed from the report of the RTOs that the transport vehicles mentioned in the invoices were scooters/scooty, auto rickshaws and transport vehicles having carrying capacity of 3 to 4 MT and they could not have been used for transportation of consignments weighing 8 to 10 MTs mentioned in 15 invoices in question. The report from the Commissioner of Road Transport, Gandhinagar states that none of the vehicles mentioned in invoices had ever crossed Gujarat border, except for one vehicle whose date of crossing is different from the dates mentioned in invoice. The appellant contention of it being minor mistake can not be accepted in as much as the discrepancy was noticed in all the invoices. The Hon'ble High Court, Gujarat has in Gyscoal Alloys Ltd. Vs. Commissioner of Central Excise, Ahmedabad – III 2014 (35) STR 199 (Guj.) held as under:

*Cenvat – Input – Non-receipt of Input – Number of vehicles through which goods were said to have been transported were of two wheelers and auto rickshaws- Heavily weighing goods could not ever have been transported through two wheelers or rickshaws- Assessee's explanation that number of vehicle would have been wrongly noted in the registers not accepted being a flimsy explanation- such discrepancies noted not in one or two vehicles, but in large number of case.*

Similarly, the Hon'ble High Court, Gujarat has in Mangalam Alloys Ltd. Vs. Commissioner of Central Excise, Ahmedabad–III 2018(363) ELT 24(Guj.) held that the conclusion based on evidence of RTO that impugned transactions were non-existent is not based on presumption or adverse reference but based on facts. I find that the ruling of the Hon'ble High Court is applicable to this case being on similar sets of facts. Hence, the fact of non-receipt of goods in factory premises of the appellants are proved by other evidences of report from Government authorities.

13(iv). As regards the appellants' contention that they had made payment through the banking channels, I find that once it has been established that the



transactions covered under the 15 Invoices in question are fictitious in nature in as much as the goods covered under them were never transported as per the documents provided, it is for the appellants to prove that the transaction has actually taken place and that it was not mere paper transaction. The findings are supported by the case law in case of M/s. Harsaran Dass Sita Ram reported at 2015(322) ELT(686)(P&H) and in case of M/s. Vinayak Hardware Pvt. Ltd. reported at 2014(307)ELT 572(Tri-Del.).

13(v). As regards the penalty imposed on appellant 2 and appellant 3, I find that they were involved in day to day transaction of their firm appellant 1 and that the fictitious transactions in question could not have taken place without their knowledge and support. Hence, I do not find any infirmity in the penalty imposed on them by the adjudicating authority.

13(vi). I have gone through the case laws cited by the appellants in their appeal memorandum. I find that they pertain to denial of cross-examination of witnesses. It is observed that in this case the matter was remanded to the adjudicating authority specifically for allowing cross-examination of witnesses. It is on record that they did not appear for the cross-examination on any of the given dates. Hence, their version has to be corroborated by other evidences which has been done by the adjudicating authority. In view of the above, I find no infirmity in the orders of the adjudicating authority. Accordingly, I reject the appeal filed by the appellants.

Date: .07.2020

Attested

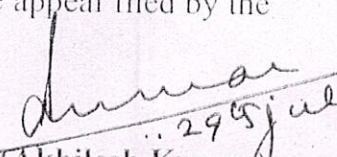
  
11/08/2020

(Jitendra Dave)  
Superintendent (Appeal)  
CGST, Ahmedabad.

**BY R.P.A.D. / SPEED-POST TO :**

M/s. Morakhia Metal & Alloys Pvt. Ltd.,  
3429-3434 & 3341, GIDC, Phase-IV,  
Chhatral-382729, Distt-Gandhinagar

(2) Shri Shrenik A. Morakhia,  
Director of M/s. Morakhia Metal & Alloys Pvt. Ltd.  
3429-3434 & 3341, GIDC, Phase-IV,  
Chhatral-382729, Distt-Gandhinagar.

  
29 July 2020  
(Akhilesh Kumar)  
Commissioner (Appeals)



(3) Shri Prakash S. Morakhia,  
Chairman & Managing Director of M/s. Morakhia Metal & Alloys Pvt. Ltd.  
3429-3434 & 3341, GIDC, Phase-IV,  
Chhatral-382729, Distt-Gandhinagar

Copy to :-

1. The Principal Chief Commissioner, CGST & Central Excise, Ahmedabad Zone.
2. The Chief Commissioner/Commissioner, CGST & Central Excise, Gandhinagar Comm'rate.
3. The Addl. Commissioner, CGST & Cen.Excise, Gandhinagar Comm'rate.
4. The Asstt. Commissioner, System, CGST & Central Excise, Gandhinagar Comm'rate.
5. The Asstt. Commissioner, CGST & Central Excise, Kalol Divn, Gandhinagar Comm'rate.
6. Guard File.
7. P.A. File.
8. Appeal No. : V2/52/GNR/19-20.
9. Appeal No. : V2/53/GNR/19-20.



