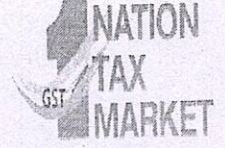




आयुक्त का कार्यालय, (अपीलस)
Office of the Commissioner,



केंद्रीय जीएसटी, अहमदाबाद आयुक्तालय

Central GST, Appeal Commissionerate- Ahmedabad

जीएसटी भवन, राजस्व मार्ग, अम्बावाड़ी अहमदाबाद ३८००१५.

CGST Bhavan, Revenue Marg, Ambawadi, Ahmedabad 380015

☎ : 079-26305065

टेलफैक्स : 079 - 26305136

रजिस्टर डाक ए.डी. द्वारा

6817+06821

क फाइल संख्या (File No.) : **V2(52)77 /North/Appeals/ 2018-19**

ख अपील आदेश संख्या (Order-In-Appeal No.): **AHM-EXCUS-002-APP-71 to 73-18-19**

दिनांक (Date): **14-Sep-18** जारी करने की तारीख (Date of issue):

श्री उमा शंकर, आयुक्त (अपील) द्वारा पारित

Passed by **Shri Uma Shanker , Commissioner (Appeals)**

ग _____ आयुक्त, केंद्रीय उत्पाद शुल्क, (मंडल-II), अहमदाबाद उत्तर, आयुक्तालय द्वारा जारी
मूल आदेश सं _____ दिनांक _____ से सृजित

Arising out of Order-In-Original No **26/ADC/2009/PRC** Dated: **22/05/2009**

issued by: **Additional Commissioner**-Central Excise (Div-II), Ahmedabad North

घ अपीलकर्ता/प्रतिवादी का नाम एवम पता (Name & Address of the Appellant/Respondent)

M/s M.V. Textiles

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 an 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) (क) (i) केंद्रीय उत्पाद शुल्क अधिनियम 1994 की धरा अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप-धारा के प्रथम परंतुक के अंतर्गत पुनरीक्षण आवेदन अधीन सचिव, भारत सरकार, वित्त मंत्रालय, राजस्व विभाग, चौथी मंजिल, जीवन दीप भवन, संसद मार्ग, नई दिल्ली-110001 को की जानी 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-35 ibid:

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

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 or 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 है।

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

(१) 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. के 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.

(२) 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 रुपये से ज्यादा हो तो रुपये 1000/- फीस भुगतान की 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.

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

(1) केन्द्रीय उत्पादन शुल्क अधिनियम, 1944 की धारा 35-बी/35-इ के अंतर्गत:-
Under Section 35B/35E of CEA, 1944 an appeal lies to:-

(क) वर्गीकरण मूल्यांकन से सम्बन्धित सभी मामले सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण की विशेष पीठिका वेस्ट ब्लॉक न. 3. आर. के. पुरम, नई दिल्ली को एवं
The special bench of Customs, Excise & Service Tax Appellate Tribunal of West Block No. 2, R.K. Puram, New Delhi in all matters relating to classification valuation and



- (ख) उक्तिलिखित परिच्छेद 2(1) क में बताए अनुसार के अलावा की अपील, अपीलों के मामले में सीमा शुल्क, केंद्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट) की पश्चिम क्षेत्रीय पीठिका, अहमदाबाद में ओ-20, न्यू मेन्टल होस्पिटल कम्पाउंड, मेघाणी नगर, अहमदाबाद-380016.
- (b) To the West regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at O-20, New Mental Hospital Compound, Meghani Nagar, Ahmedabad: 380016, in case of appeals other than as mentioned in para-2(1) above.
- (2) केन्द्रीय उत्पादन शुल्क (अपील) नियमावली, 2001 की धारा 6 के अंतर्गत प्रपत्र इ.ए.-3 में निर्धारित किए अनुसार अपीलीय न्यायधिकरण की गई अपील के विरुद्ध अपील किए गए आदेश की चार प्रतियाँ सहित जहाँ उत्पाद शुल्क की माँग, ब्याज की माँग और लगाया गया जुर्माना रुपए 5 लाख या उससे कम है वहाँ रुपए 1000/- फीस भेजनी होगी । जहाँ उत्पाद शुल्क की माँग और लगाया गया जुर्माना रुपए 5 लाख या ५० लाख तक हो तो रुपए ५०००/ फीस भेजनी होगी । जहाँ उत्पाद शुल्क की माँग और लगाया गया जुर्माना रुपए ५० लाख या उससे ज्यादा हो तो रुपए १००००/ फीस भेजनी होगी । फीस सहायक रजिस्टार के नाम से रेखांकित बैंक ड्राफ्ट के रूप में संबंध में की जाए । यह ड्राफ्ट उस स्थान के किसी नामित सार्वजनिक क्षेत्र के बैंक की शाखा का हो जहाँ उक्त न्यायाधिकरण की पीठ स्थित है । स्टे के लिए आवेदन-पत्र रुपए ५००/- फीस भेजनी होगी ।
- 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/penalty/demand/refund is upto 5 Lac. 5 Lac to 50 Lac and above 50 Lac respectively in the form crossed bank draft in favour of Asst. Registrar of 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. Application made for grant of stay shall be accompanied by a fee of Rs. 500/-
- (3) यदि इस आदेश में कई मूल आदेशों का समावेश होता है तो प्रत्येक मूल आदेश के लिये फीस 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 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 १९७० यथा संशोधित की अनुसूची-१ के अंतर्गत निर्धारित किये अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रुपए ६.५० पैसे का न्यायालय शुल्क टिकट लगा होना चाहिये ।
- 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 सम्बंधित मामलों को नियंत्रण करने वाले नियमों की ओर भी ध्यान आकर्षित किया जाता है जो सीमा शुल्क, केंद्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (कार्यावधि) नियम, १९८२ में निहित है ।
- (6) Attention is invited to the rules covering these and other related matter contended in Customs, Excise & Service Tax Appellate Tribunal (Procedure) Rules, 1982.

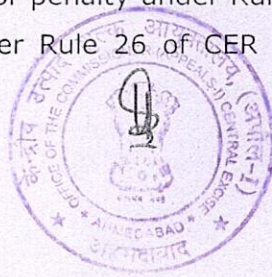


ORDER-IN-APPEAL

This appeal arises out of the Hon'ble CESTAT's order No.A/12957/2017 dated 12.10.2017 passed against Order-in-Appeal No.AHM-EXCUS-002-APP-038 to 40-15-16 dated 15.12.2015 of Commissioner (Appeals) Ahmedabad.

2. Brief facts of the case is that M/s M.V.Textile, 12,Vijay Estate, Naroda Memco Road, Ahmedabad (hereinafter referred to as "appellant") were engaged in the manufacture and clearance of Cotton Yarn falling under chapter 52 of the Central Excise Tariff Act, 1985 (CETA) and registered with Central Excise department. Search was conducted at the factory premises of the appellant on 30.05.2003, wherein excess stock of 13050 Kgs of Cotton Yarn valued at Rs.10,44,000/-was seized and certain records were withdrawn. Search was also conducted at M/s Vasudev Spinners, Bhavna Estate, Naroda Ahmedabad (hereinafter referred to as M/s Vasudev), wherein excess stock of 4400 Kgs of Cotton Yarn valued at Rs.3,52,000/- was seized and certain records including a diary written by Shri Veljibhai, Prop. Of M/s Vasudev were withdrawn. Shri Veljibhai revealed that he was getting yarn manufactured on job-work basis; that he used to purchase cotton and send the same to the appellant where Blow Room is installed and lap of yarn is being manufactured there; that his second son is owner of the appellant.

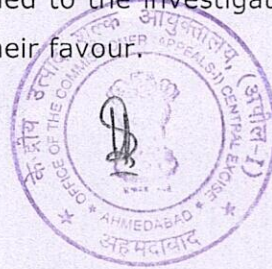
2.1 Scrutiny of Diary seized was done on spot under Panchnama, wherein Shri Veljibhai informed that the said diary contained the details of manufacture and sales of cotton yarn right from procurement of cotton by different units during 2001-02, including appellant; that all the firms were owned by his family members and all the activities of all firms had been carried out under his supervision. After statement of authorized persons of all such firms recorded and further investigation, a show cause notice dated 27.11.2003 was issued to the appellant for [i] demanding duty of Rs.19,11,664/- leviable on clandestinely cleared Cotton Yarn valued at Rs,2,07,78,960/- under Section 11 A of Central Excise Act, 1944 with interest; [ii] confiscation of Cotton Yarn weighing 13050 Kgs valued at Rs.10,44,000/- seized at the factory of the appellant under Rule 25 of the Central Excise Rules, 2002; and [iii] imposition of penalty under Section 11AC of CEA and Rule 173Q of erstwhile Central Excise Rules read with Rule 25 of CER. The show cause notice also proposes for penalty under Rule 209A of erstwhile Central Excise Rules, 1944 and under Rule 26 of CER to Shri



Ketan Veljibhai Patel, Power of Attorney of the appellant and Shri Veljibhai P Patel, Prop. Of M/s Vasudev for their active involvement of the goods clandestinely removed.

2.2 Vide Order-in-Original No.26/ADC/2009/PRC dated 22.05.2009, the case was finally decided by the Additional Commissioner of Central Excise, Ahmedabad-II, by confirming [i] duty of Rs.19,11,664/- with interest ; [ii] imposed penalty of Rs.19,11,664/- on the appellant; [iii] imposed penalty of Rs.3,00,000/- each on Shri Ketan Veljibhai Patel and Shri Veljibhai P Patel; and confiscated the seized cotton yarn and allowed to redeem of Rs.2,65,000/-. The Commissioner (Appeals) vide Order-in-Appeal dated 15.12.2015 has set aside the OIO dated 22.05.2009 and dropped all the proceedings initiated in the show cause notice. The Hon'ble CESTAT vide order dated 12.10.2017, while considering the appeal filed by the department against the said OIA in respect of appellant's case, has set aside the order of Commissioner (Appeal) and remanded back for re-considering the evidences recorded by the investigating authority.

3. The appellant has, inter-alia, submitted in their appeal memorandum that in the same case, searches were also conducted in the premises of other units and seizure was also carried out on 30.05.2003; that show cause notice dated 27.11.2003 were also issued unit viz M/s Ankit Textiles and V.S.Spintex & Others; that vide OIO No.15-16/Commissioner/2006 dated 10.02.2006, the Commissioner has dropped the proceedings initiated in the show cause notice; that the appeal filed by the department against the said order rejected by the Hon'ble CESTAT vide order No.A/11799-11803/2014 dated 24.10.2014; that since the issued involved in the appellant's case is same , the said order of the Hon'ble Tribunal has now become final and they requested to follow the same; that vide Panchnama dated 30.05.2009, the department has seized the unaccounted goods, however there is nothing in the said panchnama that the said goods were for clandestine removal from the factory. The diary seized reflects figures and accounts of various parties including appellant which iss not reliable. The statements recorded were retracted vide affidavit dated 03.06.2003 and forwarded to the investigating officers. The appellant relied on various case laws in their favour.



4. Personal hearing in the matter was held on 25.07.2018. Shri P.P.Jadeja, Authorized Representative appeared for the same and reiterated the grounds of appeal filed earlier and submitted further written submission.

5. I have carefully gone through the facts of the case, Hon'ble Tribunal's order and appellant's earlier submissions in the appeal memorandum submissions made after personal hearing.

6. At the outset, I observe that the appeal has again come up for decision before me in view of Hon'ble CESTAT's order No.A/12957/2017 dated 12.10.2017 on appeal filed by the department against Order-in-Appeal No.AHM-EXCUS-002-APP-038 to 40-15-16 dated 15.12.2015 passed by me. The gist of Hon'ble Tribunal's order under which the case was remanded is as under:

"5. It can be seen from the summarized grounds of appeal, the entire case of the Revenue is regarding the evidences of unrecorded manufacturing activity and clearance of the same by the respondent is based on the diary which was recovered from one Shri Veljibhai P Patel and a conclusion arrived from such re-consideration of the figures mentioned in the diary. I find that the first appellate authority in paragraph 6,7,8, and 9 has not correctly appreciated in the evidences emanating from statements and the recovery of documents more specifically, the figures in the diary maintained by Shri Veljibhai P Patel.

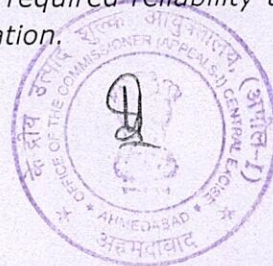
7. I observe that the instant case came out from an investigation carried out by the DGCEI officers in the premises of the appellant and M/s Vasudev, wherein it was found excess stock of 13050 Kgs of Cotton Yarn valued at Rs.10,44,000/-. They further found that Shri Veljibhai, Prop. Of M/s Vasudev was getting yarn manufactured on job-work basis and he used to purchase cotton and send the same to the appellant as well as other unit viz. M/s Ankit Textiles. The fact on records revealed that the show cause notice dated 27.11.2003 issued by the in respect of M/s Ankit Textile was dropped by the Commissioner of Central Excise vide OIO dated 10.02.2006, however the case against the appellant was confirmed by the Additional Commissioner vide order dated 22.05.2009.



8. The Hon'ble Tribunal while remanding the case, mainly contended that the first appellate authority has not correctly appreciated in the evidences emanating from statements and the recovery of documents more specifically, the figures in the diary maintained by Shri Veljibhai P Patel. In this regard I would like to quote the decision dated 11.01.2017 of Hon'ble Supreme Court, in a land marked decision in the Interlocutory Application No. 3 and 4 of 2017 in Writ Petition (Civil) No.505 of 2015 in respect of Common Cause (A registered Society) & Others V/s Union of India. In para 20 and 21 of the said decision states that:

20. It is apparent from the aforesaid discussion that loose sheets of papers are wholly irrelevant as evidence being not admissible under Section 34 so as to constitute evidence with respect to the transactions mentioned therein being of no evidentiary value. The entire prosecution based upon such entries which led to the investigation was quashed by this Court.

21. We are constrained to observe that the Court has to be on guard while ordering investigation against any important constitutional functionary, officers or any person in the absence of some cogent legally cognizable material. When the material on the basis of which investigation is sought is itself irrelevant to constitute evidence and not admissible in evidence, we have apprehension whether it would be safe to even initiate investigation. In case we do so, the investigation can be ordered as against any person whosoever high in integrity on the basis of irrelevant or inadmissible entry falsely made, by any unscrupulous person or business house that too not kept in regular books of accounts but on random papers at any given point of time. There has to be some relevant and admissible evidence and some cogent reason, which is prima facie reliable and that too, supported by some other circumstances pointing out that the particular third person against whom the allegations have been levelled was in fact involved in the matter or he has done some act during that period, which may have co-relations with the random entries. In case we do not insist for all these, the process of law can be abused against all and sundry very easily to achieve ulterior goals and then no democracy can survive in case investigations are lightly set in motion against important constitutional functionaries on the basis of fictitious entries, in absence of cogent and admissible material on record, lest liberty of an individual be compromised unnecessarily. We find the materials which have been placed on record either in the case of Birla or in the case of Sahara are not maintained in regular course of business and thus lack in required reliability to be made the foundation of a police investigation.



9. I further observe that consistent views have been taken by various Hon'ble Tribunals, Hon'ble High Courts and the Hon'ble Appex Court that clandestine removal must proved with positive evidence. Some of the decisions are:

[i] Sakeen Alloys Pvt Ltd [2013 (296) ELT 292 -Tri Ahm]

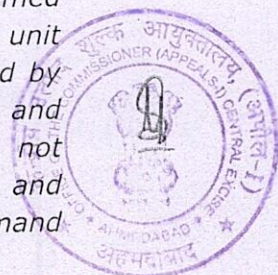
Clandestine removal of excisable goods - Evidence - Records/pen-drives recovered from business premises of third party, dealer M/s. Sunrise Enterprises - Confessional statements of persons, retracted subsequently, not sufficient proof of clandestine removal.

"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 appellatant, excess consumption of power like electricity, any seizure of cash during the investigation when huge transactions are made in cash".....

This decision has been upheld by the Hon'ble Court of Gujarat [2014 (38) ELT 655-Guj] and also affirmed by the Hon'ble Supreme Court [2015 (319) ELT AIR SC]

[ii] M/s Nabha Steel Ltd[2016 (344) E.L.T. 561 (Tri. - Chan.)]

"Demand - Clandestine clearance - Shortages and excess of raw material and finished goods - Evidence - Entire case made out on basis of Kachcha slips found on premises showing cash transactions and statement of some witnesses whose cross-examination denied in adjudication - Shortages and excess of goods determined on basis of eye estimation and not on actual weightment of goods - Cash transactions shown in Kachcha slips, as per assessee, pertaining to trading of steel items, which fact not verified by authorities - Duty of adjudicating authority to give credence to evidence regarding consumption of electricity during normal course of manufacture in case of alleged clandestine clearance - Consumption of electricity for producing 1 MT of MS Ingots is 900 to 1000 units as per assessee, whereas if allegation of clandestine manufacture accepted, electricity consumption works out to only 490 units per MT which is not possible - Assessee's unit not having production capacity to produce huge amount of goods on which duty of ` 19 crores has been confirmed - Exculpatory statements of officials/employees of assessee's unit not considered - Statements of 16 buyers out of 28 produced by Revenue not reliable as said statements identically worded and typed - As cross-examination denied, said statements not admissible evidence - Allegation of clandestine manufacture and clearance not supported by any corroborative evidence - Demand not sustainable - Section 11A of Central Excise Act, 1944".



[iii] M/s Ambica Organics [2016 (334) E.L.T. 97 (Tri. - Ahmd.)]

Entire case of clandestine removal based on certain statements of buyers and computer printout - Assessee, immediately after raid, submitting affidavit that no printout taken from Computer but from USB drive brought by computer expert accompanying officers during raid - HELD : Evidentiary value of statements of buyers already held weak by Commissioner (Appeals) as these were found involuntary and similarly pre-drafted on a computer sheet, a fact admitted in cross-examination by makers of said statements - As regards computer printout and its admissibility as evidence, investigating officer failed to comply with mandatory provisions and conditions of Section 36B of Central Excise Act, 1944 - No certificate as required under impugned provisions, taken from person occupying responsible official position - Coupled with assessee immediately disowning contents of these printouts, no evidentiary value attributable to these printouts also - No other corroborative evidence having been brought out, clandestine manufacture or removal not established - Assessee's clearances being within SSI limit, demand, confiscation and penalty not sustainable - Section 11A of Central Excise Act, 1944

This decision was affirmed by the Hon'ble High Court of Gujarat [2016 (334) ELT A 67].

[iv] Commissioner of Central Excise, Rajkot V/s FOTON CERAMICS [2011 (272) E.L.T. 388 (Tri. - Ahmd.)]

Confiscation and penalty - Excess stock - No statement or documentary evidence to establish clandestine manufacture or removal - Records being maintained - Mere non-accountal of day's production not sufficient to order confiscation of goods at it is not necessary to enter production immediately, it can be recorded at the end of the day - No allegation that records not being maintained for quite long period - Order of lower Appellate Authority quashing the confiscation and penalty upheld - Rules 25 and 26 of Central Excise Rules, 2002

[v] CCE V/s Swati Polyster [2015 (321) E.L.T. 423 (Guj.)]

Demand - Clandestine production and removal - Department failing to establish by any substantive evidence unaccounted production and clandestine removal of goods - Demand based only on assumptions and retracted statements also barred by limitation - Findings of Tribunal in setting aside demand not perverse

This decision has been affirmed by the Hon'ble Supreme Court [2015 (321) ELT A 217]



[vi] Biharji Mfg Pvt Ltd [2005 (186) ELT 587]

Demand - Clandestine removal of goods - Evidence - Tribunal, on appreciation of facts held that Revenue has failed to adduce any positive/tangible evidence of clandestine removal and that demand of duty is based on assumptions and presumptions - Demand, confiscation, penalty accordingly set aside - Findings of Tribunal being pure findings of fact, no question of law is involved - No ground for interference by High Court - Section 11A of Central Excise Act, 1944

This decision has been maintained by the Hon'ble Supreme Court [2015 (323) A 213].

[vii] Rajaasthan Foil Pvt Ltd [2005 (183) ELT 101 Tri Del]

Demand - Clandestine removal - Entries in private note books seized from appellant's premises not to be made the sole basis for alleging clandestine removal - Corroborating evidence in the form of receipt of goods by buyers without cover of invoice, names of buyers etc. not produced - Demand not sustainable -

10. It is a fact on record that except the diary and the statements of Shri Veljibhai Patel as well as statement of Shri Ketan V Patel, there was no other evidence on record to substantiate the allegations in the show cause notice. However, the statement of Shri Veljibhai has been retracted on 03.06.2003 by filing affidavit and forwarded to the investigating officers. There is no corresponding investigation conducted at the end of the appellant factory to unearth such clandestine manufacture and removal. The other aspect involved in the instant appeal is that it is a well settled law that in cases where there was allegation of clandestine production or manufacture and removal, the onus was heavily cast on the department and it is the responsibility of the department to prove the charges with concrete evidences. It must be noted that the case of M/s Ankit Tetiles was already decided in the favour of the party and it was expected that the original authority will try to strengthen the case in the impugned Order-in-Original, however, I do not find any positive evidence except the case laws cited. Therefore, the case has to be decided on the basis of materials on record as well as well established judicial principals. In the instant case, there was not a bit of evidences collected or recovered from the appellant. Further, on perusal of show cause notice, I observe that the investigating authority has discussed only the figures mentioned in the diary and statement of Shri



Veljibhai and Shri Ketan Veljibhai. For a clarity relevant major portion of the show cause notice is as under.

and handed over to Shri Govindbhai N. Patel, Supervisor of the unit under Supratnama dated 30.05.2003, for safe custody.

A statement of Shri Govindbhai N. Patel, Supervisor of M/s. M.V. was also recorded on 30.05.2003 under Section 14 of the Central Excise Act, 1944 wherein he gave the details of the machineries installed in the factory and admitted to having stored unaccounted stock of Cotton Yarn weighing 13050 Kgs seized during the panchnama.

A statement of Shri Bhagwanbhai Kalidas Patel, Supervisor of the unit on the ground floor of 12, Vijay Estate, engaged in the manufacture of Inter Yarn and informed by him to be a unit of Shri Veljibhai Patel, was also recorded on 30.05.2003 under Section 14 of the Central Excise Act, 1944 wherein he interalia stated that the Inter Yarn manufactured their was being sent to M/s. M.V. which is situated in the Celler of 12. Vijay Estate.

During the search at M/s. Shree Vasudev Spinners, Bhavna Estate, , Near New Nar Narayan Weigh Bridge, Near Onkar Process, Naroda, Ahmedabad, records found relevant to the investigation were seized at Annexure 'A' to the Panchnama which included various Central Excise and other records of the aforesaid three Cotton Yarn manufacturing units. During Panchnama, Shri Veljibhai Purushottamdas Patel, Proprietor of M/s. Shree Vasudev Spinners was asked to brief about the works/ activities done by his Proprietary firm M/s. Vasudev Spinners. In reply to the same, Shri Veljibhai interalia informed that his firm has been engaged in the trading of Cotton Yarn since 1999 and getting yarn manufactured on job-work; He used to purchase Cotton and send it to M/s. V.M.Textiles. Ganesh Estate, Naroda wherein Blow Room is installed and lap of Yarn is being manufactured there; his second son Shri Ketan Veljibhai Patel is the owner of M/s. V.M.Textile; thereafter, the laps of Cotton are being sent to M/s Shahil Spintex, 12. Vijay Estate, Naroda and M/s. Ankit Textile, Bhavna Estate, Naroda where manufacturing of Inter Yarn on Card Drawing Inter Machine takes place; M/s. Shahin Spintex is owned by his eldest son Shri Subhashbhai V.Patel and the proprietor of M/s. Ankit Textiles is his brother Shri Mangalbhai P. Patel; thereafter the Inter Yarn of M/s. Ankit is being sent to another unit of M/s. Ankit Textiles situated at 6, Satyam Estate, Naroda where Cotton Yarn is being manufactured on Ring Frames; the Inter Yarn manufactured at M/s. Shahin Spintex is being sent to M/s. M.V. Textiles, Celler, 12 Vijay Estate, Naroda whose Proprietor is Veljibhai's third son Shri Vikkybhai V.Patel and to M/s. V.S. Spintex, the Proprietor of which is his cousin brother Shri Ambalal T. Patel, for the manufacture of Cotton Yarn on Ring Frames; the Cotton Yarn, after being manufactured, is being cleared from the respective factories. Shri Veljibhai further informed in the presence of Panchas that from the beginning to the end the ownership of the Yarn remains with him only.

The scrutiny of the diary seized at Sr. No.A/1 was done on the spot under the panchnama. On being shown the aforesaid diary seized at Sr. No. 1, Shri Veljibhai in the presence of Panchas went through the contents thereof and informed that on page Nos. 32 to 55 there were details of manufacture and sales of Cotton Yarn by the different units right from the procurement of Cotton during the year 2001 -2002 and on the previous pages there were details of loans and finance; the production details in the name of Ganesh, Vijay and Bhavna on page nos. 32,34,36,38,40,42,44,46,48,50,52 and 54 pertained/ represented to M/s. V.M.Textiles, M/s. Shahil Spintex and M/s. Ankit Textiles respectively and are the name of their Industrial Estates; Under the name of Ganesh, there were details of manufacture of Laps from Cotton and under the name of Vijay and Bhavna there were details of Inter Yarn manufactured by M/s. Shahil and M/s. Ankit respectively.



On being shown page no. 33 of the diary during the panchnama, Shri Veljibhai informed that below the name Ankit there were details of Cotton Yarn manufactured out of Inter Yarn by M/s. Ankit Textiles, 6, Satyam Estate, below the name of Vasudev there were details of Cotton Yarn manufactured out of Inter Yarn by M/s. V.S.Spintex, 6, Bhaijibhai Estate, Naroda. He explained that Vasudev name is used for M/s. V.S.Spintex as his firm M/s. Shree Vasudev Spinners was earlier functioning from that premises. On being shown page nos. 35,37,39,41,43 and 45, during the panchnama Shri Veljibhai explained that these pages contained the similar details as at page no. 33 (which has been explained above). On being shown the page nos. 47,49,51,53 and 55, Shri Veljibhai explained that on these pages besides M/s. Ankit and M/s. V.S.Spintex there were details of Cotton Yarn manufactured out of Inter Yarn by M/s. M.V.Textiles, Celler, 12, Vijay Estate, Naroda also under the name of Vijay (MV).

On being asked to explain the details mentioned at page No.33 as a sample during panchnama Shri Veljibhai explained that below Ankit there were details of Opening balance of Inter Yarn at M/s. Ankit Textiles, 6, Satyam Estate, Naroda, below that is their receipt of Inter Yarn from the units of Vijay Estate and Bhavna Estate, below that is the closing stock of Inter Yarn for April'01, below that is the total consumption of cotton Inter Yarn during the month, below that is the details of usable waste, below that is the details of Finished Cotton Yarn manufactured and cleared during the month and at the bottom is the details of wastage. He explained that on other pages Nos. 35,37,39,41,43,45,47,49,51,53 and 55 the details of M/s. M.V.Tex, M/s. Ankit Tex. and M/s. V.S.Spintex are written in the similar manner. He informed that the aforesaid details were for the year 2001-2002.

Thereafter, on being shown page nos. 56 to 79 of the diary during the panchnama. Shri Veljibhai informed that on page nos. 56,58,60,62,64,70,72,74,76 and 78, the details of Cotton Lap manufactured by M/s. V.M.Textiles, Ganesh Estate and the details of Inter Yarn manufactured by M/s. Shahil Textiles, Vijay Estate and M/s. Ankit Textiles, Bhavna Estate respectively are written & on page Nos. 57,59,61,63,65,67,69,71,73,75,77 and 79 the details of Cotton Yarn manufactured from Inter Yarn by M/s. Ankit Textiles, Satyam Estate, M/s. V.S.Spintex, Bhaiji Estate and M/s. M.V.Textiles, Vijay Estate are written. He explained that all the details written on page Nos.56 to 79 are for the year 2002-2003. He also explained during the panchnama that the Diary has been written by him in his own handwriting and all the details mentioned therein are correct and in token of its conformity signed all the written pages of the diary. He further informed that the manufactured Finished Cotton Yarn written on the aforesaid pages and which are excisable has been manufactured from the Cotton purchased by him and sold also by him and these facts are fully correct. Thereafter, Shri Veljibhai was shown Annexure 'B' to the panchnama prepared on the basis of the aforesaid diary and showing the details of Cotton Yarn manufactured by M/s. Ankit Textiles, 6, Satyam Estate, M/s. M.V. Textiles, 12, Vijay Estate and M/s. V.S.Spintex for M/s. Vasudev Spinners during the year 2001-02 and 2002-03 and after going through the same Shri Veljibhai found these to be fully correct and signed thereon in token of its correctness in the presence of the Panchas. Shri Veljibhai admitted during the panchnama that during the year 2001-02 and 2002-03, he has got manufactured a total of 348316 Kgs of Cotton Yarn from M/s. M.V.Textiles, a total of 667155 Kgs of Cotton Yarn from M/s. Ankit Textiles, Satyam Estate and a total of 629029 Kgs of Cotton Yarn from M/s. V.S.Spintex and have sold the same. He informed that since Budget,2003, Grey fabrics being dutiable he has taken the Central Excise registration in the name of M/s. Shree Vasudev Spinners.



He also informed during the panchnama that all the firms mentioned in the panchnama are owned by his family members and, therefore, all the activities of all the aforesaid factories have been taking place under his supervision.

A statement of Shri Veljibhai Purusottamdas Patel, Proprietor of M/s. Sures Vasudev Spinners, Bhavna Estate, Naroda was recorded 30.05.2003 under Section 14 of the Central Excise Act, 1944, wherein he interalia stated that he is the proprietor of M/s. Vasudev Spinners engaged in the procurement of Cotton and getting Cotton Yarn manufactured on job-work basis; he has been present throughout during the panchnama proceedings at his office premises on 30.05.2003 and agreed to the panchnama same; the diary seized at Sr.No.1 of Annexure 'A' of panchnama and analyzed by him during the panchnama has been written by him; the Annexure 'B' of the panchnama which has been prepared on the basis of the aforesaid diary during the panchnama shows the details of excisable Finished Cotton Yarn got manufactured by him from M/s. Ankit Textiles, 6, Satyam Estate, Naroda, M/s. M.V. Textiles, 12, Vijay Estate, Naroda and M/s. V.S.Spintex, 6, Bhajji Estate, Naroda during the year 2001-2002 and 2002-2003 on their power operated Ring Frame Machines is fully correct and in case the liability of the Central Excise duty is fixed on him, the same is acceptable to him and he would try to pay up the same in near future; he also agreed to the seizure of the documents during the panchnama.

A statement of Shri Ketan Veljibhai Patel, Power of Attorney Holder of M/s. M. V. Textiles, 12, Vijay Estate, Naroda Memco Road, Ahmedabad was recorded 02.09.2003 under Section 14 of the Central Excise Act, 1944 wherein he interalia stated that he has been given the power of attorney for M/s. M. V. Textiles by the Proprietor of the company Shri Vicky Veljibhai Patel who is his brother and residing abroad; he ensured to submit the copy of Power of Attorney by the next day (he submitted the Xerox copy of the same on 03.09.2003); his aforesaid company has been engaged in the manufacturing of Cotton Yarn and is registered with the Central Excise; all the activities of his factory has been taking place under his knowledge and he himself is a pharmacist; that day he was shown the panchnama dated 30.05.2003 drawn at his factory and the statement of Shri Govindbhai Nayanlal Patel, Supervisor of his unit recorded under Section 14; after going through and having understood the same he signed thereon; the details mentioned in the aforesaid panchnama and statements are based on facts and are correct; thereafter he was shown the copy of Panchnama dated 30.05.2003 drawn at the office premises of his father Shri Veljibhai Patel situated at Bhavna Estate, New Nar Narayan weigh Bridge, Near Omkar Process, Naroda Memco road, Ahmedabad and the statement dated 30.05.2003 of Shri Veljibhai Patel recorded under Section 14 of the Central Excise Act, 1944; after going through and having understood the same he signed thereon; the details mentioned in the aforesaid panchnama and statements are based on facts; the raw material received in our factory has been Inter Sliver supplied by M/s. Vasudev Spinners (Shri Veljibhai is the proprietor of the firm) and his factory manufactured Cotton Yarn from the same; they never manufactured yarn on the Cotton of any other party; his company never purchased raw material on their own; the ownership of the raw materials and the finished goods remained with Shri Veljibhai i.e. M/s. Vasudev Spinners; his company has been getting Rs.15 per Kg. as job-charge; his family is a joint family and he has been residing with Shri Veljibhai; the Cotton Yarn weighing 13050 Kgs valued at Rs. 10,44,000/- seized during the panchnama dated 30.05.2003 drawn at his factory was not accounted for in their RG-1 register hence they would clear the same after obtaining Central Excise permission and on payment of duty; he was shown the diary of Shri Veljibhai seized at Sr. No. 1 of Annexure 'A' to the panchnama dated 30.05.2003 drawn at the office premises of Shri Veljibhai; he signed the first and the last pages of the diary after going through and having understood



the same; on going through page no 32 of the diary he has informed that the same shown the details of manufacturing of Inter Yarn since the receipt of Cotton by the units situated at Ganesh Estate, Vijay Estate and Bhavna Estate; on page No.33 there were details of manufacture of Cotton Yarn from Inter Yarn by M/s. Ankit Tex. And M/s. Vasudev; similar details are there on page nos. 32 to 79; on the pages on left side there were details of manufacture of Inter and on the pages on right side there has been the details of manufacturing of Cotton Yarn from Inter; thereafter he was shown Annexure 'B' of the panchnama dated 30.05.2003 drawn at M/s. Shree Vasudev Spinners which has been prepared on the basis of the aforesaid diary and is as per the details shown in the diary; on the pages of the diary has been the account details.

From the aforesaid facts and evidences, it appears that M/s. Shree Vasudev Spinners, Bhavna Estate, Near New Nar Narayan Weigh-bridge, Near Omkar Process, Naroda Memco Road, Ahmedabad is a Proprietary firm of Shri Veljibhai Patel who purchases Cotton and getting the Cotton Laps manufactured by M/s. V.M.Textiles, Ganesh Estate, Naroda, a unit owned by his second son. Thereafter, he sent the Cotton Laps to M/s. Shahil Spintex, 12, Vijay Estate, Naroda (owned by his eldest son Shri Subhashbhai V.Patel) and M/s. Ankit Textile, Bhavna Estate, Naroda (owned by his brother Shri Mangalbhai P. Patel) where manufacturing of Inter Sliver takes place. Thereafter, he sent the Inter Sliver to M/s. Ankit Textiles, 6, Satyam Estate, Naroda (owned by his brother Shri Mangalbhai P. Patel) or to M/s. M.V.Textiles, Celler, 12, Vijay Estate, Naroda (owned by his son Shri Vicky V.Patel) or to M/s. V.S.Spintex, 6, Bhajibhai Estate, Naroda (owned by his cousin brother Shri Ambalal T. Patel) and got the Cotton Yarn manufactured on job-work basis. Cotton Yarn being excisable and excluded from the purview of SSI exemption, all these three units are registered. All these units have done job-works only on the Cotton supplied by Shri Veljibhai i.e. M/s. Shree Vasudev Spinners. They have not manufactured Cotton Yarn for any other party or for themselves. Shri Veljibhai has been the owner of the goods right from Cotton to the Cotton Yarn. He has therefore, maintained the diary to monitor the entire movement of Cotton till the manufacture of Cotton Yarn and in his diary maintained all the details like opening balance, receipt of raw material, consumption thereof, manufacture of finished goods, generation of usable and actual waste. His diary is the summary of the actual production and clearance of the finished goods of all the factories discussed herein above and hence also the details of Cotton Yarn manufactured by M/s. Ankit, M/s. V.S. and M/s. M.V. for the period April'2001 to March'2003. These facts have been confirmed by him during the panchnama dated 30.05.2003 and in his statement dated 30.05.2003. The details of the Cotton Yarn manufactured by M/s. Ankit, M/s. V.S. and M/s. M.V. for the period April'2001 to March'2003 has been compiled / summarized in Annexure 'B' to the Panchnama dated 30.05.2003 drawn at M/s. Shree Vasudev Spinners. The manufacturing of these Cotton Yarn has been corroborated also from the statements of the Proprietors of M/s. Ankit & M/s. V.S. and the Power of Attorney Holder of M/s. M.V.. Power of Attorney Holder of M/s. M.V., in his statement recorded on 02.09.03 was shown the details of the diary and explained and admitted the diary showing the details of production of Cotton Yarn by his unit. Shri Veljibhai has admitted during the panchnama that entire production of Cotton Yarn shown in the diary has been manufactured by him and sold by him. Since as the diary showed the entire month-wise production and clearances of Cotton Yarn the aforesaid three units M/s. Ankit, M/s. V.S. and M/s. M.V., copies of RT-12/ E.R.1 returns were asked for from their Jurisdictional Central Excise Range Offices vide this office letter F.No.DGCEI/AZU/ 12(4) 24/2003 dated 15.09.2003. The copies of RT-12/ ER-1 returns in respect of M/s. M.V. have been received for the period May'02 to Mar'03 under letter F.No. AR-III/Misc-1/2002-03 dated 16.09.03 of Superintendent of Central Excise AR-III, Division-II, Commissionerate- Ahmedabad-II as they had obtained C.Ex registration on 29.05.2002.

11. From the above, it is very clear that the investigating authority has not adopted any fruitful method to unearth clandestine removal said to be carried by the appellant except discussing certain entries in the diary recovered from Shri Veljibhai and confessional statement thereof of him and other persons viz. Ketel Veljibhai, son of Veljibhai and statements of Supervisor of the appellant. Not single evidence from buyers end by recording their statements, no details of raw materials purchased have been discussed which can prove that the appellant had manufactured such huge quantity of production so as to remove illicitly. Further, the authority had

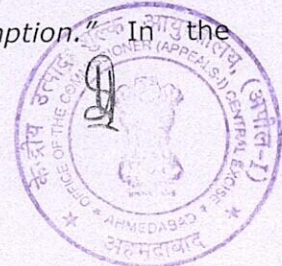


failed to grab a single transporter who involved in the illicit removal either at any stage even in the statement of Shri Veljibhai and others. The whole details of clandestine removal were based mainly on the basis of diary recovered from Shri Veljibhai and his statement. The entries in the diary of Shri Veljibhai and statement given by him (which was retracted later on) could not be relied upon as per settled law as discussed above. Since the details mentioned in the diary maintained by Shri Veljibhai is not reliable as per law and the statement given by him was also retracted, comparing figures mentioned in the diary with his statement and other documents withdrawn compose no merit to prove the clandestine removal.

12. Further, it is to mention here that in the same case of search and seizure carried out on 30.05.2003, show cause notice dated 27.11.2003 was also issued to M/s Ankit Textiles and demand of duty and seizure of excess quantity of goods found during search were dropped while adjudication by the Commissioner of Central Excise, Ahmedabad-II and the appeal filed by the department has failed before the Hon'ble Tribunal, Ahmedabad

11. In view of above discussion and applying ratio of various decision of Tribunal, High Court and Apex Court, the demand raised amounting to Rs.19,11,664/- with interest is without any foundation and required to be set aside. Accordingly, I do so. Since the demand in question is not sustainable, the question of imposition penalty does not arise.

12. As regards seizure of excess finished goods 13050 Kgs valued at Rs.10,44,000/- found in the premises of the appellant, I observe that the entire seizure is based on Panchnama dated 30.05.2003. It is contended by the appellant that the Panchnama by itself does not prove clandestine manufacture or removal of goods in any manner and it only shows seizure of excess goods as compared to stock accounted in REG-1. It is a fact on records that no corroborative evidence brought out by the investigating authority that the said goods were meant for clandestine removal. Further, settled law stipulates that *"mere non-entry of the productions in the RG-1 will not bring in the liability to confiscation under provision of the Central Excise Rules if there is no corresponding material of clandestine clearance also available. Unaccounted production goes in tandem with clandestine removal and evidence of both has to be present in a given case to avoid the charge to be determined on an assumption/presumption."* In the



circumstances, I do not find any merit in confiscation and seizure of excess quantity found in the premises of the appellant. Therefore, I set aside the seizure of the said goods.

13. In view of above discussion, I set aside the Order-in-Original No.26/ADC/2009/PRC dated 22.05.2009 and allow the appeal filed by the appellant.

उमा शंकर

(उमा शंकर)
आयुक्त
केन्द्रीय कर (अपील्स)

Date: / /2018

Attested

Mohan V.V
(Mohan V.V)
Superintendent,
Central GST (Appeals), Ahmedabad.

By R.P.A.D.

To
M/s M.V.Textile,
12, Vijay Estate, Naroda Memco Road,
Ahmedabad

Copy to:

1. The Chief Commissioner of C.G.S.T., Ahmedabad.
2. The Commissioner of C.G.S.T., Ahmedabad (North).
3. The Additional Commissioner, C.G.S.T, Ahmedabad (North).
4. The A.C / D.C., C.G.S.T Division: II, Ahmedabad (North).
5. Guard File.
6. P.A.

