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
☎ 26305065-079 : टेलेफैक्स 26305136 - 079 :
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DIN-20211264SW0000519983

5368 TO 5396

स्पीड पोस्ट

क फाइल संख्या : File No : GAPPL/COM/CEXP/25 to 28/2021-Appeal-O/o Commr-CGST-Appl-Ahmedabad

ख अपील आदेश संख्या Order-In-Appeal Nos. **AHM-EXCUS-002-APP-50 to 53/2021-22**
दिनाँक Date : **27.12.2021** जारी करने की तारीख Date of Issue : **28.12.2021**

आयुक्त (अपील) द्वारा पारित
Passed by **Shri Akhilesh Kumar**, Commissioner (Appeals)

ग Arising out of Order-in-Original Nos. **04/AC/Dem/2020-21 dated 13.10.2020**, passed by the Assistant Commissioner, CGST & C. Ex., Div-V, Ahmedabad-North.

घ अपीलकर्ता का नाम एवं पता Name & Address of the Appellant / Respondent

Appellant No. 1- M/s. Shree Hans Alloys Ltd., 201-202 & 203, GIDC, Dholka-380025.

Appellant No. 2- M/s. Neo incorpation, Plot No. 4, 5 & 6, Survey No. 239/1, Nr. Rollwell Forge, Shapar (Veraval), Rajkot-360024.

Appellant No. 3- Shri Omprakash Siremal Kanungo, Partner of M/s. Neo Incorporation, Plot No. 4, 5 & 6, Survey No. 239/1, Nr. Rollwell Forge, Shapar (Veraval), Rajkot-360024.

Appellant No. 4- Shri Dinesh B. Daga, Director of M/s. Shree Hans Alloys Ltd., 201-202 & 203, GIDC, Dholka-380025.

Respondent-The Assistant Commissioner, Central GST & Central Excise, Div-V, Ahmedabad-North.

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 अतत नीचे बताए गए मामलों के बारे में पूर्वोक्त धारा को उप–धारा के प्रथम परन्तुक 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।

(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 प्रक्रिया 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.

(क) 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 मामलें में जो भारत के बाहर किसी राष्ट्र या प्रदेश में निर्यातित है।

(A) 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.

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

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

अंतिम उत्पादन की उत्पादन शुल्क के भुगतान के लिए जो ड्यूटी केडिट 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।

(c) 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 दिनॉक 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 जहॉ संलग्न रकम एक लाख रूपये या उससे कम हो तो रूपये 200/– फीस भुगतान की जाए और जहॉ सलग्न 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–बी/35–इ के अंतर्गत:–

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

(क) 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 2nd **माला, बहुमाली भवन ,असरवा ,गिरधरनागर,अहमदाबाद** –380004

(a) To the west regional bench of Customs, Excise & Service Tax Appellate Tribunal (CESTAT) at 2nd floor,Bahumali Bhawan,Asarwa,Girdhar Nagar, Ahmedabad : 380004. in case of appeals other than as mentioned in para-2(i) (a) above.

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. Registar 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 ओदश 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 हैं।

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 not withstanding the fact that the one appeal to the Appellant Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

(4) न्यायालय शुल्क अधिनियम 1970 यथा संशोधित की अनुसूचि–1 के अंतर्गत निर्धारित किए अनुसार उक्त आवेदन या मूल आदेश यथास्थिति निर्णयन प्राधिकारी के आदेश में से प्रत्येक की एक प्रति पर रू.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 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 in 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 उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण **(सिस्टेट)**, के प्रति अपीलो के मामले में **कर्तव्य मांग** (Demand) एवं **दंड** (Penalty) का 10% **पूर्व जमा करना अनिवार्य है। हालांकि, अधिकतम पूर्व जमा** 10 **करोड़ रुपए** है ।(Section 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

केन्द्रीय उत्पाद शुल्क और सेवा कर के अंतर्गत, शामिल होगा "कर्तव्य की मांग"(Duty Demanded) -

(i) *(Section)* **खंड** 11D **के तहत निर्धारित राशि;**
(ii) **लिया गलत सेनवैट क्रेडिट की राशि:**
(iii) **सेनवैट क्रेडिट नियमों के नियम** 6 **के तहत देय राशि.**

☞ **यह पूर्व जमा 'लंबित अपील' में पहले पूर्व जमा की तुलना में, अपील'** दाखिल करने **के लिए पूर्व शर्त बना दिया गया है .**

For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (Section 35 C (2A) and 35 F of the Central Excise Act, 1944, Section 83 & Section 86 of the Finance Act, 1994)

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.

इस 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।

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

Following appeals have been filed against the OIO No.04/AC/Dem/2020-21/BK dated 13.10.2020 (in short '*impugned order*') passed by the Assistant Commissioner, Central GST, Division-V, Ahmedabad North (hereinafter referred to as '*the adjudicating authority*').

Sr.No.	Appeal No.	Appellants
01	GAPPL/COM/CEXP/28/2021	M/s. Shree Hans Alloys Ltd. 201-202 & 203, GIDC, Dholka-380025 (hereinafter referred as '**Appellant-1**')
02	GAPPL/COM/CEXP/27/2021	M/s. Neo Incorporation, Plot No. 4, 5 & 6, Survey No. 239/1, Near Rollwell Forge, Shapar (Veraval), Rajkot-360024 (hereinafter referred as '**Appellant-2**')
03	GAPPL/COM/CEXP/26/2021	Shri Omprakash Siremal Kanungo, Partner of M/s. Neo Incorporation, Plot No. 4, 5 & 6, Survey No. 239/1, Near Rollwell Forge, Shapar (Veraval), Rajkot-360024 (hereinafter referred as '**Appellant-3**')
04	GAPPL/COM/CEXP/25/2021	Shri Dinesh B. Daga, Director of M/s. Shree Hans Alloys Ltd. 201-202 & 203, GIDC, Dholka-380025 (hereinafter referred as '**Appellant-4**')

2. The facts of the case, in brief, are that during an investigation carried out by the DGCEI, Mumbai Zonal Unit, against M/s. Suraj Ltd., Mehsana, it was revealed that for the period from April, 2012 to November, 2013, they issued sales invoices of S.S.Scrap & Waste without actually supplying the goods to M/s. Neo Incorporation ***(Appellant-2)***, a registered Central Excise Dealer. Against the invoices issued, M/s. Suraj Ltd. used to receive payments from Appellant-2 through RTGS/cheques. Against each payment made by Appellant-2, M/s. Suraj Ltd used to retain certain amount of the invoice value as commission and returned the remaining amount in cash to Appellant-2. A private cash ledger recovered by the officers of DGCEI, co-relates the cash amounts received by M/s. Suraj Ltd from Appellant-2, through RTGS/cheques.

2.1 Subsequent search was also carried out by DGCEI at the premises of Appellant-2 and invoices issued by them during July, 2012 to December, 2013 to various buyers of S. S. Scrap & waste, against the invoices issued to them by M/s. Suraj Ltd during the period from April, 2012 to November, 2013 were seized. Statement of **Appellant-3** (*Shri Omprakash Siremal Kanungo, Partner of M/s. Neo Incorporation*) was recorded under Section 14 of the C.E.A, 1944 on 17.06.2015, wherein he admitted that during the period from April, 2012 to November, 2013, Appellant-2 received sales invoices from M/s. Suraj Ltd. without receipt of goods mentioned therein.

2.2 Further investigation revealed that **Appellant-1** ***(M/s. Shree Hans Alloys Ltd.)*** engaged in the manufacturing of Sand Castings were procuring inputs mainly from dealers of Gujarat including **Appellant-2** (***M/s. Neo Incorporation***). During the period

from June, 2013 to November, 2013, Appellant-1 received only cenvatable invoices from Appellant-2, without actual receipt of S.S. Scrap & waste. Analysis of the private cash ledger recovered from the premises of M/s. Suraj Ltd, Mumbai under Panchnama dated 06.12.2013 and the depositions made in Statements of Appellant-3 recorded on 17.6.2015, 12.09.2017 & 13.09.2017, revealed that Appellant-2 passed on ineligible Cenvat credit amount of **Rs.1,88,308/-** to Appellant-1, for which they were not entitled as per provision of Cenvat Credit Rules, 2004.

2.3 Statement of **Appellant-4 (Shri Dinesh B. Daga, Director of M/s. Shree Hans Alloys Ltd.)** was also recorded on 30.01.2018, under Section 14 of the CEA, 1944, wherein he stated that they procured raw materials / inputs S.S. Scrap & Waste, M.S.Scrap, Ferro Alloys from the dealers of Gujarat, including Appellant-2 and has taken Cenvat credit of the C.Ex. duty paid on such raw materials/inputs. He gave details of the purchases made from Appellant-2 but could not produce the lorry receipt and other documents, evidencing payments of freight for the said purchases.

2.4 It, therefore, transpires that the excisable finished goods cleared from the factory premises of Appellant-1, were without payment of Central Excise duty as the Cenvat credit of Rs.1,88,308/- used to make such duty payments was availed fraudulently. A Show Cause Notice (SCN) No. DGGSTI/RRU/36-01/2018-19 dated 07.05.2018 was, therefore, issued proposing recovery of Cenvat credit amount of Rs.1,88,308/- wrongly availed and utilized from Appellant-I under Rule 14 of CCR, 2004 read with Section 11A(4) of the CEA, 1944 saved vide Section 174 of the CGST Act, 2017 alongwith interest under Rule 14 of the CCR read with Section 11AA of CEA, 1944 saved vide Section 174 of the CGST Act, 2017. Imposition of penalty under Rule 15(2) of the CCR, 2002 read with Section 11AC on Appellant-1; Confiscation of excisable goods manufactured and cleared on payment of Central Excise duty by utilizing the fraudulently availed Cenvat credit under Rule 25 of the CER, 2002 read with Section 174 of the CGST Act, 2017 and penalty under Rule 25 of the CER, 2002 on Appellant-1 was also proposed. Penalty under Rule 26(2) of the CER, 2002 on Appellant-2 and Penalty under Rule 26(1) of the CER, 2002 on both Appellant-3 and Appellant-4 was also proposed.

2.5 The said SCN was adjudicated vide impugned order, wherein the adjudicating authority disallowed the Cenvat credit amount of Rs.1,88,308/- and ordered recovery of the said amount alongwith interest. He imposed equivalent penalty of Rs.1,88,308/- on Appellant-I u/s 11(AC) and also held the excisable goods liable for confiscation under Rule 25 of the CER, 2002. He imposed penalty of Rs.1,88,308/- u/r 25 of CER, 2002 on Appellant-1 and Penalty of Rs.1,88,000/- each on Appellant-2, Appellant-3 and Appellant-4, u/r/ 26 of the CER, 2002.

3. Aggrieved by the impugned order, all the four appellants filed appeals. **Appellant-1** requested to set-aside the impugned order on the contention that the impugned order has been issued based on evidences collected from the possession of some other person and were not examined properly; also cross-examination of the persons from whose possession the evidences were collected was not allowed. The inquiry was initiated at the level of M/s Suraj Limited and the evidences collected at

their end has been relied upon to implicate them, but apart from an alleged cash ledger and a Panchnama no other evidences collected has been provided to them; that the statement of Appellant-3 recorded was under pressure and threat which was subsequently retracted vide Affidavit dated 14.09.2017; even otherwise confessional statement without any corroborative evidence is not a valid evidence. They placed reliance on decision passed in the case of Mohammad Bagour reported at 2012(275) ELT 513 (Del). They claim that the adjudicating authority did not discuss the evidences to prove that the goods were not received, whereas the statements, copies of ledger, register, purchase bills weighment slip etc prove that the goods were actually received and were entered in the books of accounts as well as in the Cenvat Credit Register. They with their appeal memorandum produced evidences like copies of Ledger A/c of Appellant-2 in the books of accounts of Appellant-1; RG23A Pt-1&II, Purchase bills from Appellant-2, Purchase Orders, Weighment Slip, Goods Receipt Notes, SBI Bank Statement etc in support of their argument that the goods were in fact received and accounted for. They also contested the imposition of interest when demand itself is not sustainable; imposition of penalty under Section 11AC when there was no intent to evade the payment of duty and that the goods are also not liable for confiscation as they were not seized at the material time. Penalty under Rule 25 is also not imposable as Rule 25 is subject to provisions of Section 11AC, which is not satisfied here; also if penalty under 11AC is imposed, penalty under Rule 25 cannot be simultaneously imposed. They relied on following case laws:-

- ~ Sterlite Industries P. Ltd.[2011 (274) ELT 178 (Guj)]
- ~ Crompton Greaves Ltd – [2014(313) ELT 760]
- ~ Shiv Krupa Ispat Pvt. Ltd- [2009(235) ELT 623 (Tri-LB)]

3.1 Appellant-2 in addition to above, also contended that the goods were actually dispatched by them and were received by Appellant 1 which is evident from the drivers version who under oath affirmed that the goods were delivered with invoices from their premises. That the RG23D register also showed details of goods purchased and its consequential sale. Penalty under Rule 26 is imposable where person has dealt with the excisable goods liable for confiscation, since there were no goods available for confiscation the provisions of Rule 26 cannot be made applicable.

3.2 Appellant-3 & Appellant-4 relying on above arguments further contended that the penalty under Rule 26 of CER, 2002, is not imposable as the department itself believes that no goods are liable for confiscation, then how can they have a reasonable belief that goods were liable for confiscation. It is alleged that the goods were cleared without payment of duty, but there is no mention of the value of the goods cleared, neither is there any demand for C.Ex. duty on such finished goods, which clearly indicate that there were no such goods. The goods in dispute were raw materials and there was no proposal to confiscate the raw materials. They placed their reliance on decisions passed in the case of Nicholas D'Souza Garage [2015 (320) ELT 579 (Tri-Mumbai)]; Ramesh Haridas Ashar [2006 (195) ELT 75 (Tri.Mum.)]; Manoj Kumar Pani [2010 (260) ELT 92 (Tri.-Del)]; Pravin Shah [2014(305) ELT 480], Mohammed F. Ghani [2010(259) ELT 179]. Appellant-3 further contended that Hon'ble Tribunal in various decisions have held that penalty on partner of the firm u/r 26 of CER, 2002 is not justified when penalty on the partnership firm is proposed to be imposed.

4. Personal hearing in the matter was held on 17.09.2021 through virtual mode. Shri R.C.Prasad, Consultant, appeared on behalf of all the appellants. He reiterated the submissions made in the appeal memorandums filed on behalf of all the four appellants. He stated that the appellants have all the documents evidencing receipt of goods in factory, which is enclosed in appeal memorandum.

5. I have carefully gone through the facts and circumstances of the case, the impugned order passed by the adjudicating authority, submissions made in the appeal memorandum as well as at the time of personal hearing and evidences available on records. The issue to be decided under the present appeal is whether the Cenvat credit of Rs.1,88,308/- availed by Appellant-1, is admissible?

6. The entire demand is raised on the grounds that the disputed credit availed by Appellant-1 was on the basis of the fake sale invoices issued by Appellant-2 under which goods were not supplied. This argument is corroborated with the fact that Appellant-2 raised invoices to Appellant-1, on the basis of the invoices issued by their supplier M/s. Suraj Ltd, who actually never supplied goods to Appellant-2 under the said invoices. As physical delivery of goods was not done, only cenvatable invoices were raised to pass on the ineligible Cenvat credit.

7. To examine the issue, I have gone through the Panchnama dated 06.12.2013 and 29.05.2015, Copy of Invoice No. 125 dated 05.06.2013 and Invoice No. 78/01 dated 01.06.2013, Ledger accounts of Appellant-2 and all the statements recorded in the case of Appellant-1,2, 3 & 4. I have also examined the Statement of Shri Gunvant T. Shah, Director of M/s. Suraj Ltd., recorded on 23.07.2015 and Statement of Shri Anil Kumar Pandey, Proprietor of M/s. Ruchi Logistics, recorded on 08.06.2015.

7.1 In find that the statement of Shri Gunvant T. Shah, Director of M/s. Suraj Ltd. was recorded on 23.07.2015, wherein he admitted that M/s. Suraj Ltd sometimes actually purchased and received C.R.Coils from M/s. Shah Foils Ltd., while in some cases only invoices were received from M/s. Shah Foils Ltd, without actual purchase of goods. For completing the sales orders, they procured inputs from open market in cash for which the suppliers were not issuing any invoices, so in order to account for their purchases they obtained some invoices from M/s. Shah Foils Ltd. The payments made to M/s. Shah Foils Ltd vide cheques/RTGS, were returned back to them in cash after retaining some percentage of invoice value. He also agreed that the invoices of Rs.1,70,88,415/- issued by M/s. Shah Foils Ltd to M/s. Suraj Stainless Ltd/M/s. Suraj Ltd, were without actual sale of the goods, during the period 2010-11 & 2011-12 and were reflected in their ledger accounts.

7.2 Similarly, I find that Shri Omprakash S. Kunungo (Partner of M/s. Neo Incorporation,) in the statements recorded on 17.06.2015, on being shown the books of accounts of M/s. Suraj Ltd, agreed to the fact that payment of Rs.12,00,000/- made through RTGS by their unit is reflected as receipt by M/s. Suraj Ltd on 12.04.2012 and subsequent cash payment of Rs.10,93,200/- was made by M/s. Suraj Ltd to Appellant-2, is also reflected in the ledger account of Appellant-2, for the period 2012-13. He,

however, stated that he was not looking after the day to day activities of Appellant-2, but on ascertaining the facts from the working partner, he agreed that during the period April-2012 to November-2013, they received the sales invoices from M/s. Suraj Ltd. without receipt of the goods mentioned in the invoices. He, in his statement dated 12.9.2017, further admitted that they have not received S.S. Scrap from M/s. Suraj Ltd. but subsequently issued invoices to various buyers in Gujarat from July, 2012 to December, 2012, without actually supplying the goods to them. They only made cenvatable invoices and wrongly showed the name of M/s. Suraj Ltd. on the body of the invoices raised by their firm during the period July, 2012 to December, 2012. Further, in statement dated 13.9.2017, he further admitted that invoices raised by Appellant-2, during the period July, 2012 to December, 2013, were without actual sale of goods and that they have wrongly passed the Cenvat credit to their buyers. He also admitted that weighment slips were not prepared and preserved. He, however, refused to comment on the fact why the amounts received through RTGS/cheque have been returned to their buyers.

7.3 Further, Shri Anil Kumar Pandey, Proprietor of M/s. Ruchi Logistics, in his statement recorded on 08.06.2015, has also admitted that he never transported any goods from M/s. Suraj Ltd. to M/s. Rajputana Stainless Ltd and M/s. Neo Incorporation (Appellant-2). He, however, as per the instructions from Shri Ashok Shah, Owner of M/s. Suraj Ltd., was preparing lorry receipts showing transportation of goods from M/s. Suraj Ltd to Appellant-2 and accordingly made entries in two booking registers of M/s. Ruchi Logistics. The payment was received vide cheque from M/s. Suraj Ltd and such payments were subsequently adjusted against the payments due towards genuine transportation of goods.

7.4 I find that in the statement of Shri Dineshbhai B. Daga, Director of M/s. Shree Hans Alloys Ltd. (Appellant-4), recorded on 30.01.2018, he stated that they took Cenvat credit of the Central excise duty paid on raw materials/inputs, procured from local markets and on capital goods and maintained records in soft copy as well as in hard copy. The payments to their suppliers were made through RTGS / Cheque. For goods procured outside Ahmedabad / Dholka, copy of invoices, challan and lorry receipt may or may not be received but in most of the cases they received weighing slip alongwith goods and on receipt of raw material, the same is weighed on the weigh bridge. After weighing, the goods are unloaded and are randomly checked for quality purpose and thereafter shown to have received in Cenvat Input register and GRN register. But he could not produce the Entry Gate Register for the year 2013-14, showing the details of every vehicle (vehicle no., date of vehicle entry, name of supplier, qty etc) as these registers he stated were not preserved beyond one year. On scrutiny of the weighment slips produced by him, DGCEI officers noticed that in respect of Invoice No. 125 dtd 05.06.2013 & Invoice No. 422 dtd 23.11.2013, issued by Appeallnt-2, the weighment slips are of other weighbridge, whereas in other cases the goods were weighed at premises of Appellant-1, on being asked, he stated that he could not recall the exact reasons, however, there might be breakdown in their weighbridge or the party might have demanded independent weighbridge. He also could not produce other evidences like Lorry receipt, registers other than invoices, ledger accounts and the weighment slips to reject the version of either of Appellant-2 or of M/s. Suraj Ltd. and the

transporter, to sustain the charge for non-receipt of cenvatable input. He, however, submitted the copy of invoices alongwith copies of weighing slips for the material received from Appellant-2 during March, 2013 to November, 2013, copy of ledger account of Appellant-2, for the period 01.03.2013 to 30.11.2013, Cenvat Credit RG23A Part-1&II, Copy of Bank Statement and E. R. Returns for the said period and also assured to submit the original copy of these invoices.

7.5 On going through the facts of the case and the depositions made in above statements, I find that the case against Appellant-1 & Appelllant-2 has been booked on the sole argument that in the event of non-supply of goods by M/s. Suraj Ltd to Appellant-2 (*M/s. Neo Incorporation*), subsequent clearance of said goods by Appellant-2 to Appellant-1 (*M/s. Shree Hans Alloys Ltd.)* is not possible. To corroborate this argument, department has relied on the cash ledger account of M/s. Suraj Ltd, wherein the amount of Rs.26,05,505/- is shown as receipt through RTGS/Cheque on 13.08.2013 by M/s. Suraj Ltd, which was subsequently returned to Appellant-2, in cash on 25.09.2013 after retaining certain amount as commission. A worksheet was prepared based on the invoices raised by Appellant-2 to Appellant-1, alleging that these invoices were raised on the basis of the invoices issued by M/s. Suraj Ltd. as supporting manufacturer, who actually never supplied goods to Appellant-2. So, when goods were not received by M/s. Suraj Ltd from their respective sellers under cenvatable invoice, it was impossible to supply such goods to Appellant-2. Similarly, when Appellant-2 has not received physical goods under Cenvatable invoice issued by M/s. Suraj Ltd. then how could, they subsequently clear such goods to Appellant-1. Thus, the excisable goods were never actually cleared but were shown as cleared only on paper transaction, to pass on ineligible credit from M/s. Suraj Ltd to Appellant-2 and subsequently to Appellant-1.

8. I find that the case against Appellant-1 & 2 is a follow up action of the case booked against M/s. Suraj Ltd. Investigation revealed that Appellant-2 raised Invoice No.125 dated 05.06.2013 for sale of 5250 Kg of S.S. Scrap & Waste to Appellant-1. In the said invoice purchase of 15080 Kg of S.S. Scrap & Waste (Assessable Value of Rs.21,86,600/-) was shown to have purchased from M/s. Suraj Ltd vide Invoice No.78/01.06.2013. Further, scrutiny of Invoice No.78/01.06.2013 of M/s. Suraj Ltd showed Central Excise duty & VAT of Rs.26,05,505/-, payment were shown as receipt in the books of accounts of M/s. Suraj Ltd., Mehsana on 01.06.2013. These payment were made by Appellant-2 vide RTGS/Cheque in installment of Rs.25,00,000/- & Rs.5,00,000/- on 13.08.2013 & 14.08.2013 respectively. However, M/s. Suraj Ltd after retaining certain commission amount returned Rs.23,42,600/- to Appellant-2, in cash which is reflected n the cash ledger of M/s. Suraj Ltd. This fact was also admitted by Shri Omprakash S. Kunungo (Partner of M/s. Neo Incorporation) in his statement recorded on 17.06.2015. He also admitted that during April, 2012 to November, 2013, Appellant-2 neither received any S.S. Scrap & Waste from M/s. Suraj Ltd. nor made any supplies to the buyers mentioned in Annexure-I dated 12.09.2014 to the SCN, which also includes Appellant-1. Thus, the investigation carried out at the buyer's end revealed that invoices raised to Appellant-1, were on the basis of invoices of M/s. Suraj Ltd. as supporting manufacturer. Therefore, neither M/s. Suraj Ltd nor Appellant-2, have supplied goods to their buyers (including Appellant-1). This is also evident from

the depositions made by Appellant-3 (Partner of Apellant-2) who admitted that during the period April, 2012 to November, 2013, they have only received cenvatable invoices without receipt of the goods, mentioned in the sale invoices of M/s. Suraj Ltd and consequently, during July, 2012 to December, 2013, Appelant-2 also issued cenvatable invoices to their buyers without supplying the goods. The fact that there was no actual movement of goods, is also obvious from the statement of Shri Anil Kumar Pandey, Proprietor of M/s. Ruchi Logistics, recorded on 08.06.2015, wherein he admitted that he never transported any goods from M/s. Suraj Ltd. either to M/s. Rajputana Stainless Ltd or to M/s. Neo Incorporation (Appellant-2) but prepared fake lorry receipts showing such transportation of goods to Appellant-2, as per the instructions from Shri Ashok Shah, Owner of M/s. Suraj Ltd.

9. Coming to the disputed two invoices i.e. Invoice No.125/05.06.2013 & Invoice No. 422/23.11.2013, I find that neither Appellant-2 nor Appellant-1 could produce the lorry receipts and documents evidencing payments made to transporter in respect of above goods. The Appellant-4 in his statement dated 30.01.2018, produced the weighment slips for the goods received from Appellant-1, but he could not give a satisfying reply as to why for said invoices he produced the weighment slips of other weighbridge when in other cases, the goods were weighed at their own weighbridge. He also did not produce Entry Gate Register by conveniently taking a plea that the same were not preserved. However, I find that alongwith their appeal memorandum they have produced, copies of purchase bills from Appellant-2, Purchase Orders, weighment slips, Goods Receipt Notes, SBI bank Statement in support of their claim that the goods were actually received. I find that submission of these documents after such a long gap appear to be an afterthought as the same were not produced either before the investigating authority or before the adjudicating authority, at the relevant time hence validating the documents now, may not be feasible. The bank statements establish that the payments were made to the suppliers through RTGS/ cheque and this fact was never disputed by the department. However, the fact that these payments were subsequently returned to the appellants by their suppliers, in cash, was admitted by Appellant-3 and by Shri Gunvant T.Shah in their statements. I, therefore, find that such bank statements may not have any evidential value.

9.1 Further, it was also argued that the books of accounts of M/s. Suraj Ltd. cannot be relied upon as admissible piece of evidence as the witnesses were never allowed to be cross-examined. I do not find merit in such arguments especially when during the investigation the suppliers of the goods have admitted that they have not supplied the goods to Appellant-2, therefore, there appears no possibility of receipt of goods by Appellant-1 from Appellant-2 unless otherwise proved. From the circumstantial evidence, it has been proved that the goods have not been received by the Appellant-1 though they have made entries in the accounts to show the receipt of the same. Non- receipt of goods have also been admitted and accepted by the Director of Appellant-1. Therefore, making entries in the statutory records may not change the fact that the goods were not actually received in the premises of the Appellant-1. On the contrary, no evidences were produced before the adjudicating authority, to negate the allegation that Appellant-1 has not physically received the goods.

9.2 I find that Shri Gunvat T.Shah, Director of M/s. Suraj Ltd, in his statement dated 23.07.2015 has categorically admitted that they have purchased the goods from the local market in cash and arranged the invoices from M/s. Shah Foils Ltd, to account for the purchase of inputs S.S.C.R.Coils. He also admitted that all these transaction were effected through agents. Similarly, Shri Omprakash S. Kunungo (Partner of Appellant-2) also admitted that during the period April-2012 to November-2013, they only received the sales invoices from M/s. Suraj Ltd. without receipt of the goods mentioned therein and subsequently they issued invoices to various buyers from July, 2012 to December, 2012, without actually supplying the goods. Thus, only cenvatable invoices were issued to wrongly pass on the inadmissible Cenvat credit to their buyers.

9.3 One of the arguments advanced on behalf of the appellants was that the adjudicating authority had breached the principles of natural justice by denying them the opportunity to cross-examine the persons from whom enquiries were made by the department. As far as granting cross-examination is concerned, I find that the case of the department is based on documentary evidences secured from various sources and not merely on the testimony of the persons to whom the appellants desire to cross-examine. Hon'ble Supreme Court in *M/s. Telestar Travels Pvt. Ltd.* v. *Special Director of Enforcement* -2013 (289) E.L.T. 3 (S.C.) observed that cross-examination of witnesses would make no material difference and failure to permit the party to cross-examine cannot be said to have caused any prejudice calling for reversal of the orders impugned by directing a *de novo* enquiry into the matter. I also place reliance upon a decision of Apex Court in the case of *Surjeet Singh Chhabra* v. *Union of India* (1997 (1) SCC 508 = 1997 SCC (Cri) 272) which held that cross-examination was unnecessary in certain circumstances where all material facts were admitted by the appellants in their statements before the authority concerned. I, therefore, find that the ratio of decision passed in the case of Mohammad Bagour reported at 2012(275) ELT 513 (Del) and relied by the appellants cannot be made applicable to the present case as there the cross-examination of translator was sought because statement was recorded in English language which the accused was not knowing and the statement of the translator was also recorded after more than five months of search hence was not reliable when no explanation was given by the prosecution about such inordinate delay. In the present case all the appellants have admitted to have read and confirmed that the statement was recorded as per their say and without any threat or coercion.

9.4 I also find that Shri Omprakash S. Kunungo (Partner of Appellant-2) subsequently retracted his statements stating that these statements were recorded in duress and the answers to the questions recorded were not as per his say. He stated that he was threatened if he retracted the statement, summons would be issued to lady partner hence he admitted the non-receipt of goods from M/s. Suraj Ltd. I find that such retraction by Appellant-4 is nothing but an afterthought to avail illegal benefit and to mislead the department. As per the decision of Hon'ble Tribunal in the case of *CCE, Mumbai-IV* v. *Champion Confectionary* - 2010 (262) E.L.T. 865 (Tri.-Mum.) wherein it has been held that retraction of any statement should be made to authority before whom statements were given, thus, it is between the giver of the statement and person before whom the statement was given. Hon'ble Tribunal in the case of *Mahesh Kumar Goyel* v. *CCE, Calcutta-II* - 2004 (177) E.L.T. 561 ((Tri- Kolkata) held that merely

retraction without any evidence of duress or coercion do not deflect from evidentiary value of statements, especially if facts stated therein are corroborated by other evidence. The case against Appellant-1 and Appellant-2 were booked on the basis of the case booked against M/s. Suraj Ltd, therefore when the Director of M/s. Suraj Ltd, Partner of Appellant-1 and Shri Anil Kumar Pandey, Proprietor of M/s. Ruchi Logistics have not retracted their statements, subsequent retraction by Appellant-3, appears to be an afterthought and may not have any legal backing.

9.5 I also find that Appellant-1, availed and utilized Cenvat credit amount of Rs.1,88,308/- in respect of invoices issued by Appellant-2, without actual receipt of S.S.Scrap and waste, which clearly establish that they intentionally suppressed these facts and knowingly utilized the inadmissible Cenvat credit for payment of duty. It has been clearly brought out that the entire gamut of financial transaction of the appellants are based on suppression of facts inasmuch as reflecting the payment made to supplier without actual receipt of goods. It is also established that Appellant-1 had obtained bogus invoices from Appellant-2 for the purpose of taking inadmissible Cenvat credit. The statements recorded under Section 14 of the Central Excise Act, clearly pins down the appellants in the fraudulent transaction.

9.6 In view of above, I find that the impugned order, disallowing the Cenvat credit of Rs.1,88,308/- availed and utilized by Appellant-1 for clearing their finished goods, holding the same as inadmissible, is sustainable. When the demand sustains there is no escape from interest hence the same is therefore recoverable under Section 11A (4) with applicable rate of interest under Section 11(AA) of the CEA, 1944.

10. The issue of mandatory penalty is also settled by Hon'ble Supreme Court in the case of UOI vs Dharmendra Textile Processors **[2008(231) ELT3 (SC)]** and in the case of UOI Vs Rajasthan Spinning & Weaving Mills [**2009 (238) E.L.T. 3 (S.C.)]** wherein it is held that penalty under Section 11AC, as the word suggests, is punishment for an act of deliberate deception by the assessee with an intent to evade duty by adopting any of the means mentioned in the section. In the present case wrong and inadmissible CENVAT credit was taken on the strength of bogus invoices without physically receiving the goods, in contravention to Rule 3, 4 & 9 of the CCR, 2004 and utilized such inadmissible Cenvat credit for payment of Central Excise duty on their final goods in contravention of Rule 4 & 8 of the CER, 2002, with an intent to evade payment of central excise duty and thereby rendering the final goods to have been cleared without payment of central excise duty. Therefore, such CENVAT credit is recoverable under Section 11A (4) of the CEA, 1944, with applicable rate of interest and penalty u/s 11AA & 11AC respectively.

11. Another contention put forth by the appellants is that when the goods were not seized, they are not liable for confiscation under Rule 25 of the CER, 2002. They placed reliance on decision of Larger Bench passed in the case of *Shiv Kripa Ispat Pvt. Ltd.* reported in 2009 (235) E.L.T. 623 (Tri-LB). I have gone through the decision, wherein Hon'ble Larger Bench has held that when goods were not available for confiscation, no confiscation was warranted and no redemption fine payable. This case law is not squarely applicable to the instant case because here no redemption fine was imposed

as the goods were not confiscated. I find that in the instant appeal, the final goods manufactured by Appellant-1 were chargeable to Central Excise duty and were cleared by utilizing inadmissible Cenvat credit availed on the basis of bogus invoices without physically receiving the goods, thereby contravening Rule 3, 4 & 9 of the CCR, 2004 and Rule 4 & 8 of the CER, 2002. This was done with intent to evade payment of central excise duty and thereby rendering the final goods to have been cleared without payment of central excise duty. In the given circumstances, the excisable goods so cleared are liable for confiscation under Rule 25 of CER, 2002. But since the goods were not available, the adjudicating authority has not confiscated the goods nor imposed any redemption fine but held the goods liable for confiscation. I placed reliance on the decision passed by Principal Bench, New Delhi passed in the case of B.K. COATED BOARD LTD reported at 2011 (273) E.L.T. 560 (Tri. - Del.) wherein it was held that;

> *" 5.4 Confiscation is an action which is deterrent in nature. It is a very serious remedy available to prosecution in criminal jurisprudence. Penal consequence in fiscal proceedings is quasi-criminal in nature. Therefore, such proceeding is also governed by criminal jurisprudence for the purpose of testing whether the deterrent measure of confiscation is warranted which depend on the facts and circumstances of each case.*
>
> *Intention to defraud revenue or cause evasion result in confiscation and penalty.* ***The ill intent established by the ingredients prescribed by Section 11AC when becomes patent, confiscation of impugned goods is bound to be ordered.*** *Fraud, collusion, wilful misstatement, suppression of fact or contravention of law with intent to evade payment of duty, calls for such action followed by consequence of penalty prescribed by Rule 25. Rule 25 has in built provision for confiscation and penalty to be ordered in the fitness of the facts and circumstances of the case. Depending on the facts and circumstances of the case, the preposition 'and' used in Rule 25 can be read as 'or'. When confiscation is unwarranted, penalty becomes payable if there is breach of law.* ***In other words, the case where ingredients of Section 11AC are present, that calls for action confiscation and penalty under Rule 25. Both confiscation of goods as well as levy of penalty is permissible when the deliberate act of the assessee results in extinct of the goods making that beyond reach of Excise Authorities.***

Applying the ratio of above decision, I find that the adjudicating authority has rightly held the goods liable for confiscation. As Appellant-1 has cleared the excisable goods without payment of duty by utilizing the fraudulently availed Cenvat credit in contravention of Rule 4 of the CER, 2002, I find that penalty on Appellant-1 under Rule 25 is also imposable. However, considering the fact that penalty under Section 11AC has already been imposed, again imposing penalty under Rule 25 may not be sustainable in terms of various judicial pronouncements and the clarification issued in para 2.2 of Part-III of Chapter-13 of CBEC's Excise Manual that *"If penalty is imposed under Section 11AC, penalty under Rule 25 cannot be imposed. This, however, does not preclude the Department from confiscating imposing any fine in lieu of confiscation and prosecuting a person."*

12. I find that Appellant-2 *(M/s. Neo Incorporation)* has contested imposition of penalty under Rule 26(2) of the CER, 2002, basically on the grounds that all the evidences discussed in SCN, like the sales invoices which clearly prove that the goods were actually dispatched by Appellant-1 and not by them. That penalty can be imposed upon a person who has dealt with excisable goods which are liable for confiscation under Rule 25 of the CER, 2002 also since the goods were not held liable for confiscation, such penalty cannot be imposed. To examine their submission, I will refer to the relevant rule which is as under:-

Rule 26 :- Penalty for certain offences :

(1) Any person who acquires possession of, or is in any way concerned in transporting, removing, depositing, keeping, concealing, selling or purchasing, or in any other manner deals with, any excisable goods which he knows or has reason to believe are liable to confiscation under the Act or these rules, shall be liable to a penalty not exceeding the duty on such goods or [two thousand rupees], whichever is greater.

(2) Any person, who issues-

(i) an excise duty invoice without delivery of the goods specified therein or abets in making such invoice; or

(ii) any other document or abets in making such document, on the basis of which the user of said invoice or document is likely to take or has taken any ineligible benefit under the Act or the rules made thereunder like claiming of CENVAT Credit under the CENVAT Credit Rules, 2004 or refund, shall be liable to a penalty not exceeding the amount of such benefit or five thousand rupees, whichever is greater."

12.1 Under the above provisions, penalty is imposable on a person, who deals with the excisable goods in the manner specified in this Rule, knowing that the same were liable for confiscation. I find that Rule 26(2) is applicable in respect of a person who issues invoice without delivery of goods or any other document or abets in making such documents. Basically this Rule has been enacted to facilitate imposition of penalty on persons who issue fake/bogus invoices without supplying the goods to facilitate availment of Cenvat credit or on persons who abet in such activities. The term 'person' as per General Clause Act, 1897, has been defined to include any company or association or body of individuals, whether incorporated or not. Since the Appellant-2, issued bogus/fake invoices without actual delivery of goods specified therein and passed on inadmissible Cenvat credit, they therefore are liable for penalty under Rule 26(2) of the CER, 2002.

12.2 The Hon'ble High Court of Punjab & Haryana in the case of VEE KAY ENTERPRISES V/s Commissioner of Central Excise, reported at 2011 (266) E.L.T. 436 (P & H) at para 10, while considering whether penalty could be levied on the person who did not actually deliver the goods and merely issued a fake invoice which enabled wrong availing of cenvat credit and the extent of penalty which could be levied, held that;

***"10.** Inspite of non-applicability of Rule 26(2), penalty could be levied as the appellant was concerned in selling or dealing with the goods which were liable to confiscation inasmuch as the appellant claimed to have sold the goods in respect of which the cenvat credit was taken. In such a case, Rule 25(1)(d) and 26(1) are also applicable. The person who purports to sell goods cannot say that he was not a person concerned with the selling of goods and merely issued invoice or that he did not contravene a provision relating to evasion of duty. The appellant issued invoices without delivery of goods with intent to enable evasion of duty to which effect a finding has been recorded and which finding has not been challenged. We are, thus, unable to hold that appellant was not liable to pay any penalty. "*

Applying the ratio of above decision and in view of above findings, I, uphold the penalty imposed under Rule 26(2) on Appellant-2.

12.3 Similarly, I find that both **Appellant-3** (Shri Omprakash S.Kanungo, Partner of Appellant-2) & **Appellant-4** (Shri Dinesh B. Daga, Director of Appellant-1) have also contested the imposition of penalty upon them, under Rule 26 (1) of the CER, 2002 on the grounds that the department itself believed that no goods are liable for confiscation; that the value of the goods cleared was not mentioned; neither is there

any demand for C.Ex. duty on such finished goods nor there was any proposal to confiscate the raw materials.

12.4 I do not find merit in above argument. Confiscation of goods manufactured and cleared by utilizing fraudulently availed Cenvat credit towards payment of central excise duty was proposed in the SCN and the same were also held liable for confiscation. Appellant-4, being a Director of Appellant-1, was aware that he and his firm were indeed dealing with the excisable goods which were shown to have been received under the fake invoices which were actually never cleared by Appellant-2. He could not give satisfactory reply in respect of Invoice No. 125 dtd 05.06.2013 & Invoice No. 422 dtd 23.11.2013, issued by Appeallnt-2, as to why the weighment slips are of other weighbridge whereas in other cases the goods were weighed at premises of Appellant-1. He was also not able to produce Lorry receipt, registers, ledger accounts and the weighment slips to reject the version of Appellant-2, M/s. Suraj Ltd and transporter to sustain the charge for non-receipt of cenvatable input. In these circumstances, penalty imposed on Appellant-4, under Rule 26(1) is sustainable, as he knew he was dealing with the excisable goods, which were liable for confiscation.

12.5 Further, I find that Appellant-3 & 4 have placed their reliance on various decisions passed in the case of Nicholas D'Souza Garage [2015 (320) ELT 579 (Tri-Mumbai)]; Ramesh Haridas Ashar [2006 (195) ELT 75 (Tri.Mum.)]; Manoj Kumar Pani [2010 (260) ELT 92 (Tri.-Del)]; Pravin Shah [2014(305) ELT 480], Mohammed F. Ghani [2010(259) ELT 179]. I have gone through the above case laws relied by appellants, which I find are distinguishable on facts, hence cannot be relied upon. In the decision of Nicholas D'Souza Garage [*2015 (320) ELT 579 (Tri-Mumbai)],* penalty under Rule 25 of Central Excise Rules, 2002, was held not imposable as the demand and order of confiscation was held not sustainable on merits and on limitation. In Ramesh Haridas Ashar [*2006 (195) ELT 75 (Tri.Mum.)*] case facts are different as, Tribunal held that no penalty was to be imposed under the said Act, for evasion of Additional Duty of Excise, inasmuch as there were no provisions for the same under the said act at the relevant point of time. Similarly, in the case of Manoj Kumar Pani [*2010 (260) ELT 92 (Tri.-Del)*], Tribunal noticed that when there was doubt about the involvement and control of the respondent on day-to-day affairs in the show cause notice, then how adjudication order inculpated him and involved him in the activities of looking after day-to-day activities without cogent evidence. Facts of the case being different in the instant appeals these decisions cannot be made applicable.

13. I find that Appellant-3 (Shri Omprakash S.Kanungo, Partner of Appellant-2) has also relied on various decisions of Hon'ble Tribunal wherein it was held that penalty on partner of the firm u/r 26 of CER, 2002, is not justified when penalty on the partnership firm is proposed to be imposed. He also relied on the judgment of Hon'ble High Court of Gujarat passed in the case of Mohammed F. Ghani [*2010(259) ELT 179*], wherein Hon'ble Court while answering the question of law as to whether penalty can be imposed on partner separately when partnership firm itself has been penalized? Court at para-3 agreeed with the view taken by the Division Bench of Gujarat High Court in *Commissioner of Central Excise* v. *Jai Prakash Motwani,* 2010 (258) E.L.T. 204 (Guj.) which held that where penalty has been imposed on the firm, no separate penalty can be imposed on its partner. Relevant para of the judgment is reproduced below;

" 3. It is not disputed that penalty has been imposed on the firm. The Tribunal [2010 (261) E.L.T. 515 (Tri. - Ahmd.)] has imposed penalty on the partner only on the ground that total amount of duty involved was approximately Rs. 88 lacs and equal amount of penalty has been imposed on the appellant firm. Therefore, penalty imposed on Mr. P.N. Shah, partner of the firm was on the higher side and it has reduced it to Rs. 10 lacs. Penalty of Rs. 87,96,398/- has been imposed on the firm under Section 11AC of the Central Excise Rules, 1944. It has been held by the Division Bench of Gujarat High Court in Commissioner of Central Excise v. Jai Prakash Motwani, 2010 (258) E.L.T. 204 (Guj.) that where no specific Rule is attributed to the partner in the firm, then once firm has already been penalised, separate penalty cannot be imposed upon the partner because a partner is not a separate legal entity and cannot be equated with employee of a firm. From the order of the Tribunal or other orders on record, we do not find that any specific role has been assigned as provided by Rule 26 of Central Excise Rules. The Division Bench of this Court in Commissioner of Central Excise (supra) has held that where penalty has been imposed on the firm, no separate penalty can be imposed on its partner. We agree with the view taken by the Division Bench. Therefore, we find force in the submission of the learned counsel for the appellant and the question is answered in the negative, in favour of the assessee and against the department. The appeal is allowed. Penalty imposed on the appellant is set aside."

In light of above decision, I find that penalty on Appellant-3, is not sustainable.

14. In view of the above discussions and findings, the appeal filed by Appellant-1, Appellant-2 and Appellant-4 stand rejected and appeal filed by Appellant-3 stands allowed, in above terms.

27th December, 2021.

(**Akhilesh Kumar**)
Commissioner (Appeals)

Date: 12.2021

Attested

(Rekha A. Nair)
Superintendent (Appeals)
CGST, Ahmedabad

By RPAD/SPEED POST

To,

1) M/s. Shree Hans Alloys Ltd.
201-202 & 203, GIDC, Dholka-380025 -- **Appellant-1**

2) M/s. Neo Incorporation,
Plot No. 4, 5 & 6, Survey No. 239/1,
Near Rollwell Forge, Shapar (Veraval),
Rajkot-360024 -- **Appellant-2**

3) Shri Omprakash Siremal Kanungo,
Partner of M/s. Neo Incorporation,
Plot No. 4, 5 & 6, Survey No. 239/1,
Near Rollwell Forge, Shapar (Veraval),
Rajkot-360024 -- **Appellant-3**

4) Shri Dinesh B. Daga,
Director of M/s. Shree Hans Alloys Ltd. -- **Appellant-4**

201-202 & 203, GIDC, Dholka-380025

5) Assistant Commissioner, Central GST, Division-V, Ahmedabad North --**Respondent**

Copy to:

1. The Chief Commissioner, Central GST, Ahmedabad Zone.
2. The Commissioner, CGST, Ahmedabad North.
3. The Additional Commissioner, CGST, Ahmedabad North
4. The Assistant Commissioner (H.Q. System), CGST, Ahmedabad North. (For uploading the OIA)
5. Guard File.
6. P.A. File