



सत्यमेव जयते

केंद्रीय कर आयुक्त (अपील)

O/O THE COMMISSIONER (APPEALS), CENTRAL TAX,

केंद्रीय कर भवन,
सातवीं मंजिल, पोलिटेकनिक के पास,
आम्बावाडी, अहमदाबाद-380015

7th Floor, GST Building,
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Ambavadi, Ahmedabad-380015

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रजिस्टर्ड डाक ए.डी. द्वारा

क फाइल संख्या : File No : V2(72)/156to160/Ahd-I/2017-18
Stay Appl.No. NA/2017-18

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2852

ख अपील आदेश संख्या Order-In-Appeal Nos. AHM-EXCUS-001-APP-472to476-2017-18
दिनांक Date : 27-03-2018 जारी करने की तारीख Date of Issue

24/4/2018

श्री उमा शंकर आयुक्त (अपील) द्वारा पारित

Passed by Shri. Uma Shanker, Commissioner (Appeals)

ग Arising out of Order-in-Original No. 35/CE-I/Ahmd/JC/KP/2017 दिनांक: 11/30/2017 issued by
Joint Commissioner, Central Tax, Ahmedabad-South

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

**Raghuvir Metal Industries
Sarvottam Industries
Vagharam Annaramji Chaudhary
Shri Ram Sales Corporation
Alpesh Roadways
Ahmedabad**

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।

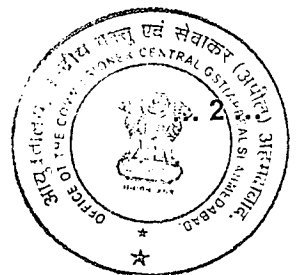
(i) A revision application lies to the Under Secretary, to the Govt. of India, Revision Application Unit Ministry of Finance, Department of Revenue, 4th Floor, Jeevan Deep Building, Parliament Street, New Delhi - 110 001 under Section 35EE of the CEA 1944 in respect of the following case, governed by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

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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



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

(b) In case of rebate of duty of excise on goods exported to any country or territory outside India of on excisable material used in the manufacture of the goods which are exported to any country or territory outside India.

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

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

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

(d) Credit of any duty allowed to be utilized towards payment of excise duty on final products under the provisions of this Act or the Rules made there under and such order is passed by the Commissioner (Appeals) on or after, the date appointed under Sec.109 of the Finance (No.2) Act, 1998.

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

The above application shall be made in duplicate in Form No. EA-8 as specified under Rule, 9 of Central Excise (Appeals) Rules, 2001 within 3 months from the date on which the order sought to be appealed against is communicated and shall be accompanied by two copies each of the OIO and Order-In-Appeal. It should also be accompanied by a copy of TR-6 Challan evidencing payment of prescribed fee as prescribed under Section 35-EE of CEA, 1944, under Major Head of Account.

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

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

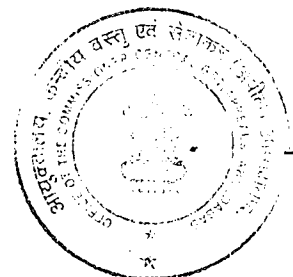
सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण के प्रति अपील:-
Appeal to Custom, Excise, & Service Tax Appellate Tribunal.

(i) 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 ओ-20, न्यू मैन्टल हॉस्पिटल कम्पाउण्ड, मेघानी नगर, अहमदाबाद-380016

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



The appeal to the Appellate Tribunal shall be filed in quadruplicate in form EA-3 as prescribed under Rule 6 of Central Excise(Appeal) Rules, 2001 and shall be accompanied against (one which at least should be accompanied by a fee of Rs.1,000/-, Rs.5,000/- and Rs.10,000/- where amount of duty / penalty / demand / refund is upto 5 Lac, 5 Lac to 50 Lac and above 50 Lac respectively in the form of crossed bank draft in favour of Asstt. Registrar of a branch of any nominate public sector bank of the place where the bench of any nominate public sector bank of the place where the bench of the Tribunal is situated.

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

In case of the order covers a number of order-in-Original, fee for each O.I.O. should be paid in the aforesaid manner notwithstanding the fact that the one appeal to the Appellate Tribunal or the one application to the Central Govt. As the case may be, is filled to avoid scriptoria work if excising Rs. 1 lacs fee of Rs.100/- for each.

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

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

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

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

- (6) सीमा शुल्क, केन्द्रीय उत्पादन शुल्क एवं सेवाकर अपीलीय न्यायाधिकरण (सिस्टेट), के प्रति अपील 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 .

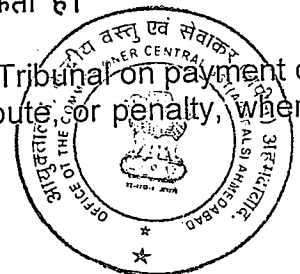
For an appeal to be filed before the CESTAT, 10% of the Duty & Penalty confirmed by the Appellate Commissioner would have to be pre-deposited, provided that the pre-deposit amount shall not exceed Rs.10 Crores. It may be noted that the pre-deposit is a mandatory condition for filing appeal before CESTAT. (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 मांग 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

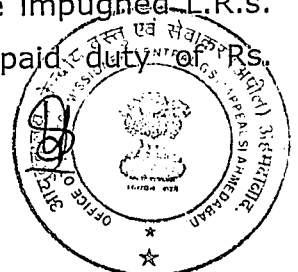
The below mentioned appellants have filed appeals against Order-in-Original number 35/CE-I/Ahmd/JC/KP/2017 dated 30.11.2017 (*hereinafter referred to as 'impugned orders'*) passed by Joint Commissioner of CGST, Ahmedabad-South (*hereinafter referred to as 'adjudicating authority'*)

Sr. No.	Name of the appellant with address	Appeal No.
1	M/s. Sarvottam Steel Industries, Plot No. 54/2/P, Phase I, GIDC, Vatva, Ahmedabad	157/Ahd-I/17-18
2	M/s. Raghuvir Metal Industries	156/Ahd-I/17-18
3	Shri Vagharam Annaramji chowdhary, Partner of M/s. Sarvottam Steel Industries	158/Ahd-I/17-18
4	M/s Shri Ram Sales Corporation, Rajkot	159/Ahd-I/17-18
5	M/s. Alpesh Roadways	160/Ahd-I/17-18

2. On 08.02.2011 acting upon the intelligence, the Officers of Central Excise(Preventive), Ahmedabad-I visited the factory premises of M/s. Sarvottam Steel Industries, Plot No. 54/2/P, Phase I, GIDC, Vatva, Ahmedabad and recovered certain L.R.s issued by M/s. Alpesh Roadways as detailed at Para 3.5 of the show cause notice dated 03.08.2011. The appellant failed to provide documentary evidences for clearance effected under L.R.s mentioned in respect to Serial No. 04 to 24 of the table, appearing at Para 3.5 of the notice dated 03.08.2011 and admitted to having cleared such quantity without cover of invoice and without payment of Central Excise duty. In pursuance to their admission, they also handed over cheque for Rs. 3,00,000/-. Stock verification revealed a shortage of 3,275 M.T. of finished goods as compared to stock as per R.G.1 (Daily Stock Account). The appellant admitted that they cleared goods involving duty of Rs. 23,613/- without cover of invoice. Statements of responsible persons were also recorded under Section 14 of the Central Excise Act, 1944 and all of them have admitted to clandestine removal of goods from their factory premises under the impugned L.R.s.

3. Inquiry was also extended at the transporters end i.e., M/s. Alpesh Roadways and their premises was also searched on 09.02.2011, wherein the officers also recovered some L.R.s as per details shown in Table at Para 6.2 of the S.C.N. dated 03.08.12011. During Panchnama, M/s. Alpesh Roadways has admitted that they have received the finished goods without cover of invoices or challans from the appellant mentioned at Sr. No. 1 of the table supra.

4. Department had also extended inquiries at the end of Shri Ram Sales Corporation, Rajkot (buyer of the appellant), registered office of transporter M/s. Alpesh Roadway located at Rajkot and M/s. Raghuvir Metal Industries (buyer of the appellant). Statements of responsible persons of these three were also recorded under Section 14 of the Central Excise Act, 1944 and all of them have admitted about receipt of goods without cover of invoices from the appellant under the impugned L.R.s. During the course of proceedings, the appellant had also paid duty of Rs.



12,92,227/- voluntarily as against Rs. 13,53,968/- involved in clandestine removal of goods.

5. Thereafter, a Show Cause Notice bearing No. MP/P1-II/INQ-16/2010-11 dated 03.08.2011 was issued to the aforementioned appellants proposing recovery of duty of Excise and imposition of penalty. This notice was adjudicated vide OIO No. 6/Additional Commissioner/2012 dated 23.02.2012. The appellant filed an appeal before the Commissioner(A) who vide his OIA No.92 to 95/2012(Ahd-I)CE/AK/Commr(A)/Ahd dated 18.10.2012 the matter was remanded back to the adjudication authority for fresh adjudication after providing the appellants sufficient opportunity and documents/records, as desired by them. Revenue feeling aggrieved filed an appeal before the CESTAT on the ground that Commissioner(A) has no power to remand the matter. The Hon'ble CESTAT however held that Commissioner (Appeals) has power to remand the matter. Accordingly the notice it was decided vide Order-in-Original no.35/CE-I/Ahmd/JC/KP/2017 dated 30.11.2017 wherein the adjudicating authority ordered for recovery of duty of excise along with interest. Penalty was also been imposed on all the appellants.

6. Being aggrieved with the impugned OIO dated 30.11.2017, the appellants again filed appeals on the following grounds.

i. **M/s. Sarvottam Steel Industries** in their grounds of appeal has raised the following contentions:

a. the adjudicating authority has erred in disallowing cross-examination.

b. that the appellants wanted to ask the panchas during cross examination if they were present at the time of drawal of panchnama, that whether Shri Motilal, Accountant and Shri Amrishbhai Production in charge had informed officers or not about the manufacturing process and that their main raw material was sent for Job work. The appellants wanted to confirm from the pancha witnesses whether actual stock taking was done by the officers.

c. the individuals at sr. no. 7,9 to 14 in the impugned OIO, Para 130.3 have already retracted their statements recorded by the departmental officers. The appellant stated that if the cross examination was allowed, the appellants would have proved that the statements recorded by the department were not disclosing true facts.

d. the cross examination of the person at sr. no. 8 was very crucial for the appellants.

e. the following case law clearly justifies cross examination request made by the appellants:-

2005(188) E.L.T.107(TRIB) Sanket Food Products pvt. ltd

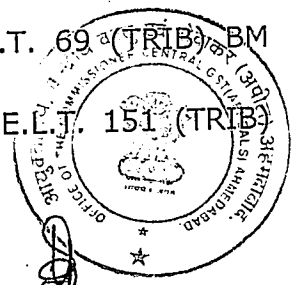
2002(140) E.L.T. 395(TRIB) Vijay Enterprises 1989(41) E.L.T. 69 (TRIB) BM

Auto India

1989(41) E.L.T. 282 (TRIB) Kishore Photo studio 1987(29) E.L.T. 151 (TRIB)

Gunantrai Harivallabha Jani

2006(193) E.L.T. 300 (TRIB) Deendayal Didwania



2006(193) E.L.T. 300 (TRIB) Chandan Tubes and Metals Pvt. Ltd.

f. the appellant stated that the statement of any individual recorded under Section 14 of the Central Excise Act, 1944 becomes admissible as evidence only if such individual is cross examined by the adjudicating authority.

g. the appellant stated that the demand on said 24 LRs cannot be confirmed as there is no other corroborative evidence which support the statement of Shri Motilal of the appellant having cleared the goods under these LRs.

h. the appellant rely on the following judgements

1. Tulse Polymers pvt ltd reported in 2009(247) ELT 223 (Tri-Ahd)
2. Gandhi Texturisers reported in 2008 (230) ELT 186 (Tri-Ahd)
3. Sumetco Alloys Pvt. Ltd reported in 2008 (230) ELT 81 (Tri-Del)
4. Rhino Rubbers Pvt. Ltd. reported in 1996 (85) ELT 260 (Tri)
5. R.V. Steel Pvt. Ltd. reported at 2009(243) ELT 316 (Tri-Chennai)
6. Rajaguru Spinning Mills Pvt. Ltd., reported at 2009(243) ELT 280 (Tri-Chennai)
7. Shri Ulaganayagi Ammal Steels, Trichy, reported In 2008(231) ELT 434 (Tri-Chennai)
8. Premium Packaging Pvt. Ltd., reported in 2005(184) ELT 165 (Tri-Del)
9. Shri Chakra Cements Ltd, Guntur reported in 2008 (231) ELT 67 (Tri-Bang)
10. Premium Packaging Pvt. Ltd., Kanpur, reported in 2005(184) ELT 165 (Tri-Del)
11. Ram Shyam Papers Ltd. Vs CCE Lucknow reported in 2004 (168) ELT 494 (Tri-Del)
12. Charminar Bottling Co. Pvt Ltd. Vs CCE, Hyderabad-II reported in 2005 (192) ELT 1057 (Tri-Del)
13. Oudh Sugar Mills Ltd Vs. Union of India reported in 1978 (2) ELT J172 (SC).

h. the appellants submit that the LRs recovered from the office premises of transporter or dispatch register recovered from the transporters premises are not related to their company.

i. there is no material of corroboration worth the name from any source and demand of duty is totally unsustainable.

j. when the consignees have not accepted having received any goods under any of the said 17 LRs, the case of the department is not established.

k. The 'Sarvottam' word does not in any way relate to their name, the department cannot rule out the chances that some other manufacturers might have used name Sarvottam for their clearances and these LRs were for those goods and duty can be demanded only those LRs which are for self.

l. the department has separately demanded duty on clearances shown in both the dispatch register as well as inward statement.

m. all the LRs recovered from the premises of transporter and duty proposed to be confirmed on the basis of entries shown by transporter in their 6 dispatch registers and inward statement are third party evidence which are to be corroborated by any other independent evidence to prove that the details of goods mentioned in those LRs and registers and statements were manufactured and cleared from our factory.



n. the department has not checked the records of consignees to ascertain how they made payments from their ledger accounts.

o. the LRs were purportedly prepared and planted in factory by someone before passing on the intelligence to the department.

p. there is no evidence about raw material having been procured. There is no investigation as regards the suppliers of raw materials. There is no evidence about extra energy having been used in the production of finished goods removed clandestinely.

q. It is settled law that the burden of proof to establish the charge of clandestine removal lies on the department .

r. There is a factual error and hence, the annexures are required to be redrafted.

s. The imposition of penalty is also illegal as the demand itself is not sustainable.

ii. **M/s. Raghuvir Metal Industries** have stated that while the first adjudicating authority imposed the penalty of Rs. 20,000/- vide OIO dated in the denovo adjudication the amount of penalty has been enhanced to Rs. 2,00,000/- which is highly excessive and arbitrary and shows the negative approach of the adjudicating authority.

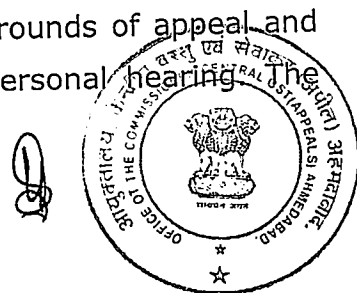
iii. **Shri Vagharam Annaramji Chowdhary** has contended that it is well settled legal position that when the penalty is imposed on the partnership firm, separate penalty on the partner of the firm cannot be imposed;

iv. **M/s. Shri Ram Sales Corporation** has contended that the appellant have not dealt with any excisable goods.

v. **M/s. Alpesh Roadways** has contended that there is no investigation as to how they have received freight from the consignor or consignee for transportation of goods which were allegedly removed without payment of duty by the main appellants or received by the buyers whose names are mentioned as co-noticee.

7. Personal hearing in respect of all the appeals was held on 31.01.2018. Shri P.P. Jadeja, Authorised Representative, appeared before me on behalf of all the appellants and reiterated the grounds of appeal and requested that the department should allow the appeals with consequential relief.

8. I have carefully gone through the facts of the case, grounds of appeal and oral submissions made by the appellants at the time of personal hearing. The question to be decided is viz.



[a] whether the confirmation of duty, interest and penalty against M/s. Sarvottam Steel Industries, is correct or otherwise;

[b] whether M/s. Raghuvir Metal Industries, Shri Vagharam Annaramji chowdhary, M/s Shri Ram Sales Corporation, Rajkot and M/s. Alpesh Roadways are liable for penalty imposed by the adjudicating authority or otherwise.

M/s. Sarvottam Steel Industries

9. In the appeal filed by M/s. Sarvottam Steel Industries, I find that the appellant has questioned the non grantal of cross examination by the adjudicating authority. The adjudicating authority has spelled out her reasons for not granting cross examination, viz.

- Regarding cross-examination of persons mentioned above, I find that persons at Sr. No. 05 to 14 above, were present during the course of Panchnama proceedings at various places and whatever they have stated was in presence of Pancha witnesses.
- Panchnama is essentially a document recording certain things which occur in the presence of the panchas and which are seen and heard by them. Panchas are taken to the scene of an offence to see and hear certain things. A Panchnama is an essential document not only by influencing the course of proper investigation but a record of memory and refresher of memory so that important details are not forgotten. Hence, the Panchnama is a factual incorporating what was actually seen and heard by the witnesses, written in their hand or written out or certified by him as found to be true and correct and as seen, witnessed, and heard by them.
- For cross-examination of transporter and buyers, I find that the transporter and buyers have produced relevant documents evidencing the movement of goods, during recording of their respective Panchnamas and Statements.
- During the subsequent proceedings also, they were shown Panchnamas & Statements recorded and documents recovered from respective premises. At no point of time, they have raised any objection / query regarding authenticity of facts / details mentioned in the documents.
- Regarding cross-examination of the officers involved in the present case, they were asked to submit set of questions intended to be asked to them, for which they denied the same during the Personal Hearing.
- Further, I find that during the original adjudication of the S.C.N., even after giving ample chances of Personal Hearing given to the appellant as well as co-noticees, no one turned up to represent their case.

9.1 However, in the grounds of appeals the appellant has posed some questions that he would have asked the panchas, and other individuals and co-noticees, primarily to prove the point that the stock taking was not done; that their material was sent for job work. These averments/allegations of the appellant has been dealt by the adjudicating authority in length. However, while questioning the stock taking what the appellant forgets is that in addition to the panchas, his staff/officer was also present during the proceedings. What is surprising is not once for a period of around six months, did the appellant feel the need to question the stock taking when he was well aware that the panchnama recorded the shortage in physical stock vis-à-vis RG-1 stock register. The appellant as I have already mentioned, raised the point of job work before the adjudicating authority, who in her findings recorded in para 149 has mentioned that "neither during investigation

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nor during adjudication details of job work was submitted." No documentary evidence has been produced even with the appeal papers to substantiate the plea that the goods were being sent for job work. Surely, a person sending goods for job work is required to remove it under proper procedure, record it in register, etc. Had the appellant produced copies of job work challan, job work register, the averment would have some merit. This averment raised fails because it appears to be just an afterthought, made without any documentary evidence to substantiate the same. I therefore, reject it. Further, I do not find that the appellant has been successful in rebutting the finding of the adjudicating authority wherein she has denied cross examination. Cross examination cannot be demanded as a right. Further, asking a person who was present during the course of panchanama, if they were ever present, does not seem to be very logical. As far as retractions are concerned, I find that the same has been dealt with by the adjudicating authority.

9.2 Now coming to the aspect of merit I find that the duty demand is as follows:

Annexure A : Duty demand in respect of 17 LRs recovered from Sarvottam Steel amounting to Rs. 340233/- wherein goods were removed without payment of Central Excise duty without the cover of invoice;

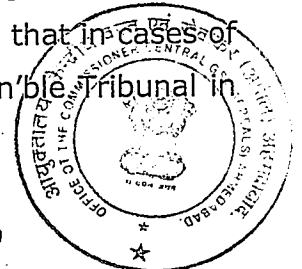
Annexure B :Duty demand in respect of 13 LRs recovered from Alpesh Roadways amounting to Rs. 291157/-, in respect of goods manufactured and cleared by the appellant wherein no duty was paid and no central excise invoices was issued.

Annexure C: Duty demand of Rs. 496995/- in respect of of goods manufactured and cleared by the appellant to various customers through M/s. Alpesh Roadways without payment of duty as mentioned in the inward statement recovered from M/s. Alpesh Roadways.[period from 2010-11]

Annexure D : Duty demand of Rs. 183919/- in respect of of goods manufactured and cleared by the appellant to various customers through M/s. Alpesh Roadways without payment of duty as mentioned in the inward statement recovered from M/s. Alpesh Roadways.[period 2008-09 to 2010-11]

Annexure E : Duty demand of Rs. 23613/- in respect of stock of finished goods found short during physical verification of finished goods and its comparison with RG 1 Register from M/s. Sarvottam.

9.3 I find that the duty demand is based on recovery of LRs, shortage of finished goods, recovery of inward statement, dispatch registers, confirmatory statements of the appellant, the transporter and the buyer, etc.. Despite all this i.e. confirmatory statements, recovery of LRs, the unraveling of the mode of transport, the appellant in his grounds has stated that the case is based only on statements, which is not factually true. Surely, the mention of the LRs seized from the appellant's premises in the inward register of M/s. Alpesh Roadways cannot be termed as a coincidence. The appellant has attempted to plug holes in the department's investigation. However, it has been held by the Courts that in cases of evasion, it cannot be proved with mathematical accuracy. The Hon'ble Tribunal in the case of Ratna Fireworks [2005 (192) ELT 382], held as follows:



7..... It is, by now, settled law that a finding of clandestine removal requires positive evidence to support it. In respect of the clearances for which demand of duty was vacated by the Commissioner, there was no such evidence available. The Apex Court's judgment was cited in support of the plea relating to mathematical precision. We are dealing with a civil dispute and not a quasi-criminal case like the one which was dealt with by the Apex Court. We also find that, even in the case of D. Bhoormull (supra), their lordships held thus "The broad effect of the application of the basic principle underlying Section 106 of the Evidence Act to cases under Section 167(8) of the Act is that the Department would be deemed to have discharged its burden if it adduces only so much evidence, circumstantial or direct, as is sufficient to raise a presumption in its favour with regard to the existence of the fact sought to be proved." This ruling does not mean that Department can prove a fact without any evidence. It only underlines the requirement of sufficient evidence.....

On examining the evidence at hand, I find that the department has discharged its onus, with ample proof. Even otherwise, it is well known fact that the evaders ensure that they leave no trail and therefore it becomes all the more difficult for Revenue to prove such cases it by plugging all the holes. I also find that the appellant has failed to counter the charges. When the transporter, the buyer, and the appellant all have accepted their roles, to now contend that the goods/LRs were not theirs is not a tenable argument. In-fact the appellant's contention questioning the annexures, the rates taken to calculate the duty, is [a] not supported by arguments as to why these annexures are wrong and [b] ignoring the fact that the rates were taken after discussion and consent from the appellant's side. The allegation of appellant in respect of shortage of finished goods figure is baseless. The shortage was found based on stock taking by the officers before independent panchas which finds a mention in the panchnama.

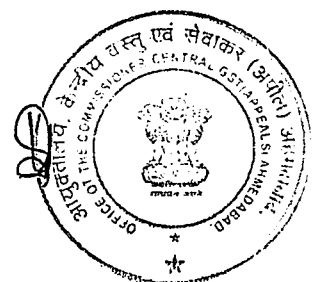
9.4 The appellant has also questioned imposition of penalty. The argument given in the grounds of appeal is that when they have paid Rs. 12,92,227/- before issuance of show cause notice, in terms of Section 11AC(1) of the Central Excise Act, 1944, the matter of interest and penalty is deemed to be concluded. The contention is not correct. I have gone through the amendments made in Section 11AC and note that vide Finance Act 2000, the following proviso was inserted in the said section

"Provided that where such duty as determined under sub-section (2) of section 11A, and the interest payable thereon under section 11AB, is paid within thirty days from the date of communication of the order of the Central Excise Officer determining such duty, the amount of penalty liable to be paid by such person under this section shall be twenty-five per cent. of the duty so determined :

Provided further that the benefit of reduced penalty under the first proviso shall be available if the amount of penalty so determined has also been paid within the period of thirty days referred to in that proviso :

The contention therefore, that since they have paid Rs. 12,92,227/- before issuance of notice they are not liable for penalty u/s 11AC, is not correct since the appellant has not paid the penalty. The argument raised is without basis and therefore, I reject the same.

M/s. Raghuvir Metal Industries



10. As far as the contention of M/s. Raghuvir Metal Industries is concerned, I find that the matter is no longer *res integra*. Hon'ble CESTAT, New Delhi in their decision in case of M/s. Sarjoo Sahkari Chini Mills Ltd (2008 (226) ELT 211 (Tri Del)) has held as follows:

In respect of penalty of equal amount imposed in the impugned order, the contention of the appellant is that the present impugned order is passed in pursuance to the remand order passed by the Tribunal. The contention is that in the earlier proceedings, the adjudicating authority imposed the penalty of Rs. 15,000/- and Rs. 20,000/- whereas on remand the impugned order was passed and penalty of equal amount has been imposed. The contention in the remand proceeding, in absence of challenge to the penalty imposed by the first adjudication order, quantum of penalty cannot be enhanced.

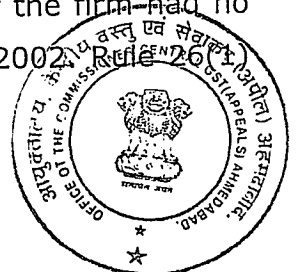
In view of the foregoing, the penalty imposed on M/s. Raghuvir Metal Industries is reduced to Rs. 20,000/- only.

Shri Vagharam Annaramji Chowdhary

11. Shri Vagharam Annaramji Chowdhary, Partner of M/s. Sarvottam Steel Industries has relied upon the judgement of National Impex [2016(335) ELT 567 (Tri-Ahd)] which relied upon the judgement of M/s Pravin N Shah [2014(305) ELT 480 Guj], to contend that no penalty is imposable upon a partner in case penalty is imposed upon the partnership firm. Ongoing through the judgement of the Hon'ble Gujarat High Court in the case of Pravin Shah, I find that the Hon'ble Gujarat High Court in the said judgement held as follows:

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 appellant and against the department. The appeal is allowed. Penalty imposed on the appellant is set aside.*

11.1 As is evident, penalty was not imposed under Rule 26 in the aforementioned case by the Hon'ble High Court on the ground that the partner of the firm had no specific role as provided by Rule 26 of the Central Excise Rules, 2002. Rule 26 of Central Excise Rules, 2002, states as follows:



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.

11.2 Now, the role of the appellant is mentioned in the para 182 of the impugned OIO. He was actively involved in the manufacture and clearance of excisable goods without accounting for the same in the books of accounts, without issuing the invoices and without payment of duty. He made all the transactions in cash. As such, he concerned himself in acquiring the possession of, depositing, keeping, selling of, and dealt with, excisable goods which he knew or had reason to believe were liable to confiscation under Central Excise Act or Rules made there under. Hence I reject the appeal filed by the appellant and the penalty imposed on Shri Vagharam Annaramji Chowdhary, Partner of M/s. Sarvottam Steel Industries vide the impugned OIO is upheld.

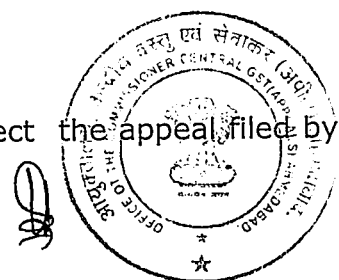
M/s. Shri Ram Sales Corporation

12. The contention raised by M/s. Shri Ram Sales Corporation, Rajkot, is already mentioned supra. However, on going through the notice and OIO I find that the appellant had purchased the goods from M/s. Sarvottam Steel Industries, Ahmedabad without invoices and without payment of Central Excise duty. They also purchased the goods from the said appellant in the name of Minaxi, Shri Hasubhai or Hasubhai Patel, Rajkot. They made all the transactions in cash. As such their act concerned themselves in acquiring the possession of, depositing, keeping, and dealing with, excisable goods which they knew or had reason to believe were liable to confiscation under Central Excise Act or Rules made there under. Therefore, I hold that penalty under Rule 26 of the Central Excise Rules, 2002 imposed on Shri Ram Sales Corporation is correct and the same is upheld.

M/s Alpesh Roadways

13. As far as the contention raised by M/s Alpesh Roadways is concerned, I find that the appellant made the transaction for freight of such transportation in cash. They were found to have acquired possession of and transportation of excisable goods, without a valid invoice, which they knew and had reason to believe were liable to confiscation under the Central Excise Act, 1944 and the rules made thereunder. In view of the foregoing, I find that the adjudicating authority has correctly imposed penalty on the appellant under Rule 26 of the Central Excise Rules, 2002 and the same is upheld.

14. In view of the facts and discussions hereinabove, I reject the appeal filed by



the appellants and uphold the impugned order.

15. अपीलकर्ता द्वारा दर्ज की गई अपील का निपटारा उपरोक्त तरीके से किया जाता है।
15. The appeal filed by the appellants stand disposed off in above terms.

उमाशंकर

(उमा शंकर)

केन्द्रीय कर आयुक्त (अपील्स)

ATTESTED

R.R. Patel

(R.R. PATEL)
SUPERINTENDENT (APPEAL),
CENTRAL TAX, AHMEDABAD.

To,

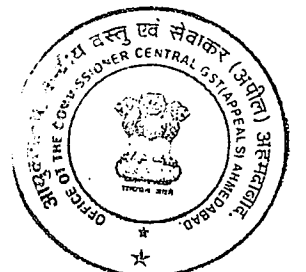
1	M/s. Sarvottam Steel Industries, Plot No. 54/2/P, Phase I, GIDC, Vatva, Ahmedabad.
2	M/s. Raghuvir Metal Industries, Plot No.21, Atlas Industrial Area, Opp. Hotel Krishna park, Gondal Road, Kotharia, Rajkot
3	Shri Vagharam Annaramji chowdhary, Partner of M/s. Sarvottam Steel Industries, Plot No. 54/2/P, Phase I, GIDC, Vatva, Ahmedabad
4	M/s Shri Ram Sales Corporation, Rajkot, 2 Amar Nagar, Street No.1, Movdi Plot, Rajkot
5	M/s. Alpesh Roadways , 18, Devdarshan Complex, Beside Annapurna Restaurant, Vatva, Ahmedabad

Copy to:

- The Chief Commissioner, Central Tax, Ahmedabad South.
The Principal Commissioner, Ahmedabad- South.
The Asst. Commissioner, Ahmedabad- South.
The Additional Commissioner, Ahmedabad- South.

Guard File.

✓ P.A. File.



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