



<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद – उत्तर, कस्टम हाँउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		 <p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
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निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./F.No.V.87/15-83/OA/2013

आदेश की तारीख/Date of Order:- 06.03.2018

जारी करने की तारीख/Date of Issue :- 12.03.2018

द्वारा पारित/Passed by:-

आर. एम. गौतम / *R.M.Gautam*

अपर आयुक्त / *Additional Commissioner*

मूल आदेश संख्या / Order-In-Original No. 07/ADC/2018/RMG

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रु .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(3) उक्त अपील की प्रति।

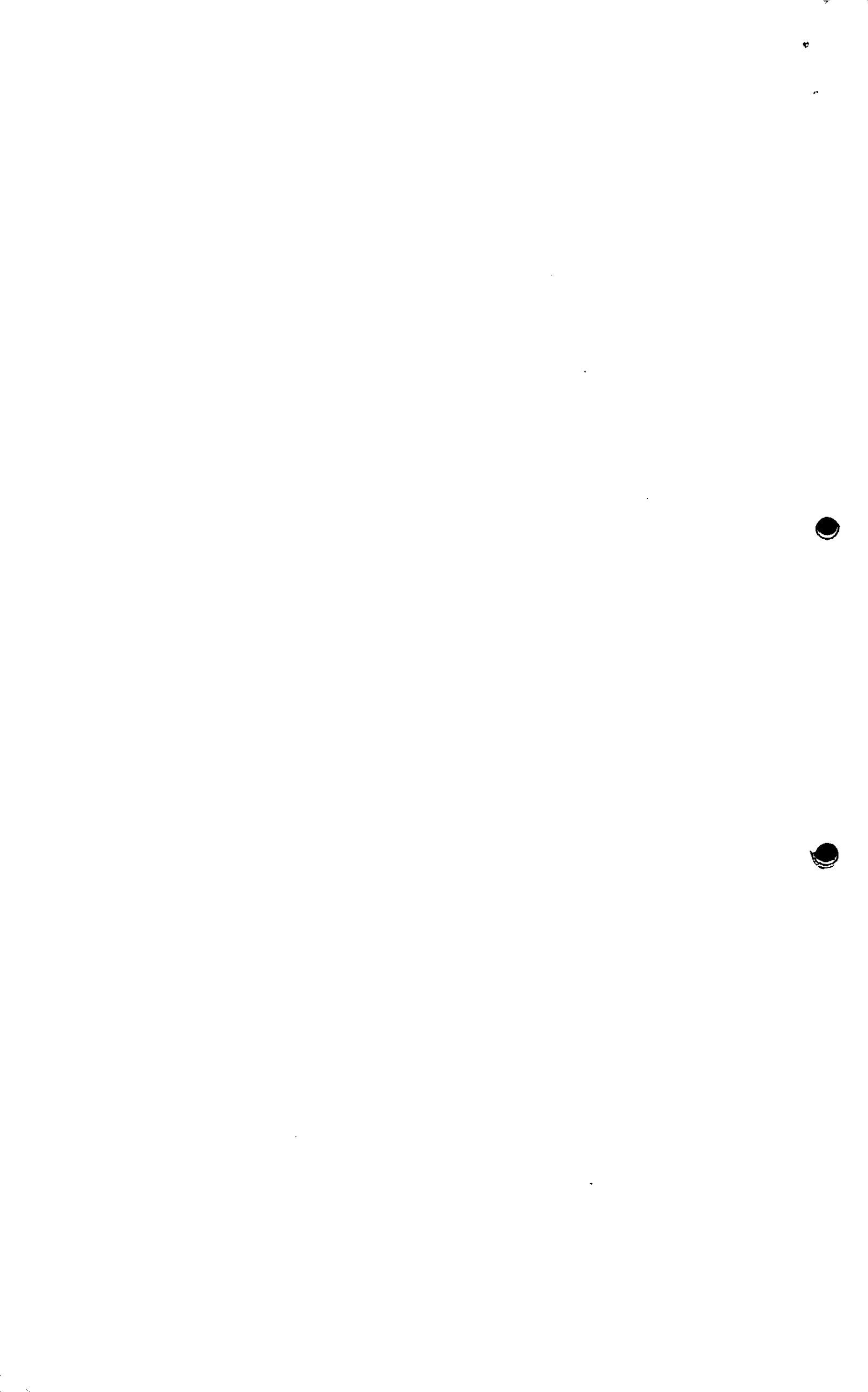
(4) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रु) 2.00 .दो रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(3) Copy of accompanied Appeal.

(4) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

विषय: -कारण बताओ सूचना/Show Cause Notice F.No. V.87/15-83/OA/2013 dated 23.03.2015 issued to M/s. Rohan BRC Gas Equipment Pvt. Ltd, 5 Ashwamegh Industrial Estate , Changodar, ta- Sanand, Ahmedabad.



Brief facts of the case:

On the basis of an investigation carried out against M/s. Rohan BRC Gas Equipments Pvt. Ltd. (engaged in the manufacture of CNG/LPG assembly kits and having Central Excise Registration No. AAECR2367NXM001 dated 05.01.2010, hereinafter referred to as "the assessee") who were found clearing the same goods with their brand name to various buyers/dealers without payment of Central Excise duty under the guise of trading activity, a show cause notice bearing no. V.87/15-83/OA/2013 dated 23.03.2015 was issued to M/s. Rohan BRC Gas Equipment Pvt. Ltd. to show cause as to why;

- (i) The activity of assembly of CNG/LPG kit done by them for clearance to dealers should not be held as manufacture and the CNG/LPG kit be classified Heading 84.09 of the First Schedule to the Central Excise Tariff Act, 1985.
- (ii) Central Excise duty amounting to Rs.43,03,858/- in respect of clearance of said final products made to various dealers in the above manner during the year 2010-11 & 2011-12 should not be recovered from them under Section 11A(1) and Section 11A(4) of the Central Excise Act 1944; since an amount of duty of Rs.13,12,857/- is already paid towards duty liability vide Challan No. 00007 dated 16.09.2010 and Challan No. 00006 dated 20.10.2011, why the same should not be appropriated and adjusted against the demand.
- (iii) Interest at the applicable rate should not be recovered from the said assessee under Section 11AB and Section 11 AA of the Central Excise Act 1944; interest of Rs.52,781/- already paid should not be adjusted/ appropriated against the interest amount recoverable from them.
- (iv) Penalty should not be imposed on them under Section 11AC of Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules 2002.
- (v) The goods valued at Rs.3,34,51,687/- cleared by them to various dealers without payment of duty should not be confiscated under Rule 25 of the Central Excise Rules 2002.

2. Shri Upendrabhai Chhanalal Shah, authorised signatory of the assessee, was also called upon vide aforesaid show cause notice to show cause as to why penalty under Rule 26 of the Central Excise Rules 2002, should not be imposed upon him.

3. The said SCN was adjudicated vide OIO No.05/ADC/2016/DSN dated 17.5.2016 wherein the adjudicating authority held that the activity of assembly of CNG/LPG Gas Conversion Kit cleared to Dealers / Traders amounts to manufacture and the CNG/LPG Gas Conversion Kit is classified under Heading 84.09 of the First Schedule to the Central Excise Tariff Act, 1985. He confirmed the demand of Rs.43,03,858/- along with interest after appropriating the payments made by the assessee. Penalty of Rs. 38,08,521/- was

also imposed under Section 11AC on the assessee and penalty of Rs.1,00,000/- was imposed on Shri Upendrabhai Chhanalal Shah under Rule 26 of the CER, 2002.

4. Feeling aggrieved by the aforesaid OIO dated 17.5.2016, the assessee filed an appeal before the Commissioner (A) who vide OIA No.AHM/EXCUS-002-APP-044-045-17-18 dated 28.08.2017 set-aside the OIO and remanded the matter to the original adjudicating authority to pass a fresh order after examining following:-

- Whether the appellant is correct when he states that only 12 parts were supplied to dealers/traders and not the whole kit as supplied to OEMs;
- If yes, whether with these 12 parts, the purchaser/dealer/trader would be able to assemble the said parts into LPG/CNG conversion kit i.e. whether it had the essential character of the complete or finished article.
- to examine the claim of the appellant on the benefit of cum duty, limitation, penalty etc while passing the order. He also directed the appellant to cooperate with the adjudicating authority and produce all the documentary evidences as required by the adjudicating authority.

5. In view of above Order-in-Appeal, I take up this case for a decision. It is noticed that the assessee, vide letter dated 27.07.2015 had contested the original demand on following grounds:-

- Manufacturing excisable goods like LPG/CNG Kits (i.e. complete CNG/LPG Gas Conversion Kit) and clearing them under their brand on payment of Central Excise duty to various original equipment manufacturers (OEM) as per the specifications and standards of such buyers and also clearing certain goods to various dealers without payment of duty are two different types of business activities and therefore no liability of excise duty could be fastened for trading business because they have sold complete CNG/LPG Gas Conversion Kits under their brand to OEMs on payment of excise duties. A complete CNG/LPG Gas Conversion kit comprised of more than 20 different components which were all put together in one box, though in unassembled condition, and that they sold them as a complete kit under their brand whereas in case of trading only a few bought out parts/components like valves, accessories, tank etc. were sold without any brand; but this material difference between two types of business undertaken by them is not taken into consideration while raising demand of excise duty on the trading business. It is clear from the record of this case that trading activity involved re-sale of only a small number of parts and components, and therefore trading activity was not in the nature of manufacturing a complete CNG/LPG Gas conversion kit which would be straightaway fitted into a motor vehicle. Moreover, the Show Cause Notice issued in March, 2015 for F.Y. 2010-11 and 2011-12 is barred by limitation also inasmuch as there is no suppression of facts on their

part regarding the trading business whereas the details of their trading business have been specifically disclosed to the Range and Divisional officers by them in past also; and therefore invocation of extended period of limitation under Section 11A of the said Act is also unjustified and unauthorized.

- In all cases where machinery such as Lathe, CNG machine, Forklifts, hexo / grinder, hand held tools, profile projector etc. were used and produced a complete gas conversion kit and sold it as such i.e. all the required parts and components assembled and sold in a box bearing their brand, they have followed the Central Excise procedure of recording all such goods in RG-1, and delivering them to the OEM buyers under Central Excise invoices on payment of excise duty on the transaction value. They rely upon extracts of their RG-1 and a few specimen invoices for production and clearance of complete CNG/LPG Gas Conversion Kits at the time of hearing of the present Show Cause Notice. They further submitted that the trading activity has been materially and substantially different, and the trading activity was also undertaken by them from a separately demarcated premises where none of the above machineries and equipments were used by them.
- They further submitted that on page 3 of panchnama dated 24.4.2012 made at their premises, it is recorded in the first paragraph that the trading activity was undertaken from another portion of the shed for which there was a separate entry, that no activity of assembly of parts was undertaken from that premises and no tools or machineries were installed or functioning in that particular area. It is also recorded in para 2 on page 3 of this panchnama that their representative Shri Upendra Shah informed the investigating officers on being specifically asked that the parts/components purchased and imported by them were re-packed in corrugated box and sold/dispatched in trading activity. Thus, the basis on which the present Show Cause Notice is issued to them that production of complete CNG/LPG Gas Conversion Kits sold to OEMs under their brand and the trading activity were the same is not correct or true.
- It is not true, nor is it established by the Revenue in this case, that in the trading business they were assembling a complete CNG/LPG Gas Conversion Kit and such Conversion Kit comprising of the parts and components for being fitted into a motor vehicle as a complete kit were sold to the dealers. The bills issued by them for the trading activity also bear out that only a certain parts and components

were sold to the dealers as a trading business, and not a complete gas conversion kit.

- They had made disclosure about trading business. In June, 2011, they had brought to the notice of the Assistant Commissioner of Central Excise, Division-IV as well as the Superintendent of Central Excise, Range-IV, Changodar that they would clear/supply/sell parts of CNG/LPG conversion kit, and they had also referred to the parts that were to be sold to local/regional buyers without payment of duty since they were not a kit. They had also referred to the total number of parts as well as their description required for a complete CNG/LPG Kit in the letter dated 10.6.2011 submitted before the above referred Range and Divisional officers. They had also informed the officers that they were to maintain separate records and inventory for selling kits to OEMs and the parts sold to local buyers. Copies of this letter dated 10.6.2011 bearing acknowledgement of the offices of the Assistant Commissioner of Central Excise and the Inspector of Central Excise have been enclosed. As is recorded in the panchnama dated 24.04.2012 also, the parts and components purchased by them for trading business are always stored separately in a shed of their factory where a separate entry is also provided; and the billing of trading business has also been separately made and maintained by them.
- In this view of the matter, they submitted that a few factual errors have crept in during the enquiry and investigation conducted by the Revenue officers that has now resulted in the present Show Cause Notice. They may therefore clarify such errors because it appears that a wrong impression is formed on part of the investigating officers because of such errors that there was no difference between the business of production and sale of complete kits to OEMs on payment of duty and the trading business of a few parts and components by them.
- They again referred to para 3 of page 2 of panchnama dated 24.4.2012 where details of process of assembly of various components for making a complete CNG/LPG Gas Conversion Kit is recorded. On the subsequent page of the said panchnama, trading business conducted from another portion of the said shed involving a separate entry is also recorded. In these two paras of the panchnama, the distinction between assembly of a complete conversion kit and sale thereof including the number of parts and components required for this manufacturing activity along with the machinery and equipment required on one hand, and the trading activity not involving any such requirements on the other hand is

recorded. When Shri Upendra Shah was specifically asked by the officers whether the same processes i.e. assembly on one side of the shed and trading as explained in the panchnama were carried out by M/s. Rohan Automotive Equipments Pvt. Ltd. also, Shri Shah has clarified that the same activities were carried out by M/s. Rohan Automotive Equipments Pvt. Ltd. i.e. parts/components purchased/imported by them were repacked in corrugated box and sold/dispached. This answer of Shri Upendra Shah is apparently with regard to the activities that M/s. Rohan Automotive Equipments Pvt. Ltd. had undertaken earlier, but it comes out not only from this answer but also from two above referred paragraphs of panchnama dated 24.4.2012 referred to by them hereinabove that the trading activity did not involve assembly of parts for making a complete LPG/CNG Gas Conversion Kit, and also that no machinery or equipment were used for trading activity whereas they had to be used for production of a complete Conversion Kit in the factory.

- Under their covering letter No. RBRC/153/ 2012/1 dated 23.5.2012, they have submitted the details of sales while clarifying that they have not sold complete kits in trading activities from 10.6.2011 onwards. They have referred to their letter dated 10.6.2011 also while submitting the details of sales, and they have also informed the Superintendent of Central Excise about the payments of Rs. 6,91,112/- and Rs. 6,74,526/- as excise duty on the automobile conversion kits on which excise duty was not discharged in past. A copy of this letter dated 23.5.2012 with the enclosures thereto is enclosed. In this regard, they clarified that the figures shown as assessable value in the table under para 3.1 of the Show Cause Notice is not the sale price of automobile conversion kit i.e. a complete CNG/LPG Gas Conversion Kit sold by them, but it is the total sale price of parts and components sold by them by way of trading business. This fact is even otherwise taken note of at para 3.3 of the Show Cause Notice that they have not sold complete kit in trading activities during the period in question.
- After Rohan Automotive Equipments Pvt. Ltd. discontinued their business activities and their company started manufacturing as well as trading business, they have informed the Range and Divisional officers in June, 2011 that they had decided to discontinue the selling practice followed till then, and they have also informed the proper Central Excise officers about the trading business that they commenced around June, 2011. Since excise duty on certain gas conversion kit sold till then remained to be discharged, they have deposited Rs.6,91,112/- and Rs. 6,74,526/- under challans No. 7 dated 16.9.2010 and No. 6 dated 20.10.2011, respectively; and they have informed the Range Superintendent vide their letter

dated 23.5.2012 also that after 10.6.2011 they had not sold complete kit in trading activities and hence there was no further duty payable. No such complete kit has ever been sold in trading business from June, 2011 onwards.

- Thus the issue is wrongly raised in the Show Cause Notice that traded goods were in the nature of excisable goods classifiable under Heading 84.09 of the Central Excise Tariff. Inasmuch as there is no assembly or assembling of various parts and components by them in trading business and it is also wrong and incorrect to suggest that a few parts or components traded by them had acquired status of finished or complete gas conversion kit. There is no evidence brought on record by the Revenue for concluding that they were assembling any parts or components in trading business, nor is there any evidence led by the Revenue to show that a few parts or components sold by them as trading activity were in the nature of excisable goods that had acquired essential character of a complete or fully finished gas conversion kit.
- They submitted that the sale of parts do not fall under "manufacture as per the legal position. They are not undertaking any processing or process on the parts imported and also purchased by them from the local market. Procuring various parts and components and selling them under a particular description is not "manufacture" in ordinary parlance. In a similar case of Messrs XI Telecom Ltd. V/s Superintendent of Central Excise, Hyderabad, the Andhra Pradesh High Court decided in the judgement reported in 1999 (105) ELT 263 (AP) that putting together 15 different items in the kit and selling the same under the description of "cable jointing kit" was not "manufacture" because except that the kit had a distinct name, the other tests laid down in various judgments of the Supreme Court to decide whether any manufacture had taken place or not, were not satisfied. There are a number of decisions rendered by the Appellate Tribunal in various cases like Dalmia Industries Ltd. reported in 1999 (112) ELT 305, Bajaj Auto Ltd. reported in 2000 (120) ELT 668, TI Diamond Chain Ltd. reported in 2000 (126) ELT 790 etc. holding that buying various articles and selling them in a combined pack under a brand or under a specific name/description was not "manufacture" and levy of excise duty was not attracted in such trading activities. Their activities, which are only of importing and purchasing various parts of LPG/CNG conversion kits and selling them as auto conversion kit after putting such parts in one box with tank and tank's stand being supplied separately is also not "manufacture" because no processing on the purchased parts is undertaken by them and selling of such parts under a specific description would by itself not give rise to the levy of excise duty on this activity.

- In the present case also, the sales made by them under the nomenclature of CNG/LPG Kit are nothing but various parts or components put together for purpose of sale, but without any process undertaken thereon by them. The method of packing or method of delivering these goods to their dealers is also relevant for deciding whether they were manufacturing any excisable goods or not and therefore the method of delivering the goods including packing used by them may also be briefly referred to. The box used by them to pack therein various parts of LPG/CNG kits is a small box which is used for selling and supplying such parts whereas auto tank and tank's stand are supplied separately.
- It is not the case of the Revenue that they have undertaken any process or processes on any of these parts procured from local and foreign suppliers. In the Show Cause Notice also, no allegation is leveled against them that they had subjected any of these parts to any process or that they had fitted these parts with one another and a fully assembled CNG/LPG Kit was removed from their premises. All the parts procured by them are packed in a box though certain parts like auto tank and tank's stand are supplied separately (and not in the box with other parts), and all the parts are also not always sold and supplied by them because various dealers purchased from them only few of the above parts whereas the other parts are procured by them on their own. In this context, the judgement of the Hon'ble Andhra Pradesh High Court in case of M/s. XI Telecom Ltd. (supra) is the relevant authority for holding that putting together different items or parts in the kit and selling them under a particular description was not manufacture. They also referred to one more decision of the Appellate Tribunal in case of Indian Meditronics Pvt. Ltd. 2006 (199) ELT 347 which was a case where parts like Tubing, Connectors, Blood Filter, Oxygen Filter etc. were imported and assembled for using as accessories of Heart Lung Machine, and even processes like cutting, wrapping, joining and sterilizing were also undertaken by the concerned person. However, the Appellate Tribunal has held that no new product emerged as a result of such processes and the activity of procuring various parts and components and putting them together even after the above processes for using them with a Heart-Lung Machine did not constitute "manufacture" of any excisable goods. In another case of M/s. Neptune Equipment Pvt. Ltd. being Final Order No. A/958-960/WZB/AHD/2011, the CESTAT, Ahmedabad has considered a similar controversy with regard to a product sold under the nomenclature "Computerised Wheel Aligner". Various parts like Personal Computers loaded with software, Turn Tables, Censor Holders, Censor with cables and Trolley were

procured from the open market and they were put in one packing and sold under a single invoice under description of Computerised Wheel Aligner. The CESTAT has considered the concept of "manufacture" while deciding this case and has also referred to the judgment of the Hon'ble Andhra Pradesh High Court in case of XI Telecom Ltd. (supra) and the decision of the Tribunal itself in case of India Meditronics Pvt. Ltd. (supra) and held that no activity was done by the said appellant in their factory and as such there was no manufacture in respect of various bought out goods cleared under one invoice.

- The Revenue has also not established that any new product with distinctive name, use or characteristics emerged by their activity of procuring the above parts from suppliers and selling them in the above referred manner. No evidence is also adduced by the Revenue to establish that such product namely parts of CNG/LPG Kit was known and identified as a different commodity in the common parlance i.e. among the people purchasing, selling and using the same. This test required to be satisfied for establishing that an excisable goods known in the market as such was produced by a person is also not addressed to by the Revenue in this case.
- None of the provisions referred to in para 4.1, 4.2 and 4.3 of the Show Cause Notice has any bearing to the core issue about manufacture of excisable goods involved in the present case. They also referred to a judgement of the Hon'ble Supreme Court in case of Commissioner of Customs V/s. Sony India Ltd. 2008 (231) ELT 385 (SC) wherein the Hon'ble Supreme Court has considered Rule 2(a) of the Rules for interpretation of Tariff and held that this rule would be applicable only and only if all the components which were intended to make a final product would have to be presented at the same time for customs clearance. It is not the case of the Revenue and no evidence is also led by the Revenue to establish that the parts or components sold by them to their dealers in trading business were adequate in number to assemble a complete gas conversion kit. As trading activities, which are only commercial or business transactions not involving any manufacture do not attract levy of excise duty, the demand of excise duty made against them does not hold any water.
- The demand of duty is for F.Y. 2010-11 and 2011-12 whereas the Show Cause Notice is issued in March, 2015 which is time barred. It is an undisputable position of fact that they have informed the Range and Divisional officers about their trading activity, and their letters dated 10.6.2011 and 23.5.2012 bear out this factual position. Secondly, they have not assembled the parts or components in trading business, and therefore invocation of extended period of limitation on

the basis that they assembled in their premises the trading goods is also incorrect and invalid. Under the circumstances, there is no justification in invoking extended period of limitation against them in this case. Even in cases where certain information was not disclosed as the assessee was under a bonafide impression that it was not duty bound to disclose such information, it would not be a case of suppression of facts as held by the Hon'ble Supreme Court in the landmark cases of Padmini Products and Chemphar Drugs & Liniments reported in 1989 (43) ELT 195 (SC) and 1989 (40) ELT 276 (SC) respectively.

- Hon'ble Supreme Court in the case of Continental Foundation Jt. Venture V/s CCE, Chandigarh reported in 2007 (216) ELT 177 (SC) held that with regard to the proviso to Section 11A of the Central Excise Act, 1944, that mere omission to give correct information was not suppression of facts unless it was deliberate and to stop the payment of duty. In the previous case like Messrs Jaiprakash Industries Ltd. reported in 2002 (146) ELT 481 (SC) also, the Hon'ble Supreme Court has held that a bonafide doubt as to non-dutiability of goods was sufficient for the assessee to challenge the demand on the point of limitation. Thus, it is a totally settled legal position that extended period of limitation by invoking proviso to the main Section for demanding duty or tax beyond the normal period of limitation would be justified only when the assessee knew about the duty/tax liability and still however, he did not pay the tax and deliberately avoided such payment, and it was only in such a situation where suppression of facts on part of the assessee could be justifiably alleged by the Revenue. However, mere failure in giving correct information would not be a case where the Revenue can invoke extended period of limitation. There being no contravention by way of suppression of facts with intent to evade payment of Central Excise duty on their part, the invocation of extended period of limitation against them is illegal and unjustified in the facts of this case.
- The demand of Rs. 43,03,858/- is even otherwise excessive because this demand is raised on a total sum of Rs. 3,34,51,687/- which is not the "value" of the goods. This amount has to be considered as cum-duty price, and the amount of duty payable shall have to be abated from such price in view of the scheme of Section 4 of the Central Excise Act. Section 4 of the Act has also not been considered by the Department while demanding differential duty on the differential price. Section 4 of the Act provides that when no duty was paid on any goods and the duty was demanded after clearance of the goods from the factory, then the money recovered by the manufacturer from the buyer would have to be considered as cum-duty price as the manufacturer would not be in a position to

recover any amount as excise duty from its customers if duty was paid or payable after transaction of sale was concluded and the money for sale of the goods was also recovered by the manufacturer. The same principle would apply even when some duty was paid by the manufacturer at the time of removal of the goods from the factory and later on differential duty was paid or payable by the manufacturer for the same transactions.

- The Larger Bench of the CEGAT in the case of Sri Chakra Tyres Vs. CCE (Madras) reported in 1999 (108) ELT 361 has held that Section 4 would apply even in cases where the goods were removed without any payment of duty. The applicability of Section 4 providing for abatement of amount of excise duty from the price of the goods, is confirmed by the Larger Bench of the CEGAT in this case. They also relied the case of Dugar Tetenal India Ltd. reported in 2008 (224) ELT 180 (SC). On above referred principle of valuation, the amount of Rs.35,52,491/- is not recoverable even otherwise.
- The said assessee submitted that the goods valued at Rs. 3,34,51,687/- traded by them are proposed to be confiscated under Rule 25 of the Central Excise Rules, but these goods have not been seized nor released provisionally. Therefore, no order regarding confiscation of the goods not seized at any point of time could be made. It is held by the Larger Bench of the Appellate Tribunal in case of Shiv Kripa Ispat Pvt. Ltd. 2009 (235) ELT 623 that order for confiscation of goods and for payment of fine in lieu of such confiscation cannot be made when there was no seizure of any goods. In case of Manjula Showa Ltd. 2008 (227) ELT 330 also, the Appellate Tribunal has taken the same view. This view has however been upheld also by the Hon'ble Punjab & Haryana High Court and also by Hon'ble Bombay High Court. Therefore, the proposal to confiscate the products sold by them during the above period does not hold any water and hence deserves to be vacated at once in the interest of justice.
- The said assessee submitted that the proposal for imposition of penalty invoking the provisions of Section 11AC of the Central Excise Act, 1944 read with Rule 25 of the Central Excise Rules, 2002 also deserves to be vacated as there is no justification in demand of duty leveled against them in this case. The present one is not a case where they had committed contravention of any of the Rules with an intent to evade payment of duty. There is no violation of any nature committed by them. They have also not committed breach of any Rules with an intent to evade payment of duty. In this view of the matter, no penalty or interest could be justifiably imposed on them in law.

- The proposal to charge interest under section 11AB/11 AA of the Central Excise Act, 1944 is also without any authority in law inasmuch as the provision of section 11 AB is not attracted in the instant case. Section 11 AB provides for interest in addition to duty where any duty of excise has not been levied or paid or has been short levied or short paid or erroneously refunded with an intent to evade payment duty. In the instant case, there is no short levy or short payment or on-levy or non-payment of any excise duty. Therefore, the proposal to charge interest under Section 11AB of the Act is also not maintainable in the present case.
- In the above premises, the said assessee submitted that the proposals leveled in the show cause notice are unsustainable in facts as well as in law, and therefore, requested to withdraw all these proposals as regards demand of duty, interest, penalty and confiscation of goods. They also requested to give an opportunity of personal hearing before passing any final order on this show cause notice, in the interest of justice.
- Shri Upendrabhai Chhanalal Shah, Manager (Accounts) and authorized signatory of the said assessee vide letter dated 27.07.2015 denied the allegations leveled against him in the show cause notice and submitted that the proposal to impose penalty on him under Rule 26 of CER, 2002 is not sustainable. He submitted that Rule 26 of CER, 2002 is absolutely pari-materia to erstwhile Rule 209A of Central Excise Rules, 1944. He relied on the decision of the CEGAT in the case of M/s. Standard Pencil reported in 1996 (86) ELT 245.
- He submitted that the notice does not state as to how he was aware and concerned himself in removing, transporting, depositing, keeping, concealing, selling of and dealt with excisable goods which he knew and had reason to believe were liable for confiscation, nor any evidence is adduced in support of such allegations. A person could not be engaged in all the activities like removing, transporting, depositing, keeping, concealing, selling of, and dealing with the excisable goods. Thus the proposal to impose penalty on him being an employee of the said assessee is unjustified and unwarranted. He referred to the cases of Vinod Kumar V/s. Commissioner of Central Excise, Delhi reported in 2006 (199) ELT 705 (Tri. – Del) and R.K. Ispat Udyog reported in 2007 (211) ELT 460 (Tri.-Del) and Order No. A/835/WZB/AHD/09 dated 20.04.2009 / 24.4.2009 of Hon'ble CESTAT in the case of Shri Hitesh Kumar Patel V/s. Commissioner of Central Excise, Mumbai. Thus the show cause notice deserves to be dropped at once in the interest of justice. He requested that an opportunity of personal

hearing may be given before passing any final order against him in these proceedings, in the interest of justice.

6. In light of above remand order dated 28.8.2017 and in the interest of natural justice, personal hearing was granted to the assessee. Shri Amal P.Dave, Advocate appeared before me on 07.02.2018 and submitted a copy of letter dated 10.6.2011 and sought one week's time to submit copy of invoices and all relevant documents to support their claim that the goods traded were not entire gas kit.

6.1 Accordingly, Shri. Paresh M. Dave, Advocate vide letter dated 14/02/2018 submitted a Chartered Engineers's certificate dated 14.02.2018, Catalogue of the company, a data showing details of parts supplied and copies of relevant invoices. Shri. Shah further stated through this letter that on perusal of the documents forwarded it is very clear that a manufactured gas kit contains various components as mentioned in the Chartered Engineers' certificate and his client had only supplied certain parts/components of such gas kits and not all the parts required to assemble complete kits and argued that since only certain parts have been supplied and not the complete kits, the demand of duty does not survive.

Discussion and Findings:

7. I have carefully gone through the subject show cause notice, submissions made by both the noticees in their written reply as well as during the course of Personal Hearing and documents / evidences submitted vide letter dated 14.2.2018. I have also perused the Order-in-Appeal No. AHM-EXCUS-002-APP-044-045-17-18 dated 28.08.2017 of Commissioner (Appeals), Ahmedabad; based on the directions given there under this order is being issued.

8. I have been directed by the Commissioner (Appeals) to decide following issues;
- Whether the appellant is correct when he states that only 12 parts were supplied to dealers/traders and not the whole kit as supplied to OEMs;
 - If yes, whether with these 12 parts, the purchaser/dealer/trader would be able to assemble the said parts into LPG/CNG conversion kit i.e. whether it had the essential character of the complete or finished article.
 - Also to examine the claim of the appellant on the benefit of cum duty, limitation, penalty etc.

8.1. Thus the limited issue in the present proceedings, as per the directives of the Commissioner (Appeals), is to ascertain whether the assessee supplied only 12 parts of LPG/CNG Conversion kit to traders/dealers by way of trading, as contended by the assessee. If the verification report is affirmative only, examination of next point i.e. whether the so called 12 parts said to have been supplied to their dealers/traders had the essential character of a complete LPG/CNG conversion kit. Besides, assessee's contention of SCN is hit by limitation is also to be examined. If duty liability is established on the part of the assessee, their plea for getting the benefit of cum duty is to be examined and the applicability of penal provisions to the assessee and Shri. Upendrabhai Shah, Authorised signatory is also to be checked up. Thus it would be seen that the key verification is the authenticity of the assessee's claim of non-supply of whole LPG/CNG Conversion Kit to their dealers/traders by way of trading activity.

9. The main contention of the assessee is that their trading business does not involve assembly of parts for making a complete LPG/CNG Gas conversion kit as the parts / components purchased/imported were merely repacked in corrugated box and sold; that not all parts /components required to assemble a complete Gas conversion kit was sold. The real bone of the contention is that complete kit sold by them on payment of duty comprised of 20 different components while the goods supplied to dealers/traders by way of trading activity without payment of duty contained only 12 parts. I find that my predecessor vide his Order-in-Original No. 5/ADC/2016-DSN dated 17.05.2016 had examined the point and at para 31.3 observed that evidences on record clearly establish that the CNG/LPG Automobile Conversion Kits supplied to dealers /traders were complete Kits.

10. Now, as per the directives of the Appellate Commissioner, assessee produced documents such as Chartered Engineer's certificate, copy of relevant invoices etc. in order to substantiate their argument that only some parts/components of Kit was supplied to dealers/traders without payment of duty and not a complete Kit. Hence a thorough verification of these documents is required.

11. Firstly, I have gone through the Chartered Engineer's (Sh. Deepak Shah) Certificate dated 14.2.2018, wherein he has stated that total 24 components (i.e. Gas filler valve, Embedding box, Copper Pipe 8mm, Multi Valve, LPG Tank, Vapour Box, Tank Stand, Duct Hoses & Pipe, Copper Pipe Roll-6mm/High Pressure Pipe 6mm, Gas Solenoid Valve, Reducer, Air Gas Mixture, Petrol Solenoid Valve, Changeover Switch, Sensor, Water Pipe, 3 Core Wire for Multivalve Harness, Nuts Bolts, Wiring Harness, Duct

Nozzles, Line Clamps & Screws, Rubber & Flexible Hoses, Power Screw, Nuts & Bolts) when assembled, installed & commissioned make complete CNG/LPG Conversion Kit to function as a kit in the vehicle. Further he also certified that if all the above mentioned components were not supplied, then a complete Kit is not supplied but, it is supply of only a few components.

11.1 This certificate specifies the function and role of each components/parts, specified in the certificate, in the making and functioning of a Gas Automobile Conversion Kit. In the present case, moot point is to be find out whether the appellant is correct in saying that only 12 parts were supplied to dealers/traders and not the whole kit as supplied to OEMs. The certificate gives an idea about the essential components of a complete Kit. Thus, it is to be checked what type of goods were sold to their dealers/traders by way of trading activity.

12. To know the status of the impugned goods sold to their dealers/traders, the documents available with me are the copy of the invoices produced by their Advocate on 15/2/2018, which are placed on records.

12.1 However on going through the invoices submitted by the assessee (scanned images of sample invoices produced below, I find that description of goods in their retail invoices mention (1) "CNG Automobile Conversion Kit-MPFI", (2) "CNG Automobile Conversion Kit -MPFI (E)", (3) "CNG Automobile Conversion Kit -MPFI" , (4) "CNG Automobile Conversion Kit -MPFI (Sequent)", (5) "4000000929-LPG Kit", (6) "LPG Tank (Cylinder)", (7) "LPG Automobile Conversion Kit MPFI (R)", (8) "LPG Automobile Conversion Kit MPFI (Economy)", (9) "LPG Automobile Conversion Kit - Carburetor" with "Stores & Spares-B", (10) "Lambda Feed Back System-BLG4098", (11) "Carburetor Switch (Rutu)", "Reducer Valve (AT90E)", (12) "MPFI Switch (Mini) "Vaporiser Parts Water Elbow Ring-LPG-OR202050-60", (13) "Vaporiser Parts Rubber Pad-LPG-GO203111" which clearly establish that the assessee cleared entire CNG/LPG Kit without payment of excise duty to their dealers/traders under the guise of trading activity as these are the similar goods cleared to OEMs on payment of duty . Thus the argument that the entire CNG/LPG kit was not supplied to their dealers was mere an eyewash to mis-guide the department. The sample copy of some invoices is reproduced below:-

RETAIL INVOICE

Rohan BRC Gas Equipment Pvt. Ltd.
 6, Ashwamegh Industrial Estate,
 Changodar Village,
 Ahmedabad - 382213
 E-Mail : info@rohanbrc.com

Invoice No.
 10-11-007
 Delivery Note
 4923010-11
 Supplier Ref.

Dated
 22-May-2010
 Mode/Terms of Payment
 Credit
 Other Reference No.

Buyer
 Hindustan Motors Ltd. - Kolkata
 Hindustan Motors Ltd. - LPG Division
 Hindmotor,
 Hooghly (W.B.) - 712233
 Ph. 93308 83207

Buyer's Order No.
 25388
 Dispatch Document No
 Despatched through
 BY Train
 Terms of Delivery

Dated
 21-May-2010
 Delivery Note Date
 22-May-2010
 Destination
 Kolkata

Sl. No.	Description of Goods	Quantity	Rate	per	Amount
1	4000000928 - LPG KIT	15 Nos.	29,788.30	Nos.	4,468,248.50
2	4074700134 - LPG Tank (Cylinder)	16 Nos.	2,095.70	Nos.	31,456.60
					4,53,296.90
	Less: CST 2% - On Sales - HO Round Off - Brcan			2 %	9,265.20 (-9,265.20)
Total					50 Nos. ₹ 4, 2, 126.00

Amount Chargeable (In words)
 Indian Rupees Four Lakh Seventy Two Thousand Five
 Hundred Twenty Five Only
 Form No. Rev. 1 : C Form 950-1072501 Dt: 19-Jul-2011

Company's VAT TIN : 2407460141B DL 18.03.2009
 Company's GST No. : 2407460141B DL 18.03.2009
 Company's Service Tax No. : AACR236718T001
 Buyer's VAT TIN : 18200030000
 Company's PAN : AACR2367H

Declaration
 We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct.

for Rohan BRC Gas Equipment Pvt. Ltd.

Authorized Signatory

This is a Computer Generated Invoice

RETAIL INVOICE

Rohan BRC Gas Equipment Pvt. Ltd.
 6, Ashwamegh Industrial Estate,
 Changodar Village,
 Ahmedabad - 382213
 E-Mail : info@rohanbrc.com

Invoice No.
 10-11-007
 Delivery Note
 6219210-11
 Supplier Ref.
 3732010-11
 Buyer's Order No.
 3732010-11
 Dispatch Document No
 Despatched through
 BY Road
 Terms of Delivery

Dated
 10-Jun-2010
 Mode/Terms of Payment
 T. Days
 Other Reference No.
 Navnet
 Dated
 10-Jun-2010
 Delivery Note Date
 10-Jun-2010
 Destination
 KANPUR

Buyer
 The West General and Kanpur
 7/140-A, Bypass SP 4888
 Kanpur (U.P.)
 Ph. - 9310707033

Sl. No.	Description of Goods	Quantity	Rate	per	Amount
1	CNG Autorol (to Conversion Kit - MPPI)	3 Nos.	31,078.47	Nos.	93,235.20
2	CNG Autorol (to Conversion Kit - MPPI (B))	1 Nos.	10,207.04	Nos.	10,207.04
3	LPG Autorol (to Conversion Kit - MPPI)	1 Nos.	10,204.12	Nos.	10,204.12
					93,157.26
	Less: CST 2% - On Sales - HO			2 %	1,862.76
Total					5 Nos. ₹ 88,000.00

Amount Chargeable (In words)
 Indian Rupees Ninety Five Thousand Only
 Form No. Rev. 1 : C Form 950-1072501 Dt: 30-Nov-2011

Company's VAT TIN : 2407460141B DL 18.03.2009
 Company's GST No. : 2407460141B DL 18.03.2009
 Company's Service Tax No. : AACR236718T001
 Buyer's VAT TIN : 0862001128
 Company's PAN : AACR2367H

Declaration
 We declare that this invoice shows the actual price of the goods described and that all particulars are true and correct.

for Rohan BRC Gas Equipment Pvt. Ltd.

Authorized Signatory

This is a Computer Generated Invoice

12.2 It would be evident from above that the goods cleared under the invoices to their dealers/traders are in fact a complete automobile conversion kit. At this stage it is worthwhile to recall the contention of the assessee that the goods supplied by way of trading activity contained only 12 parts of Kit and all twelve parts also not sold together to any dealer/traders. Documents supplied by the assessee, as per the directives of the Appellate Commissioner, clearly demonstrate that the said argument raised before the original adjudicating authority as well the Appellate Authority is totally baseless and misleading as the goods cleared under these documents were shown by the assessee themselves that are Automobile Conversion Kits. If they cleared only parts/components under these documents, as disputed by the assessee, description of such part/component should have been mentioned in these invoices. On the contrary, they themselves shown the description of the goods cleared is Automobile Conversion Kit which clearly indicate that on the guise of trading activity, excisable goods were cleared without fulfilling the duty liability.

13 I have also gone through the write-up listing the components/parts required to assemble a CNG/LPG Kit submitted by the assessee. In the write-up they claim that CNG Automobile Conversion Kit –MPFI (Sequent) contains 19 parts out of which only 12 parts were supplied; LPG Automobile Conversion Kit –MPFI (Sequent) contains 23 parts out of which only 18 parts were supplied; CNG Automobile Conversion Kit –MPFI contains 21 parts out of which only 12 parts were supplied; LPG Automobile Conversion Kit (LTR) – MPFI contains 25 parts out of which only 20 parts were supplied; LPG Automobile Conversion Kit –Carburetor contains 26 parts out of which only 16 parts were supplied; Schematic Layout-LPG two wheeler contains 13 parts / components. Further it is also mentioned that in respect of CNG Automobile Conversion Kit –MPFI (E) out of 21 only 12 parts were supplied; for CNG Automobile Conversion Kit –MPFI out of 21 only 12 parts were supplied; for CNG Kit for T250 out of 20 only 10 parts were supplied; for 4000000929-LPG Kit out of 26 only 18 parts were supplied; LPG Automobile Conversion Kit Carburetor out of 24 only 18 parts were supplied; LPG Automobile Conversion Kit MPFI out of 24 only 18 parts were supplied; LPG Automobile Conversion Kit MPFI (Economy) out of 24 only 16 parts were supplied; LPG Automobile Conversion Kit MPFI (R) out of 24 only 16 parts were supplied; LPG Automobile Conversion Kit MPFI (Rutu) out of 24 only 16 parts were supplied; LPG Automobile Conversion Kit Close Loop- MPFI out of 24 only 19 parts were supplied; Tank Kit –Fuel-000000028291464 out of 21 only 7 parts were supplied.

13.1 Above said write up given by the assessee on the matter of components of a kit and the supplied components to their dealers/traders is not relevant as the documents i.e. invoices issued to dealer/traders, show another picture i.e. various types of Automobile Conversion Kits were supplied by the assessee as a trading. In fact, the documents available on records and the above said write up is contrary in each other. Documentary evidence is crucial to conclude a matter. Above said submissions of the assessee are not supported by any documentary evidences and on the other hand the documentary evidences available on records defeat the submissions of the assessee.

14. In view of above, I find that the assessee is not correct in contending that only 12 parts were supplied to dealers/traders and not the whole kit. Documentary evidences such as invoices issued by the assessee indicate that the description of goods cleared vide these invoices were whole Automobile Conversion Kit. Assessee is not in a position to corroborate their position that they supplied only some parts of Automobile Conversion Kit to their dealers/traders without payment of duty. Documentary evidences viz. invoices issued by the assessee, in fact support the stand of the department that the assessee supplied Automobile conversion kits to their dealers/traders on the guise of trading of parts/components.

15. Since the result of the verification of the first point given in the said Order-in-Appeal is negative i.e. the assessee is not correct in their statement about the type of goods cleared by way of trading activity, no need to examine the second point assigned by the Appellate Commissioner to the adjudicating officer for verification. However, by way of showing the goods cleared as a trading are Automobile Conversion Kits in the concerned invoices, the said goods are known in the market as a LPG/CNG Conversion Kit and hence it is to conclude that the goods had all the essential character of a complete LPG/CNG Conversion Kit. However, without prejudice to above said conclusion, it is also to say that even if the assessee's contention that they supplied some parts of the Kit were supplied to dealers/traders is accepted, considering the fact that such parts/components were sold under the description of *CNG Automobile Conversion Kit-MPFI/ CNG Automobile Conversion Kit-MPFI(E)/LPG Kit with LPG Tank/ CNG Automobile Conversion Kit-MPFI(sequent)/ CNG Automobile Conversion Kit-MPFI(economic)/ CNG Automobile Conversion Kit-Carb(Economic)/ CNG Automobile Conversion Kit-Carburetor* etc. what were supplied to dealers/traders were conversion Kit assembly. When assembled these items, resulting product must be an Automobile Conversion Kit.

16. At this stage, I find that Hon'ble Commissioner (Appeals) at para 11 of the said Order-in-Appeal observed that the appellant has stated in his grounds that goods sold to OEMs were in unassembled condition but in one box bearing the appellant's brand name, while the goods sold to dealers/traders,(also in unassembled condition) did not bear their brand name; ideally both the activity of supplying goods to (i) OEMs and (ii) dealers/traders should be leviable to central excise duty in view of Section 2(f) of the Central Excise Act, 1944, read with Rule 2(a) of the General Rules for the Interpretations, and Notes 4 and 6 to Section XVI of CETA, 1985. Hon'ble Commissioner (Appeals) further observed that before Central Excise duty can be imposed on any article, it must satisfy two basic conditions viz. (i) the article should be goods and (ii) it should have come into existence as a result of manufacture. For the process to amount to manufacture, the incomplete or unfinished article (CNG/LPG Conversion Kit supplied to the trader/dealer) should have the essential character of the complete or finished article for finding out which Appellate Commissioner given directives to the adjudicating authority to verify as to whether only 12 parts were supplied to dealers/traders and not a whole kit, as claimed by the assessee and if yes, whether purchaser/dealer would be able to assemble the parts into a LPG/CNG Converter Kit i.e. whether it had the essential character of the LPG/CNG Converter Kit.

17. It is already concluded that the goods supplied to the dealers/traders by way of trading were described as various types of Automobile Conversion Kit in the concerned invoices. Thus, evidences available on records do not support the theory of the assessee that they supplied only parts of Kit to traders/dealers. Even if their contention is accepted, considering the description of goods shown in the concerned invoices i.e. *CNG Automobile Conversion Kit-MPFI/ CNG Automobile Conversion Kit-MPFI(E)/LPG Kit with LPG Tank/ CNG Automobile Conversion Kit-MPFI(sequent)/ CNG Automobile Conversion Kit-MPFI(economic)/ CNG Automobile Conversion Kit-Carb(Economic)/ CNG Automobile Conversion Kit-Carburator* etc, the goods routed through such invoices have essential character of the complete or finished goods i.e whole kit of Automobile Conversion and the identity of said goods in market is in the name of Automobile Kit and not parts of kit. It is also worthwhile to point out here that when the Kits were supplying to OEMs on payment of duty also, they clearing the same in unassembled condition.

18. From the above facts and discussions it would be evident that the activity of supplying goods to traders/dealers under the cover of relevant invoices is leviable to central excise duty in view of Section 2(f) of the Central Excise Act, 1944, read with Rule

2(a) of the General Rules for the Interpretations, and Notes 4 and 6 to Section XVI of CETA, 1985. Thus I hold that the clearances of CNG/LPG automobile conversion kits made by the assessee to dealers/traders are liable to central excise duty.

19. Now, I would like to examine the next point contained in the said Order-in-Appeal i.e. the contention of the assessee that the subject notice is hit by limitation. Their contention that the demand notice issued in March, 2015 is time barred as they vide letters dated 10.6.2011 and 23.05.2012 informed their practice of trading of goods. , I find that in the letter dated 10.06.2011, the assessee has submitted that they would procure duty paid imported as well as indigenous parts and would put assembly in a box with their logo and they would sell it to OEM business on payment of Excise duty after availing Cenvat facility, on the other hand, they would clear / supply / sell the parts of CNG / LPG Conversion Kit viz. relative to respective LPG or CNG Part to their local / regional buyers without payment of duty since the same is not a Kit. However, I find that as elaborately discussed in paras *supra*, the assessee had cleared complete CNG / LPG Automobile Conversion Kits to Dealers / Traders. The activity declared in the letter dated 10.6.2011 is in fact not followed by them. The letter is found to be misleading the department. Only when the officers verified the matter, it was come to notice that on the guise of trading, excisable goods were cleared without paying duty. Thus I find that the assessee used their letter dated 10.6.2011 as a shield to hid their illegal activity from the department. It is also to note here that in their periodical returns filed, only the details of Kits manufactured which were cleared on payment of duty were shown. Returns do not show the details of Kits supplied to dealers/traders. They also not opted to inform the clearances of such so called parts or Kits to department through separate letters. Thus it shows clearly their intention to evade duty of payment on the Kits cleared to dealers/traders on the pretext of trading activity. Thus, the subject show cause notice is correctly issued by invoking the extended period of five years under erstwhile Section 11A(1) and Section 11A(4) of the Central Excise Act, 1944. Further, with the letter dated 23.05.2012, the said assessee had submitted the details of Description, Quantity, Rate and Value of various types of CNG / LPG Automobile Conversion Kits cleared by them to Dealers / Traders during the period [01.04.2010 to 31.08.2010], [01.09.2010 to 31.03.2011] and [01.04.2011 to 31.08.2011] and also submitted the details of part payment of Central Excise Duty and interest made by them against their duty liability towards sale of complete CNG / LPG Kits to Dealers / Traders. The assessee was well aware that goods supplied to two classes of buyer were similar and hence duty of excise was required to be discharged. Having failed to do so, larger period of limitation is applicable in their case inasmuch as the said assessee herein had not shown clearance of

such CNG/LPG kit assembly, claimed to be traded goods in the ER-1 returns filed by them. Hence, *bona fide* doubt cannot be attributed. I, therefore find that the argument of the assessee that the show cause notice is time barred is totally baseless.

20. Next point to be examined, as per the directives of the Appellate Commissioner, is that whether cum-duty is to be adopted for the purpose of arriving at the assessable value, as pleaded by the assessee. It is seen that the benefit of cum-duty can be given to the assessee only when there is evidence to show that neither the excise duty has been recovered nor there is any scope for recovering the same. In the present case, on the contrary impugned goods were cleared without payment of duty, and hence whatever price was collected from their buyers was on the footing that no duty was payable because of the traded goods, wrongly claimed by them. Such price can never include any duty amount because goods in question were cleared without payment of duty and no question of recovering any cum-duty price on such goods from the customers is found. Accordingly, benefit of cum-duty price cannot be extended to the assessee. This view also get support from the decision of the Hon'ble Tribunal in the case of Asian Alloys Ltd. Vs CCE, Delhi-III reported at 2005 (203) ELT 252 (Tri..) which is affirmed in Supreme Court (2012 (278)ELT.A.143 (SC) wherein it is observed that when exemption from duty claimed and such a price can never include any duty amount because when appellant-company itself proceeded on footing that no duty was payable, no question of its having recovered any cum-duty price from customers in DTA and there is no scope in the case to treat the sale price worked out for assessment as "cum-duty" price.

21 Therefore, the Central Excise duty of **Rs.43,03,858/-** involved is recoverable from them by invoking the extended period of five years under the proviso to erstwhile Section 11A (1) [now Section 11A(4)] of the Central Excise Act, 1944. Interest, at applicable rate under Section 11AB/11AA of the Central Excise Act, 1944, is also recoverable from the said assessee. As the assessee has already paid the amount of Central Excise Duty (including Education Cess and Secondary and Higher Education Cess) of Rs.13,12,857/- and interest of Rs. 52,781/- vide Challan No. 00007 dated 16.09.2010 and Challan No. 00006 dated 20.10.2011, the same are required to be appropriated against the demand of Central Excise duty and interest payable thereon.

22. Finally, I come to the point of the applicability of the penal provisions on the assessee and the co-noticee, Shri. Upendrabhai C Shah, Authorised representative. The assessee had removed excisable goods in contravention of the provisions of the Central

Excise law without declaring goods cleared to the customers, other than OEMs, in their monthly ER-1 returns, without assessing and paying duty on these goods. Therefore, it is clear that the said assessee has contravened the provisions of Rules 4 and Rule 6 of CER, 2002 in as much as they had failed to assess and pay the appropriate Central Excise duty on excisable goods cleared by them by mis-declaring same as non-excisable goods or trading goods; Rule 8 of the said Rules in as much as they failed to pay the appropriate Central Excise duty on the due date; Rule 11 of the said Rules in as much as they failed to issue valid Central Excise invoice in respect of the said goods cleared from their factory; Rule 12 of the said Rules in as much they failed to file proper and correct return with the jurisdictional Central Excise officer. These acts of contraventions of the provisions of CEA, 1944 and Rules framed there under, on the part of the said assessee are found to have been committed by reason of willful mis-statement, suppression of facts and contravention of the provisions of the CEA, 1944 and Rules made there under with intent to evade payment of duty. As the assessee has made willful mis-statement, suppressed the material facts and contravened the provisions of CEA, 1944 and rules made there under with intent to evade payment of duty on CNG / LPG Gas Conversion Kits supplied to Traders / Dealers, penalty under Section 11AC of the CEA, 1944 is mandatorily imposable as has been held by Hon'ble Supreme Court in the case of M/s. Dharmendra Textile Mills Ltd. [2008 (231) E.L.T. 3 (S.C.)] and in the case of M/s. Rajasthan Spinning & Weaving Mills Ltd. [2009 (238) E.L.T. 3 (S.C.)]. Therefore, I hold that the said assessee is liable to penalty as provided under Section 11AC of CEA, 1944 read with Rule 25 of CER, 2002.

23 As per proviso to clause (c) of sub-section (1) of present Section 11AC of CEA, 1944, (clause (b) of sub-section (1) of erstwhile Section 11AC of CEA, 1944), where details of any transaction available in the specified records for the period beginning with the 8th April, 2011 up to 14th May, 2015 (the date on which the Finance Bill, 2015 received the assent of the President), reveal that any duty of excise has not been levied or paid or has been short levied or short paid by reason of fraud or collusion or any willful mis-statement or suppression of facts, or contravention of any of the provisions of CEA, 1944 or rules made there under with intent to evade payment of duty, the person who is liable to pay duty as determined under sub-section (10) of section 11A shall also be liable to pay a penalty equal to fifty per cent of the duty so determined. Further, clause (e) of sub-section (1) of present Section 11AC of CEA, 1944 (clause (c) of sub-section (1) of erstwhile Section 11AC of CEA, 1944) provides that where any duty as determined under sub-section (10) of Section 11A and the interest payable thereon under Section 11AA in respect of transactions referred to in clause (c) is paid within thirty days of the date of communication of the order of the Central Excise Officer who

has determined such duty, the amount of penalty liable to be paid by such person shall be twenty five per cent of the duty so determined, subject to the condition that such reduced penalty is also paid within the period so specified. I find that the Central Excise Duty of Rs. 33,13,184/- not paid by the said assessee pertain to the period from April-2010 to March-2011, hence the same is not covered by the proviso to clause (C) of present Section 11AC(1) of CEA, 1944, though the benefit of clause (e) of present Section 11AC(1) of CEA, 1944 is admissible. However, the Central Excise duty of Rs.9,90,674/- not paid by the assessee pertains to the period from April-2011 to August-2011 and the same had been reflected in the specified records, hence are covered by proviso to clause (c) and clause (e) of present Section 11AC of CEA, 1944.

24 As regards the proposal for imposition of penalty under Rule 26 of the CER, 2002 on Shri Upendrabhai C. Shah, reliance has been placed on the case of Standard Pencil [1996 (86) ELT 245], on the ground that in the said case it was held that Rule 209A was attracted only in specific cases where the revenue had established that any person was concerned with such excisable goods with knowledge or reason to believe that they were liable to confiscation. In the case of Shri Upendrabhai C. Shah, he was quite aware about the excisability since they were paying duty in respect of goods supplied to OEM only because they insisted on Cenvatable invoices. In case of Vinod Kumar [2006 (199) ELT 705 (Tri - Del)], the appellant was held to be not liable for penalty on the ground that he was not involved in policy matters. In the Order No. A/835/WZB/AHD/2009 dated 20.04.09/24.04.09 passed by the Hon'ble Appellate Tribunal, in the case of Shri Hitesh Kumar Patel Vs Commissioner of Central Excise, Mumbai, relied upon by Shri Upendrabhai C. Shah, penalty on the co-noticee, was set aside on the ground that his role was not discussed. Hence, ratio of the said case is not applicable to this case. Shri Upendrabhai C Shah, was responsible for the work relating to Central Excise. By not observing due procedure of Central Excise law relating to payment of duty, he was concerned in removing and selling or in any other manner dealing with the CNG/LPG Gas Conversion kit assembly, which he knew or had reasons to believe, were liable to confiscation under the CEA, 1944 or CER, 2002. In this view of the matter, I propose to impose penalty under Rule 26 of CER, 2002 upon him.

25. In view of above findings, I pass the following order.

ORDER

- 4 1 2
- (i) I confirm the demand of Central Excise duty amounting to **Rs. 43,03,858/-** (Rupees Forty Three Lakh Three Thousand Eight Hundred Fifty Eight Only) from M/s Rohan BRC Gas Equipment Pvt. Ltd., under proviso to erstwhile Section 11A(1) [now Section 11A(4)] of the Central Excise Act, 1944. I order that the Central Excise duty amounting to Rs. 13,12,857/- (Rs. thirteen lakh twelve thousand eight hundred and fifty seven only) already paid by M/s Rohan BRC Gas Equipment Pvt. Ltd. is appropriated against this confirmed demand.
- (ii) M/s Rohan BRC Gas Equipment Pvt. Ltd. is ordered to pay interest at appropriate rate under erstwhile Section 11AB (now Section 11AA) of the Central Excise Act, 1944) on the aforesaid amount of duty. I order that the interest of **Rs. 52,781/-** (Rs. fifty two thousand seven hundred and eighty one only) already paid by M/s Rohan BRC Gas Equipment Pvt. Ltd. is appropriated against the interest amount recoverable from them.
- (iii) I impose penalty of **Rs.38,08,521/-** (Rupees Thirty Eight Lakh Eight Thousand Five Hundred Twenty One Only) [100% of Rs. 33,13,184/- + 50% of Rs. 9,90,674/-] on M/s. Rohan BRC Gas Equipment Pvt. Ltd., under section 11AC read with Rule 25 of the Central Excise Rules, 2004.

However, as per clause (e) of sub-section (1) of present Section 11AC of CEA, 1944, if they pay the amount of Central Excise duty determined under (i) above along with interest payable thereon as ordered under (ii) above within thirty days from the date of communication of this order, the amount of penalty shall be Rs. 10,75,965/- i.e. twenty-five percent of the duty determined. The benefit of reduced penalty shall be available if the amount of penalty so determined is also paid within the aforesaid period of thirty days.

- (iv) I impose penalty of Rs. 1,00,000/- (Rupees one lakh Only) on Shri Upendrabhai Chhanalal Shah under Rule 26 of the Central Excise Rules, 2002.

This order is being issued in accordance with the directives given by the Commissioner (Appeals) in Order-in-Appeal No. AHM-EXCUS-002-APP-044-045-17-18 dated 28.08.2017 and accordingly the Show Cause Notice F.No.V.87/15-83/OA/2013 dated 23.03.2015 issued to (i) M/s. Rohan BRC Gas Equipment Pvt. Ltd. and (ii) Shri

Upendrabhai C. Shah, Authorised Signatory of the said assessee, is disposed of in above terms.

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6.3.18

[R. M. GAUTAM]
Additional Commissioner
C.Ex. & CGST, Ahmedabad-North

F.No: V.87/15-83/OA/2013

Date: 06.03.2018

By Regd. Post A. D./Hand Delivery

To,

- 1) M/s. Rohan BRC Gas Equipment Pvt. Ltd.,
5, Ashwamegh Industrial Estate,
Changodar, Taluka-Sanand,
Ahmedabad.
- 2) Shri Upendrabhai Chhanalal Shah,
Manager (accounts)/Authorized Signatory,
M/s. Rohan BRC Gas Equipment Pvt. Ltd.,
5, Ashwamegh Industrial Estate,
Changodar, Taluka-Sanand,
Ahmedabad.

Copy to:

1. The Commissioner, C.Ex.& CGST, Ahmedabad-North.
2. The Deputy Commissioner, C.Ex.& CGST, Division-IV, Ahmedabad- North.
3. The Assistant Commissioner (RRA), C.Ex.& CGST, Ahmedabad-North.
4. The Superintendent, C.Ex.& CGST, AR-III, Division-IV, Ahmedabad-North.
5. Guard File.

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